I. ORGANIZATION OF THE *GUIDE*

There are many ways that this book could be organized. No single format would satisfy everyone's needs. This is true, in part, because the book is intended for a wide variety of people who already have, and require, different levels of understanding about the EEO process and the substantive law involved. The book is intended for use by laypersons, who have little or no understanding of the area; by human relations specialists; equal employment opportunity personnel; and less experienced representatives, who have some background and understanding of the procedures and substantive law; and by longtime EEO personnel, seasoned practitioners and administrative judges, who fully understand both the procedures and the law. In other words, this book is intended for use by the full array of individuals who must administer, implement, defend, prosecute, and adjudicate equal employment opportunity programs and cases in the federal sector.

The book is organized first to acquaint the reader with the statutory authority of the Equal Employment Opportunity Commission and the federal sector EEO administrative process, including the precomplaint or counseling stage, and to give a complete overview of the formal complaint stage. Until October 1, 1992, the Equal Employment Opportunity Commission operated the federal sector EEO process under 29 CFR Part 1613. As of October 1, 1992, the Commission's regulations at 29 CFR Part 1614 became effective, and Part 1613 was abolished. Part 1614 revised the federal sector EEO administrative process. The *Guide* has been organized to be consistent with Part 1614. At the same time, because the Commission still looks to Part 1613 to interpret Part 1614, case law and guidance issued under Part 1613 are included in the book to the extent they remain relevant. On July 12, 1999, the Commission amended Part 1614 to be effective November 9, 1999. The changes, which were significant, generated much in the way of comment from agencies, complainants' representatives, and affected organizations. The changes brought about by the amendments are reviewed in Chapter 1 and discussed in detail throughout the *Guide*, where appropriate. On May 21, 2002, the Commission issued a notice of final rulemaking amending 29 CFR 1614.203. 67 Fed. Reg. 35732. The rulemaking adopts the Commission's guidance under the Americans with Disabilities Act at 29 CFR Part 1630 as being applicable in federal sector cases effective June 20, 2002, thereby replacing its previous guidance issued under the Rehabilitation Act of 1973. Pursuant to the ADA Amendments Act of 2008, the Commission issued its Notice of Final Rulemaking adopting changes to Part 1630 to make it consistent with the ADAAA. The amendments to Part 1630 become effective May 24, 2011.

In December 2009, the EEOC issued a notice of proposed rulemaking that would make several discrete, though largely insignificant changes, to Part 1614 and the federal sector process. The most significant changes were to the class complaint processing regulations. The changes, published at 77 Fed. Reg. 43498-43506 (July 25, 2012) became effective on September 24, 2012, brought the class complaint process in line with the individual complaint process and adopted a final agency action procedure requiring agencies to appeal findings of administrative judges in class complaints in the same manner as they must appeal individual complaint decisions. Other changes were mostly cosmetic and are noted in the appropriate chapters on the EEO complaint process.

Although the regulations of the EEOC set forth the administrative process in general detail, the Commission supplements the regulations through management directives issued to federal agencies. These management directives contain further explanation, guidance, and clarification of the Commission's position on a wide range of substantive and procedural issues in much the same way that the Federal Personnel Manual formerly supplemented the regulations of the Office of Personnel Management. Of particular significance is Management Directive ("MD") 110, Federal Sector Complaints Processing Manual, which was revised in November 1999 to implement the Commission's amendments to Part 1614. MD–110 is now available online at https://www.eeoc.gov/federal-sector/management-directive/management-directive-110, and has also been included in relevant sections of the *Guide*. The importance of MD–110 should not be overlooked; the "Commission's guidance is binding in nature, Federal agencies are required to comply with it." MD–110 at p. 2. One of the few other changes of any significance in the Commission's 2012 rulemaking was the addition of 29 CFR 1614.102(e) making clear that compliance with Part 1614 and EEOC Management Directives and Bulletins is mandatory on the part of agencies.

As of July 1, 2002, the Commission published a Handbook for Administrative Judges. The Judges' Handbook contains standardized procedural guidance for the processing of cases at the hearing stage and also contains considerable guidance on discovery and summary judgment. The *Judges' Handbook* is discussed in Chapter 6.

In October 2003, the Commission issued Management Directive 715 with guidance to federal agencies for establishing and maintaining affirmative employment programs under Title VII and the Rehabilitation Act. The Management Directive requires federal agencies to do an annual self-analysis of complaint activity and processing and to scrutinize the resulting data for employment barriers to protected groups. MD–715 is discussed in Chapter 1 under the subheading "Management Directive 715."

The Commission also publishes, from time to time, "Enforcement Guidance" and "Field Instructions" on various topics of interest in the field of discrimination law that set forth the Commission's position and case law, as well as the case law of the federal courts. The Commission has issued and periodically updates an EEOC *Compliance Manual* that contains additional guidance on substantive and procedural matters before the Commission. Although the *Compliance Manual* is drafted primarily with the private sector in mind, many sections are specifically applicable to the federal government and the Office of Federal Operations, the EEOC's federal sector appellate branch, routinely relies on the *Compliance Manual* in its decisions.

Finally, the Commission publishes the Digest of Equal Employment Opportunity Law on a quarterly basis. The Digest reviews significant federal sector decisions issued by the Office of Federal Operations and also contains an article on a current topic of interest setting forth important decisions and Commission guidance on the subject. All of these publications are available on the Commission's website at www.eeoc.gov.

The first seven chapters of the *Guide* explain the EEO process as administered by the federal agencies covered by Title VII of the 1964 Civil Rights Act, the Rehabilitation Act, the Age Discrimination in Employment Act, the Equal Pay Act and the Genetic Information Nondiscrimination Act. The *Guide* begins with a chapter that presents an overview of EEOC jurisdiction and the administrative process. The next three chapters cover the complaint process from precomplaint counseling through the investigative stage. Under the former Part 1613, agencies were required to make attempts at settling the complaint at the conclusion of the investigative stage. Although that requirement was dropped from Part 1614, as the complaint moves from the investigative to the hearing stage, aside from precomplaint counseling this still is the most likely time for the parties to engage in settlement discussions. As a result, the topic of settlement is covered in Chapter 5. Hearings are covered in Chapter 6, and the discussion of the administrative process concludes with a Chapter 7 on final agency decisions. Appeals to the EEOC are covered in Chapter 8. Chapter 9 deals with issues related to employees and their representatives in the administrative process, including the use of official time.

Chapters 10 through 12 discuss the theories of intentional, adverse impact, and harassment discrimination, and the burdens of proof applicable to each theory. The purpose behind this organization is to give the reader a firm grasp of the entire EEO process and a basis for evaluating potential cases.

Chapters 13 through 17 deal with the actual prohibited bases of discrimination, i.e., race, color, sex, national origin, religion, disability status, age, and reprisal. The purpose of these chapters is to give the reader an understanding of how the analytical modes apply to the various bases of discrimination and to bring attention to variations of those modes under specific prohibited bases. The next chapter, Chapter 18, focuses on how these bases of prohibited discrimination are applied to the wide variety of personnel actions and terms and conditions of employment encountered in the federal workplace.

A chapter on processing class action complaints, Chapter 19, has been included to follow the chapter on personnel actions. The chapter deals mainly with practice and procedure in class actions, as distinguished from individual complaints. Since the vast majority of agency and Commission cases deal with complaints of discrimination filed by individuals, the chapter has been segregated from the other chapters on the administrative processing of complaints to avoid confusion.

Chapter 20 deals with options for pursuing EEO complaints through negotiated grievance procedures and the Merit Systems Protection Board. In some instances, as addressed in that chapter, the employee will have the option of choosing one of those forums over the EEO process.

Next, the book contains chapters on forms of relief available through the EEO process, Chapter 21, and the recovery of attorney fees, Chapter 22. Since relief is, after all, the object of bringing any complaint and, at least from a complainant's point of view, the desired culmination of all the effort that goes into a complaint, it seemed appropriate to reserve a discussion of relief until the end of the book. This is not to say that the chapter on relief is only for complainants. Agencies also should be familiar with their potential liabilities in a case, since such a determination may have considerable influence on settlement deliberations. Also, a thorough familiarity with remedies will help avoid disputes in cases where an agency enters a finding of discrimination and grants relief. In previous editions, the issues of relief and attorney were included in the same chapter. But with the passage of time, not to mention new legislation, each area has become complex enough to deserve separate treatment.

The *Guide* includes a subject matter index, a detailed table of contents, and a table of cases. It is anticipated that the book will not keep one so enthralled as to be read from cover to cover. Rather, it is anticipated that the book will be used by persons to gain a general understanding of specific areas of law, or to assist in answering particular questions about an individual case.

The book also is not designed to give the reader an exhaustive account of every case decided by the Commission on a particular subject. For the most part, string cites have been avoided. The author's intent is to give the reader a reasonably succinct statement of the law in a particular area, discuss the significant cases, provide commentary, and then move on to other subjects.

One reason for avoiding string cites is that, in the past, the Commission, unlike the courts, issued written decisions in each case that came before it. Courts, on the other hand, do not always issue written decisions and even when they do, many are "unpublished" because the court does not believe the case is of precedential value or clarifies existing law in any way. Many of the Commission's past decisions lack any precedential or clarifying value. They are merely the final administrative resolution for the parties of cases that involve the application of well–established law to a particular set of facts. An attempt to include all of these cases in any book would add quantity, but not quality. In late 1997, the Commission adopted the practice of issuing "short form" decisions in many of its cases. Those decisions, without any discussion, provide a final administrative resolution to cases.

String cites also have been avoided because they tend to give the reader the impression that the author has made an extensive effort to include in the text all citations that are, or may be, relevant to a particular determination in a specific case. This, in turn, tends to discourage further research. For the practitioner, there is no substitute for an actual review of Commission decisions selected because of their relevance to a particular case. The book is intended to make the overall task of research easier, not to replace it. Review of additional Commission decisions which apply established law to various factual scenarios may well give the reader a better understanding of how to evaluate his or her own case.

Comments, be they on the organization, substance, style, or errors of commission or omission, are appreciated. Once the author has overcome the personal trauma of the particular criticism, comments will be assessed and possibly even used in subsequent revisions of the book. Of course, the author retains the right to label the commentator a fool and persist in his own backward and stubborn ways. Finally, the publisher retains the right to label the author a fool and insist on appropriate revisions.

This book is designed to be a resource for learning about the sometimes peculiar world of discrimination law in the federal sector. The author has sought to include some practical tips regarding the handling of those cases; those tips should not be construed as legal advice. In the end, there is no substitute for the preparation that goes into individual cases. It is hoped, however, that this *Guide* will make that preparation somewhat easier.

The Commission's decisions are published and available in printed form and on computer on–line services, greatly expanding the resources of both employees and agency representatives in pursuing discrimination complaints. The Commission has made some of its federal sector case law available on its website.

A. RESEARCH FOR THE BOOK

The principal resources used in the preparation of this book are the decisions of the Equal Employment Opportunity Commission, the decisions of its Office of Federal Operations, federal court decisions, federal statutes, the Commission's regulations set forth at 29 CFR Part 1600, *et seq*., the Commission's Complaint Processing Manual, MD–110 (August 2015), the Commission's Enforcement Guidance, and the EEOC *Compliance Manual*.

The docket numbers used by the EEOC also tell a great deal about the nature and history of the case. The first two digits in the docket number indicate how the case came to the Commission. The docket numbers "01" indicate that the case was decided by the Office of Federal Operations on an appeal by a complainant from a final agency decision or final agency action; the docket numbers "02" indicate that the case is an appeal from a final grievance decision; the docket numbers "03" indicate that the decision involves a petition for review of a decision for the Merit Systems Protection Board; the docket numbers "04" indicate that the case involves a petition for enforcement of a Commission decision or settlement agreement; the docket numbers "05" indicate that the case involves a request to reopen a previous Commission decision; and the docket numbers "07" indicate that the case was decided by OFO on appeal from an agency which has declined to fully implement the decision of an administrative judge. Cases decided under the amended regulations at Part 1614 that became effective in November 1999, contained the letter "A" in the docket number until October 2006. The next two digits in the docket number indicate the year in which the appeal was first filed with the Commission. The final four digits are the actual case number.

As of October 2006, OFO adopted a new case docket numbering system. Cases still carry the two digit opening codes as described above. This is followed by the year in which the appeal was filed, e.g., "2006." Finally, the last digits are a notation of the order in which a particular case was filed with OFO in each calendar year. Appeals docketed under the former system are given a new docketing number at the time a decision is issued.

Of the appeals decided by the Commission, some are issued under the signature of the Executive Secretariat and some are issued under the signature of the Director of the Office of Federal Operations. When an appellate decision is signed by the Executive Secretariat, this indicates that the decision has actually been reviewed by the Commissioners. A decision issued under the signature of the Director of OFO has been issued directly from that office based on its authority delegated by the Commissioners. As a result, those decisions issued directly by the Commission are considered to be binding precedent. Ironically, even though OFO has direct review authority over the decisions of administrative judges, its decisions are not considered binding in the traditional sense. Instead, administrative judges are strongly encouraged to follow those decisions.

B. OTHER REFERENCE SOURCES

The EEOC relies heavily upon federal court cases in reaching its administrative decisions. Because the decisions of the EEOC are not subject to direct appellate review, court decisions seldom are binding upon the Commission in the traditional sense. In many instances, the Commission has adopted the decisions of the U.S. Supreme Court and lower federal courts. Certainly, the Commission will always consider any relevant court decisions brought to its attention in its own deliberations.

The Commission's regulations are published in full in the Code of Federal Regulations at Title 29, Part 1600, *et seq*. The Federal Register is often a useful source of additional information, since the comments of the Commission in adopting and amending regulations may give insight as to their scope and intent. This is particularly true of the changes brought about by Part 1614. In the proposed versions of the regulations, as well as the final version, the Commission provided detailed comment on the deficiencies of Part 1613 and how the new regulations are intended to address those deficiencies. The legislative history of Title VII, the Rehabilitation Act of 1973, as amended, the Age Discrimination in Employment Act and the Equal Pay Act, the Civil Rights Act of 1991, and all their amendments also should not be overlooked when dealing with issues on which there is little other guidance.

CHAPTER 1
OVERVIEW

I. AUTHORITY AND JURISDICTION

A. STATUTORY AUTHORITY

The Equal Employment Opportunity Commission derives its authority and jurisdiction over federal sector discrimination complaints from three primary pieces of legislation: Title VII of the 1964 Civil Rights Act, as amended, the Rehabilitation Act of 1973, as amended, and the Age Discrimination in Employment Act (ADEA), as amended. On November 21, 1991, President Bush signed Public Law 102–166, the Civil Rights Act of 1991, which made several amendments to the 1964 Civil Rights Act, as well as some modifications to the Rehabilitation Act. On October 29, 1992, the Rehabilitation Act was amended through Public Law 102–569. Through this amendment, some of the requirements of the more stringent Americans with Disabilities Act (ADA) of 1990, Public Law 101–336 (July 26, 1990), were made applicable to the federal government. Most recently, Congress passed the Americans with Disabilities Amendments Act of 2008, S. 3406 (September 25, 2008), which enacted significant revisions to the ADA. The amendments are summarized below and discussed in detail in Chapter 14.

As explained more fully in the following chapters, there are other pieces of legislation which either give the Commission additional authority or indirectly impact upon its own authority. However, Title VII, the Rehabilitation Act, and the ADEA account for the vast majority of the EEOC caseload. The Commission also has significant responsibility and authority with respect to employment discrimination in the private sector. However, its role in the private sector should not be confused with its role in the federal sector. In the private sector, the Commission investigates complaints of employment discrimination within its jurisdiction and, when it deems appropriate, can initiate civil actions against employers it believes have engaged in prohibited discrimination. In the federal sector, the Commission's role is one of oversight with respect to agency processing of EEO complaints, adjudicating complaints when a hearing is requested, and deciding appeals from final agency actions or decisions on discrimination complaints. As a result of the different roles the Commission has in the private and federal sector, the processes in each sector are quite different.

The Commission also has jurisdiction over federal sector complaints of sex-based wage discrimination under the Equal Pay Act. To some extent, this jurisdiction is concurrent with its Title VII jurisdiction over complaints based on sex discrimination. The provisions of the Equal Pay Act are summarized below under the subheading "Equal Pay Act" and the subject is treated in more detail in Chapter 13 under the topic of "Sex Discrimination."

In the federal sector, the EEOC also is responsible for coordinating the government's policy prohibiting discrimination against employees based on protected genetic information. The EEOC's jurisdiction in this area originally came from Executive Order 13145. That jurisdiction was expanded through the Genetic Information Nondiscrimination Act of 2008 discussed briefly below and more extensively in Chapter 15.

Although the various pieces of legislation referenced above give the EEOC its substantive jurisdiction over employment discrimination in federal employment on the basis of race, color, sex, national origin, religion, disability status age and genetic information, it was another piece of legislation—the Civil Service Reform Act of 1978—that centralized jurisdiction in the Commission over federal sector employment discrimination. The Civil Service Reform Act is discussed more fully below under the section "Effect of the Civil Service Reform Act."

1. Title VII of the 1964 Civil Rights Act

As originally passed, Title VII of the 1964 Civil Rights Act, codified at 42 USC 2000e, *et seq*., did not apply to employees or applicants for employment in the federal government. It was not until March 24, 1972, the effective date of Public Law 92–261, that discrimination in the federal workplace was prohibited by statute. Since that time, discrimination complaints in the federal government have spawned voluminous and often confusing case law, but the prohibition had a rather inauspicious beginning. Under the 1972 amendments, 717(a) of the Title VII, codified at 42 USC 2000e-16(a), simply states:

> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from discrimination based on race, color, religion, sex, or national origin.

Originally, enforcement authority was given to the former Civil Service Commission. 42 USC 2000e-16(b) (1978).

Unlike the Rehabilitation Act and the Age Discrimination in Employment Act, Title VII applies to everyone. Everyone has a race, color, sex and national origin. Presumably, everyone also has a religion, or the absence of one. (Theological discussions are distinctly beyond the province of this book.) It is worth noting that Title VII does not prohibit all discrimination or all unfair treatment. Title VII applies strictly to the five bases enumerated in the Statute.

The federal government was specifically excluded from the definition of an employer in 701(b) of the 1964 Act. But 701 did provide that employment in the federal government was to be free from discrimination. Through Executive Order 11246, as amended by Executive Order 11478, the President gave the Civil Service Commission the authority to issue regulations to establish a formal mechanism for the filing of discrimination complaints by federal employees. Some discrimination case law was developed by the CSC prior to its abolition in 1978. That case law is beyond the scope of this book, except to the extent that it has been subsequently adopted by the EEOC.

As amended in 1972, the General Accounting Office specifically was excluded from Title VII. 42 USC 2000e-16(a) (1978). Although employees from the Library of Congress were included, authority for enforcement of the Statute was vested in the Librarian of Congress and not the Civil Service Commission. *See* 42 USC 2000e-16(b) (1978).

On January 23, 1995, through the Congressional Accountability Act of 1995, Public Law 104–1, § 2000e-16(a) was amended to delete the reference to the legislative branch and to add the Government Printing Office and the General Accounting Office to the list of federal agencies subject to Title VII. As a result, 42 USC 2000e-16 currently states:

> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branches of the Federal Government having positions in the competitive service, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from discrimination based on race, color, religion, sex, or national origin.

The new provisions took effect on January 23, 1996. 2 USC 1311(d). The Congressional Accountability Act ended the jurisdiction of the EEOC over competitive service employees of the legislative branch. The Act covers employees of the U.S. House of Representatives and the U.S. Senate, as well as several other government entities. Those employees now are provided the protections of Title VII, the ADA, ADEA and the Rehabilitation Act. Enforcement, however, is through the U.S. Office of Compliance and not the EEOC.

2. Rehabilitation Act of 1973

The Rehabilitation Act, Public Law 93–112, requires that each department and agency of the federal government, including the U.S. Postal Service and the Postal Rate Commission, develop an affirmative action plan "for the hiring, placement and advancement of individuals with disabilities…." The Act is codified at 29 USC 791. As discussed in Chapter 14, the Rehabilitation Act is unique in that it not only prohibits discrimination against qualified individuals with disabilities, it further requires reasonable accommodation of those individuals, where appropriate. It also requires that federal agencies take positive steps in the hiring, placement and advancement of individuals with disabilities.

As with Title VII, the Civil Service Commission originally had enforcement authority for the Rehabilitation Act. That authority was transferred to the EEOC under § 4 of the Reorganization Plan No. 1 and § 1–100 of Executive Order 12106 (Dec. 28, 1978).

In July 1990, Congress passed the Americans with Disabilities Act, Public Law 101–336, 104 Stat. 327, codified at 42 USC 12101, *et seq*. However, the United States and corporations wholly owned by the United States are excluded from the definition of "employer" under the Act. 42 USC 12111(5)(B). A section of the ADA that relates to current drug users does apply to the federal government.

In October 1992, Congress amended the Rehabilitation Act, 42 USC 791(g), making further provisions of the ADA applicable to the federal government:

> The standards used to determine whether this section has been

violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 and the provisions of sections 501 through 504, and 510 of the Americans with Disabilities Act of 1990, as such sections relate to employment.

The applicable sections of the ADA are codified at 42 USC 12111, *et seq.*, and 42 USC 12201–204 and 12210. The October 1992 amendment also substituted the terminology of "individuals with disabilities" for "handicapped employees," the terminology originally used in the Rehabilitation Act. The Rehabilitation Act and the relevant provisions of the ADA are discussed in detail in Chapters 14 and 15.

3. Americans With Disabilities Act Amendment Act of 2008

Disturbed by rulings of the U.S. Supreme Court that restricted the number of individuals covered by the ADA, in September 2008 Congress passed the ADA Amendments Act of 2008, S. 3406. The Act amended the nonaffirmative action employment provisions of the ADA that are applicable to the federal government under the Rehabilitation Act. The amendments specifically overruled four Supreme Court decisions holding that the ADA should be narrowly interpreted in determining whether an individual had a disability under the Statute, *i.e.*, whether the individual had a physical or mental impairment that substantially limited a major life activity. The ADA Amendments Act of 2008 is discussed in detail in Chapters 14 and 15, below.

4. Age Discrimination in Employment Act

The Age Discrimination in Employment Act was passed in 1967 as Public Law 90–202. In April 1974, through Public Law 93–259, the ADEA was amended to prohibit age discrimination in the federal sector. Modeled largely after Title VII in its substantive provisions, the Act provides at 29 USC 633(a):

> All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the United States), in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, and in the Government Printing Office, the General Accounting Office and the Library of Congress shall be made free from any discrimination based on age.

Note that the ADEA does not prohibit all discrimination on the basis of age. For example, it does not prohibit an employer from deciding that a prospective employee is too young for a particular position. What the ADEA prohibits is discrimination against persons 40 years of age or older.

The Age Discrimination in Employment Act is covered in depth in Chapter 16, below. It is worth observing here that the Commission's jurisdiction over ADEA complaints is more discretionary in nature than its jurisdiction over Title VII and Rehabilitation Act complaints. Employees with complaints under the ADEA may exercise the option to pursue their complaints through the administrative process, or they may elect to proceed directly into U.S. district court after giving notice of intent to sue to the EEOC. Employees with Title VII or Rehabilitation Act complaints must exhaust the administrative process before obtaining the right to sue in U.S. district court.

As with Title VII and the Rehabilitation Act, administrative enforcement authority under the ADEA was initially vested in the Civil Service Commission and later transferred to the EEOC upon passage of the Civil Service Reform Act of 1978. *See* § 2 of Reorganization Plan No. 1, and § 1–101 of Executive Order 12106.

Also, as with Title VII, the ADEA was amended through the Congressional Accountability Act to delete the original reference to the legislative branch and to add the Government Printing Office and the General Accounting Office to the list of federal agencies subject to the ADEA. These ADEA provisions also took effect on January 23, 1996, and like their Title VII counterparts, required that the Administrative Conference and Judicial Conference report to Congress with recommendations on future ADEA coverage for judicial branch, Government Printing Office, General Accounting Office and Library of Congress employees. *See* "Statutory Authority," above.

Although the substantive proscription against age discrimination in the ADEA was patterned after the proscription against race, color, sex, national origin and religious discrimination in Title VII, the relief provisions of the ADEA more closely mirror the provisions of the Fair Labor Standards Act. As a result, federal sector remedies, including the award of attorney fees, are different from those under Title VII. See Chapter 16, subheading "Attorney Fees."

5. Equal Pay Act

The Equal Pay Act (EPA) is an amendment to the Fair Labor Standards Act intended to eliminate sex discrimination in the payment of wages. The relevant portion is codified at 29 USC 206(d) and provides:

> No employer having employees subject to the provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Federal agencies are included within the definition of employer under 29 USC 203(d)–(e). Enforcement authority for the Equal Pay Act was vested in the Administrator, Department of Labor, Wage and Hour Division. *See* 29 USC 204. Under Reorganization Plan No. 1 of 1978, Equal Pay Act enforcement authority was transferred to the EEOC. *See* Reorganization Plan No. 1, § 1.

Under previous regulations at 29 CFR Part 1613, the Commission established a separate administrative procedure for pursuing federal sector EPA complaints. Such complaints initially had to be filed with the appropriate district director of the EEOC and were not initiated by contacting an agency EEO counselor. Under Part 1614, complaints under the EPA are processed just as any other complaint of discrimination.

As with the ADEA, complainants alleging a violation of the EPA are not required to pursue an administrative complaint of discrimination. A complainant may file a civil action in U.S. district court within two years of the alleged violation, or three years if the violation is willful. *See* 29 CFR 1614.408.

All forms of sex-based wage discrimination under the EPA also are violations of Title VII and an employee can pursue both remedies simultaneously. The employee may not engage in double recovery for violations of both statutes, but is entitled to the highest recovery provided by either statute.

6. Civil Rights Act of 1991

With the enactment of the Civil Rights Act of 1991, Public Law 102–166, effective November 21, 1991, Congress significantly amended the Civil Rights Act of 1964. The Civil Rights Act of 1991 was in response to substantial criticism of the original Civil Rights Act and its subsequent interpretation by the U.S. Supreme Court.

From a substantive point of view, the legislation made two important changes. First, it authorized the payment of compensatory damages for such things as emotional pain, suffering, and future economic losses. Although the 1991 Civil Rights Act contains a provision for punitive damages, the federal government is exempt from that provision. It also reversed, in part, the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed.2d 733 (1989), that placed all aspects of the burden of proof in disparate or adverse impact cases on the plaintiff. In cases involving disparate impact employment discrimination, Congress reinstated the standard first set down by the court in *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed.2d 158 (1971). Under the 1991 Civil Rights Act, if a plaintiff proves a *prima facie* case of disparate impact discrimination, the burden of production and persuasion shifts to the employer. See Chapter 11, subheadings "The Civil Rights Act of 1991" and "Agency's Burden—Business Necessity."

The 1991 Civil Rights Act also provides a "good faith" defense to claims of failure to make reasonable accommodation under the Rehabilitation Act. An employer may avoid an award of damages for violation of the reasonable accommodation clause if it can demonstrate that, in consultation with the disabled employee, it has made a good faith effort at reasonable accommodation.

With regard to persons employed by the federal government, the Civil Rights Act of 1991 made two significant changes with respect to coverage. The 1991 Act extended the protection of Title VII to employees of the House of Representatives and also to such entities as the Architect of the Capitol, the Congressional Budget Office, the General Accounting Office, the Government Printing Office, the Office of Technology Assessment, and the U.S. Botanic Garden. It also extended the protections of the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, and specified sections of the Americans with Disabilities Act of 1990 to those employees. A section of the law designated as the Government Employee Rights Act of 1991 further extended Title VII protections to employees of the U.S. Senate. Although the protections of Title VII, the Rehabilitation Act and the ADEA were extended to these employees, in most instances, the jurisdiction of the EEOC was not expanded to cover these employees and enforcement was through other means. Many of the coverage changes of the 1991 Civil Rights Act were temporary in nature and were superseded by the Congressional Accountability Act of 1995.

A full treatment of the Civil Rights Act of 1991 is included in Chapter 13.

7. Congressional Accountability Act of 1995

The Congressional Accountability Act of 1995, Public Law 104–1, codified at 2 USC 1301, *et seq.*, was a sweeping attempt to bring legislative branch employees, as well as employees of several other government entities, within the ambit of the antidiscrimination statutes with a centralized enforcement mechanism. While legislative branch employees were given expanded rights under Title VII, the Rehabilitation Act, and the ADEA, enforcement is through the Office of Compliance and not the EEOC. *See* 2 USC 1301, *et seq.*

For a detailed discussion of the Act, see Chapter 13 under the subheading "Congressional Accountability Act—Legislative Employees."

8. No FEAR Act of 2002

The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 became effective on October 1, 2003. The No FEAR Act has three basic components: 1) training for managers and employees on the antidiscrimination and antiretaliation laws; 2) making the entity found to have engaged in discrimination or retaliation financially responsible for the effects of the discrimination or retaliation; and 3) detailed reporting by each agency of complaint activity and, in particular, findings of discrimination and retaliation. The EEOC has no specific enforcement duties under the No FEAR Act. However, the EEOC is one of the entities to which federal agencies must report under the Act.

On January 26, 2004, the EEOC published interim rules for implementation of the No FEAR Act. 69 FR 3483–3492. The comment period on the interim rules ended March 24, 2004. On July 27, 2006, the Commission published its notice of final rulemaking at 71 Fed. Reg. 43643—43652 with its final regulations, which are now, incorporated in the Commission's federal sector regulations at 29 CFR 1614.701, *et seq.*

In support of the legislation, Congress made the following findings in Section 101 of the Act:

(1) Federal agencies cannot be run effectively if they practice or tolerate discrimination,

(2) the Committee on the Judiciary of the House of Representatives has heard testimony from individuals, including representatives of the National Association for the Advancement of Colored People and the American Federation of Government Employees that point to chronic problems of discrimination and retaliation against Federal employees,

(3) in August 2000, a jury found that the Environmental Protection Agency had discriminated against a senior social scientist, and awarded that scientist $600,000,

(4) in October 2000, an Occupational Safety and Health Administration investigation found that the Environmental Protection Agency had retaliated against a senior scientist for disagreeing with that agency on a matter of science and for helping Congress to carry out its oversight responsibilities,

(5) there have been several recent class action suits based on discrimination brought against Federal agencies, including the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, and Firearms, the Drug Enforcement Administration, the Immigration and Naturalization Service, and the United States Marshals Service,

(6) notifying Federal employees of their rights under discrimination and whistleblower laws should increase agency compliance with the law,

(7) requiring annual reports to Congress on the number and severity of discrimination and whistleblower cases brought against each Federal agency should enable Congress to improve its oversight over agencies' compliance with the law, and

(8) penalizing Federal agencies by requiring them to pay for any discrimination or whistleblower judgments, awards, and settlements should improve agency accountability with respect to discrimination and whistleblower laws.

The Act applies to all executive agencies as defined at 5 USC 105 and to the Postal Rate Commission and the U.S. Postal Service. Section 102(3).

One of the principal provisions of the Act is to require that federal agencies found to have engaged in discrimination or retaliation reimburse a federal judgment fund out of their operating budgets. Section 201 of the Act provides:

(a) Applicability.—This section applies with respect to any payment made in accordance with section 2414, 2517, 2672, or 2677 of title 28, United States Code, and under section 1304 of title 31, United States Code (relating to judgments, awards, and compromise settlements) to any Federal employee, former Federal employee, or applicant for Federal employment, in connection with any proceeding brought by or on behalf of such employee, former employee, or applicant under—

(1) any provision of law cited in subsection (c), or

(2) any other provision of law which prohibits any form of discrimination, as identified under rules issued under section 204.

(b) Requirement.—An amount equal to the amount of each payment described in subsection (a) shall be reimbursed to the fund described in section 1304 of title 31, United States Code, out of any appropriation, fund, or other account (excluding any part of such appropriation, of such fund, or of such account available for the enforcement of any Federal law) available for operating expenses of the Federal agency to which the discriminatory conduct involved is attributable as determined under section 204.

(c) Scope.—The provisions of law cited in this subsection are the following:

(1) Section 2302(b) of title 5 of the United States Code, as applied to discriminatory conduct described in paragraphs (1) and (8), or described in paragraph (9) of such section as applied to discriminatory conduct described in paragraphs (1) and (8), of such section.

(2) The provisions of law specified in section 2302(d) of title 5 of the United States Code.

(3) The Whistleblower Protection Act of 1986 and the amendments made by such Act.

The Act, in Section 202, further requires that federal employees, former federal employees and applicants for federal employment be provided with written notification of the rights and protections available to federal employees. That written notification must include posting on the Internet. The section further requires that federal employees receive training on the rights available to them and the remedies for violation of those rights:

(d) *Notification of Final Agency Action*.

(1) *In General*.—Not later than 90 days 19 after the date on which an event described in paragraph (2) occurs with respect to a finding of discrimination (including retaliation), the head of the Federal agency subject to the finding shall provide notice—

(A) on the public internet website of the agency, in a clear and prominent location linked directly from the home page of that website;

(B) stating that a finding of discrimination (including retaliation) has been made; and

(C) which shall remain posted for not less than 1 year.

(2) *Events Described*.—An event described in this paragraph is any of the following:

(A) All appeals of a final action by a Federal agency involving a finding of discrimination (including retaliation) prohibited by a provision of law covered by paragraph (1) or (2) of section 201(a) have been exhausted.

(B) All appeals of a final decision by the Equal Employment Opportunity Commission involving a finding of discrimination (including if the finding included a finding of retaliation) prohibited by a provision of law covered by paragraph (1) or (2) of section 201(a) have been exhausted.

(C) A court of jurisdiction issues a final judgment involving a finding of discrimination (including retaliation) prohibited by a provision of law covered by paragraph (1) or (2) of section 201(a).

(3) *Contents*.—A notification provided under paragraph (1) with respect to a finding of discrimination (including retaliation) shall—

(A) identify the date on which the finding was made, the date on which each discriminatory act occurred, and the law violated by each such discriminatory act; and

(B) advise Federal employees of the rights and protections available under the provisions of law covered by paragraphs (1) and (2) of section 201(a).

Section 203 of the Act provides that each agency shall make annual reports on violations of the antidiscrimination and antiretaliation provisions and the costs of those violations. Section 203 provides:

(a) Annual Report.—Subject to subsection (b), not later than 180 days after the end of each fiscal year, each Federal agency shall submit to the Speaker of the House of Representatives, the President pro tempore of the Senate, the Equal Employment Opportunity Commission, and the Attorney General an annual report which shall include, with respect to the fiscal year—

(1) the number of cases arising under each of the respective provisions of law covered by paragraphs (1) and (2) of section 201(a) in which discrimination on the part of such agency was alleged,

(2) the status or disposition of cases described in paragraph (1),

(3) the amount of money required to be reimbursed by such agency under section 201 in connection with each of such cases, separately identifying the aggregate amount of such reimbursements attributable to the payment of attorneys' fees, if any,

(4) the number of employees disciplined for discrimination,

retaliation, harassment, or any other infraction of any provision of law referred to in paragraph (1),

(5) the final year-end data posted under section 301(c)(1)(B) for such fiscal year (without regard to section 301(c)(2)), and

(6) a detailed description of—

(A) the policy implemented by such agency to discipline employees who are determined in any judicial or administrative proceeding to have discriminated against any individual in violation of any of the laws cited in section 201(c), and

(B) with respect to each of such laws, the number of employees who are disciplined in accordance with such policy and the specific nature of the disciplinary action taken.

(b) First Report.—The 1st report submitted under subsection (a) shall include for each item under subsection (a) data for each of the 5 immediately preceding fiscal years (or, if not available for all 5 fiscal years, for however many of those 5 fiscal years for which data are available).

Section 204 of the Act gives the President or his designee responsibilities for issuing rules to carry out the provisions of the Act and rules to "require that a comprehensive study be conducted in the executive branch to determine the best practices relating to the appropriate disciplinary actions" against federal managers and supervisors who engage in discrimination or retaliation.

Significantly, with respect to the EEOC, Section 206 of the Act requires:

(a) Study.—Not later than 180 days after the date of the enactment of this Act, the General Accounting Office shall conduct a study relating to the effects of eliminating the requirement that Federal employees aggrieved by violations of any of the laws specified in paragraphs (7) and (8) of section 201(c) exhaust administrative remedies before filing complaints with the Equal Employment Opportunity Commission. Such study shall include a detailed summary of matters investigated, of information collected, and of conclusions formulated that lead to determinations of how the elimination of such requirement will—

(1) expedite handling of allegations of such violations within Federal agencies and will streamline the complaint-filing process,

(2) affect the workload of the Commission,

(3) affect established alternative dispute resolution procedures in such agencies, and

(4) affect any other matters determined by the General Accounting Office to be appropriate for consideration.

(b) Report.—Not later than 90 days after completion of the study required by subsection (a), the General Accounting Office shall submit to the Speaker of the House of Representatives, the President pro tempore of the Senate, the Equal Employment Opportunity Commission, and the Attorney General a report containing the information required to be included in such study.

The Act, at Section 301, also requires that federal agencies, on an annual basis, post on their public websites a summary of statistical information relating to EEO complaints filed against them. Section 301 provides:

(a) In General.—Each Federal agency shall post on its public Web site, in the time, form, and manner prescribed under section 303 (in conformance with the requirements of this section), summary statistical data relating to equal employment opportunity complaints filed with such agency by employees or former employees of, or applicants for employment with, such agency.

(b) Content Requirements.—The data posted by a Federal agency under this section shall include, for the then current fiscal year, the following:

(1) The number of complaints filed with such agency in such fiscal year.

(2) The number of individuals filing those complaints (including as the agent of a class).

(3) The number of individuals who filed 2 or more of those complaints.

(4) The number of complaints (described in paragraph (1)) in which each of the various bases of alleged discrimination is alleged.

(5) The number of complaints (described in paragraph (1)) in which each of the various issues of alleged discrimination is alleged.

(6) The average length of time, for each step of the process, it is taking such agency to process complaints (taking into account all complaints pending for any length of time in such fiscal year, whether first filed in such fiscal year or earlier). Average times under this paragraph shall be posted—

(A) for all such complaints,

(B) for all such complaints in which a hearing before an administrative judge of the Equal Employment Opportunity Commission is not requested, and

(C) for all such complaints in which a hearing before an administrative judge of the Equal Employment Opportunity Commission is requested.

(7) The total number of final agency actions rendered in such fiscal year involving a finding of discrimination and, of that number—

(A) the number and percentage that were rendered without a hearing before an administrative judge of the Equal Employment Opportunity Commission, and

(B) the number and percentage that were rendered after a hearing before an administrative judge of the Equal Employment Opportunity Commission.

(8) Of the total number of final agency actions rendered in such fiscal year involving a finding of discrimination—

(A) the number and percentage involving a finding of discrimination based on each of the respective bases of alleged discrimination, and

(B) of the number specified under subparagraph (A) for each of the respective bases of alleged discrimination—

(i) the number and percentage that were rendered without a hearing before an administrative judge of the Equal Employment Opportunity Commission, and

(ii) the number and percentage that were rendered after a hearing before an administrative judge of the Equal Employment Opportunity Commission.

(9) Of the total number of final agency actions rendered in such fiscal year involving a finding of discrimination—

(A) the number and percentage involving a finding of discrimination in connection with each of the respective issues of alleged discrimination,

(B) of the number specified under subparagraph (A) for each of the respective issues of alleged discrimination—

(i) the number and percentage that were rendered without a hearing before an administrative judge of the Equal Employment Opportunity Commission, and

(ii) the number and percentage that were rendered after a hearing before an administrative judge of the Equal Employment Opportunity Commission, and

(C) with respect to each finding described in subparagraph (A)—

(i) the date of the finding,

(ii) the affected Federal agency,

(iii) the law violated, and

(iv) whether a decision has been made regarding disciplinary action as a result of the finding.

(10) (A) Of the total number of complaints pending in such fiscal year (as described in the parenthetical matter in paragraph (6)), the number that were first filed before the start of the then current fiscal year.

(B) With respect to those pending complaints that were first filed before the start of the then current fiscal year—

(i) the number of individuals who filed those complaints, and

(ii) the number of those complaints which are at the various steps of the complaint process.

(C) Of the total number of complaints pending in such fiscal year (as described in the parenthetical matter in paragraph (6)), the total number of complaints with respect to which the agency violated the requirements of section 1614.106(e)(2) of title 29 of the Code of Federal Regulations (as in effect on July 1, 2000, and amended from time to time) by failing to conduct within 180 days of the filing of such complaints an impartial and appropriate investigation of such complaints.

(11) Data regarding each class action complaint filed against the agency alleging discrimination (including retaliation), including—

(A) information regarding the date on which each complaint was filed,

(B) a general summary of the allegations alleged in the complaint,

(C) an estimate of the total number of plaintiffs joined in the complaint, if known,

(D) the current status of the complaint, including whether the class has been certified, and

(E) the case numbers for the civil actions 20 in which discrimination (including retaliation) has been found.

Subsection C requires agencies to compile and publish interim year-to-date data, final year-end data, and data for the five preceding fiscal years.

Finally, Section 302 of the Act requires the EEOC to post the following statistical data on its website:

> (a) In General.—The Equal Employment Opportunity Commission shall post on its public Web site, in the time, form, and manner prescribed under section 303 for purposes of this section, summary statistical data relating to—
>
> (1) hearings requested before an administrative judge of the Commission on complaints described in section 301, and
>
> (2) appeals filed with the Commission from final agency actions on complaints described in section 301.
>
> (b) Specific Requirements.—The data posted under this section shall, with respect to the hearings and appeals described in subsection (a), include summary statistical data corresponding to that described in paragraphs (1) through (10) of section 301(b), and shall be subject to the same timing and other requirements as set forth in section 301(c).
>
> (c) Coordination.—The data required under this section shall be in addition to the data the Commission is required to post under section 301 as an employing Federal agency.

9. Genetic Information Nondiscrimination Act of 2008

Initially adopted through Executive Order 13145, "[i]t is the policy of the Government of the United States to provide equal employment for all qualified persons and to prohibit [discrimination] against employees based on protected genetic information, or information about a request for or the receipt of genetic services." The Executive Order applied to the department and agencies of the federal government only and its policies were extended to all federal employees covered by Title VII.

Unlike its statutory jurisdiction, the EEOC did not have the authority under the Executive Order to directly adjudicate complaints of discrimination based on genetic information. The Executive Order did not create any enforceable rights for the employees covered. The EEOC's responsibility under the Executive Order was to coordinate the federal government's policy prohibiting genetic discrimination.

In 2008, through Pub. L. 110-233, Congress adopted the Genetic Information Nondiscrimination Act of 2008. The EEOC has given statutory authority for enforcement of Title II of the Act, which contains the provisions related to employment. The Act, which became effective on November 21, 2009, also directed the EEOC to promulgate final regulations on genetic discrimination. The Commission issued a Notice of Proposed Rulemaking under GINA on March 2, 2009, and issued final regulations on November 9, 2010. *See* 75 Fed. Reg. 68912-68939.

The Genetic Information Nondiscrimination Act is discussed more fully in Chapter 15.

B. EFFECT OF THE CIVIL SERVICE REFORM ACT

In 1978, as a result of Reorganization Plans Nos. 1 and 2, the functions of the former Civil Service Commission regarding Title VII, the Rehabilitation Act, and the ADEA were transferred to the Equal Employment Opportunity Commission, effective January 1, 1979. Reorganization Plans Nos. 1 and 2 of 1978 served as the bases for the Civil Service Reform Act of 1978, Public Law 95–454 (Oct. 23, 1978). Prior to this time, the EEOC had only enforcement authority in matters involving private sector employment.

The Civil Service Reform Act (CSRA) represented the first major overhaul of federal personnel law in nearly 100 years. In addition to transferring jurisdiction over discrimination complaints to the EEOC, the Act abolished the Civil Service Commission (CSC) and created the Office of Personnel Management to take over the administrative personnel functions of the CSC, and the Merit Systems Protection Board to take over many of the adjudicative functions of the CSC.

To some extent, the Civil Service Reform Act increased the number of avenues through which discrimination complaints could be pursued. The Act made it a so-called "prohibited personnel practice" for federal sector supervisors and managers to engage in prohibited discrimination. In particular, 5 USC 2302(b) provides:

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—
>
> (1) discriminate for or against any employee or applicant for employment—
>
> (A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964;
>
> (B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967;
>
> (C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938;
>
> (D) on the basis of a handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973; or
>
> (E) on the basis of marital status or political affiliation, as prohibited under any law, rule or regulation….

Under 5 USC 1201, *et seq*., employees or applicants for employment who believe they are the victims of prohibited personnel practices may file a complaint with the Office of Special Counsel. The Special Counsel, originally a part of the Merit Systems Protection Board but now an independent agency, is authorized to investigate complaints and, where appropriate, seek both corrective action on behalf of the employee or applicant and disciplinary action against the offending officials. The Special Counsel has not pursued many corrective action complaints involving alleged discrimination due to a policy of deferring to the EEO process. While the Office of Special Counsel has not actively sought relief for the victims of discrimination, it has on a few occasions brought disciplinary actions against officials who have engaged in discrimination—a power which the EEOC does not have.

For employees who are subject to actions that are within the jurisdiction of the MSPB, see Chapter 20 below, prohibited personnel practices may be raised as an affirmative defense. For example, a competitive service employee who is removed on charges of misconduct may assert that, in truth, the action was based on discriminatory motives.

From a substantive standpoint, the Civil Service Reform Act brought about very few changes in discrimination law. But a working knowledge of the Reform Act and its many changes in federal civilian personnel law are important to understanding discrimination cases in the federal sector. A basic understanding of the procedural and substantive protections granted to employees by the CSRA is fundamental to determining whether an agency has complied in any given case. Failure to comply can be an indication of discrimination, particularly if the agency has complied in past cases. Conversely, the provisions of the Reform Act may explain why an otherwise apparent discriminatory act on the part of the agency is in fact justified. For example, it may explain why the agency engages in competitive selection for a vacancy rather than simply awarding the position to an employee who would appear to be the logical choice. Also, the Civil Service Reform Act has important election of remedy provisions which can determine the forum in which a complaint is brought and the issues that can be raised in that forum.

Every attempt has been made to explain various provisions of the CSRA at appropriate junctures in this book. But a final note of caution: the treatment here is by no means all inclusive. A working knowledge of Reform Act provisions in any given case is only gained by reference to the Act itself, Office of Personnel Management regulations and guidance, the regulations and case law of the Merit Systems Protection Board, the regulations and case law of the Federal Labor Relations Authority, the case law of the U.S. Court of Appeals for the Federal Circuit and agency regulations. Each of these sources should be consulted in any given case to ensure that nothing is overlooked.

C. ORGANIZATION OF THE COMMISSION

The Equal Employment Opportunity Commission consists of five members, appointed by the President with the advice and consent of the Senate. Each commissioner serves a term of five years. Not more than three members of the Commission can be of the same political party. The President is responsible for appointing both a chairman and vice chairman of the Commission from its members. *See generally* 42 USC 2000e-4.

A General Counsel to the Commission, appointed by the President with the advice and consent of the Senate, serves a term of four years. The Commission is also authorized to appoint hearing examiners, attorneys, and other employees to carry out its functions under law.

The federal sector represents only a portion of the Commission's work. Its primary responsibilities lie in the private sector where it investigates complaints of discrimination and can serve as a prosecutor bringing suit against private sector employers that the Commission believes have engaged in prohibited discrimination. In the federal sector, the employing agency is responsible for conducting investigations into complaints of discrimination. The Commission employs a cadre of administrative judges who hold hearings and issue decisions in federal sector cases and it also conducts an appellate review of those decisions as well as final agency decisions in cases where no hearing was requested.

It would not be unfair or inaccurate to describe the Commission's federal sector as being organizationally scattered. The Commission has district offices throughout the country. It also has field and area offices within each district. Each district also has a district director. The administrative judges work in the district, field and area offices. They report to a supervisory administrative judge who, in turn, reports to his or her respective district director. At the headquarters level, the district offices are organizationally within the Office of Field Programs.

The Commission's federal sector appellate functions are centralized at its headquarters in Washington, D.C., in what was formerly the Office of Review and Appeals. Effective February 21, 1991, the Office of Review and Appeals officially became the Office of Federal Operations (OFO). *See* 58 Fed. Reg. 6983 (Feb. 21, 1991). All references to the Office of Review and Appeals in the Commission's regulations also were amended to reflect the change in name. No substantive changes accompanied this change in name.

The net effect of the organizational structure of the EEOC is that the Office of Federal Operations establishes guidance and procedures for the administrative judges and, as part of its appellate process, reviews the work product of administrative judges. The judges themselves, however, work for and answer to the Office of Field Programs and not OFO. At times, this organizational structure has led to confusion as to the binding effect of the guidance and case decisions of OFO.

The EEO complaint process is summarized later in this chapter under the subheading "Processing Discrimination Complaints—Part 1614" and then treated in detail throughout the *Guide*. The EEOC does not, in the first instance, process discrimination complaints in the federal sector. Complaints are filed with the involved agency and that agency is responsible for investigating the complaint and, in cases where an EEOC hearing is not requested, issuing a final decision on the complaint. The primary role of the Commission during the agency processing of a complaint is to provide an administrative judge for a hearing if one is requested by the complainant. Prior to November 10, 1999, the administrative judge could only issue a recommended decision which was subject to acceptance, rejection, or modification by the agency. Under a Notice of Final Rulemaking, 64 Fed. Reg. 37644 (July 12, 1999), the Commission essentially gave its administrative judges the authority to make binding decisions that either the complainant or the agency can appeal to the EEOC. The revised regulations still permit agencies to issue a "final action" decision indicating if it will fully comply with the decision of the administrative judge. However, if the agency does not fully comply with the decision of the administrative judge, it is required to file a simultaneous appeal with the EEOC Office of Federal Operations. A full discussion of the 1999 changes is included later in this chapter.

Once the agency issues a final decision on a discrimination complaint, the Commission has appellate jurisdiction over that decision. Appeals are filed with and decided by the Office of Federal Operations. The Office of Federal Operations employs attorney-advisors who can be of assistance in responding to questions about the Commission's appellate process.

It is the exception rather than the rule that the five-member Commission actually gets involved in a discrimination complaint. Final decisions of the Office of Federal Operations are subject to reconsideration by the Commission, but the decision to grant reconsideration is entirely discretionary on the part of the Commission.

When specific questions arise, they should be addressed to the appropriate division of the EEOC. Communications with the Commission regarding specific complaints should include the case name, agency case number, and EEOC case number.

D. JURISDICTION

The EEOC's jurisdiction to decide complaints of discrimination in the federal sector is rather simple. Unlike agencies such as the Merit Systems Protection Board or the Federal Labor Relations Authority, the authority of the Commission is not circumscribed by a defined set of personnel actions nor restricted to issues of collective bargaining. The Commission's jurisdiction extends to all personnel actions as well as the terms, conditions and privileges of employment provided the complainant alleges some form of discrimination on the basis of race, color, sex, religion, national origin, disability status, age, or genetic information. The Commission also has jurisdiction over any complaint alleging reprisal because of participation in the EEO process or opposition to an employment practice prohibited by Title VII, the Rehabilitation Act, the ADEA, or GINA, as well as by Commission regulation.

1. Agencies Covered

As noted above, the jurisdiction of the Commission extends to all employees within the executive agencies covered by the antidiscrimination statutes, with exclusions from coverage being the exception rather than the rule. The military agencies include the Department of the Army, the Department of the Navy, and the Department of the Air Force. *See* 5 USC 102. Executive agencies covered are defined at 5 USC 105 as "an Executive department, a Government corporation, and an independent establishment." Government corporations are defined by reference in section 103 of Title 5 as any corporation owned or controlled by the United States. Independent establishments include the General Accounting Office and any "establishment" in the executive branch which is not a department, military department, or government corporation. 5 USC 104. The U.S. Postal Service and the Postal Rate Commission are specifically covered by the acts.

Under Title VII, as originally amended to apply to federal employees, the General Accounting Office was exempt from coverage. 42 USC 2000e-16(a) (1978). The General Accounting Office and the Government Printing Office have since been added to the list of independent establishments coming within the ambit of Title VII. Under Title VII and the ADEA, as originally amended to include federal workers, the Commission also had jurisdiction over complaints of discrimination for competitive service employees in the government of the District of Columbia, the federal judicial and legislative branches and the Library of Congress. Note that with respect to these units of government, the Commission's jurisdiction was circumscribed to include only competitive service employees. The Commission, as noted above, does not have jurisdiction over complaints by competitive service employees in the legislative and judicial branches under the Rehabilitation Act. The Commission's jurisdiction over legislative branch employees was eliminated with the Congressional Accountability Act of 1995, discussed earlier under the heading "Congressional Accountability Act of 1995."

The Civil Rights Act of 1991 extended the protections of Title VII to employees of the House of Representatives, the U.S. Senate and the legislative agencies. The legislation provided that the House and Senate shall establish procedures for processing discrimination complaints. The legislation did not make clear what role, if any, the Commission would have in such complaint procedures. The procedures for enforcing the antidiscrimination statutes for legislative branch employees were established under the Congressional Accountability Act of 1995. *See* 2 USC 1301, *et seq.*

2. Covered Actions

Title VII, the Rehabilitation Act, the ADEA, and GINA cover all personnel actions, as well as the terms, privileges, and conditions of employment. From a purely technical point of view, the amendment that brought the federal government within the ambit of Title VII, requires only that all "personnel actions shall be free of discrimination" on the bases of race, color, sex, national origin, and religion. *See* 42 USC 2000-e(16). However, the Commission has interpreted that provision consistent with the private sector prohibition at 42 USC 2000-e(2)(a)(1), which states that "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin…." That interpretation also has been extended to the other anti-discrimination statutes and, as a result, a discrimination complaint may be filed over anything from a removal action to a change in work hours. The only requirement is that the employee be "aggrieved" by the agency's action. In order to be aggrieved, the employee must sustain an "injury in fact." In legal terms, the issue of whether an employee is sufficiently aggrieved to bring a complaint is most often referred to as an issue of "standing."

Over the years, the EEOC, through both regulations and case law, has circumscribed its jurisdiction to some degree. For example, in enacting Part 1614, the Commission removed proposed adverse actions from the scope of the complaint processing regulations on the theory that proposed actions do not sufficiently aggrieve an employee until or unless they become effective. Through case law, the Commission has removed midyear performance appraisals from the ambit of the complaint process. Again, the basic theory is that midyear performance appraisals that do not result in a formal rating, with some exceptions, do not cause sufficient harm to render an employee aggrieved until the final year-end rating issues.

In cases involving alleged retaliation for protected activity, the Supreme Court has broadened Commission jurisdiction holding that an employee can be aggrieved by actions both inside and outside the workplace that would be reasonably likely to deter a reasonable person from filing or pursuing an EEO complaint.

See the section in Chapter 3 on "Standing: Failure to State a Claim," for a detailed discussion; see also Chapter 18, "Personnel Actions"; and Chapter 17, "Reprisal."

3. Employees Covered

The Commission's jurisdiction, unlike that of the Merit Systems Protection Board, is not limited to those executive branch employees who have completed a probationary period and obtained conversion to permanent appointments. The EEOC has jurisdiction over all complaints of discrimination based on race, color, religion, sex, national origin, age, disability status, and genetic information even when the complainant is an applicant for federal employment. The few positions which are exempt constitute an exception rather than the rule. Under Title VII, the Rehabilitation Act, and GINA, complainants are required to exhaust their administrative remedies before proceeding to U.S. district court. Under the ADEA and the EPA, complainants in the federal sector are not required to exhaust their administrative remedies by filing a complaint with the involved agency, but may avail themselves of the administrative process. Utilizing the administrative process does not toll the statute of limitations for civil actions under the ADEA and the EPA.

Both Title VII and the ADEA confer protection on competitive service employees of the judicial branch. Under legislation, discussed above, competitive service employees from the legislative branch have been removed from the jurisdiction of the EEOC. Under the Rehabilitation Act, the Commission does not have jurisdiction over complaints by competitive service employees in the legislative and judicial branches of government. The issue of coverage of competitive service employees in the legislative and judicial branches is discussed earlier under the subheading "Title VII of the 1964 Civil Rights Act." See also discussion later in this chapter on "Legislative and Judicial Branches"; Chapter 3, "Legislative and Judicial Employees"; Chapter 13, "Congressional Accountability Act—Legislative Employees."

Uniformed military personnel are not within the Commission's jurisdiction.

See DeGroat v. Secretary of Air Force, 05900409 (1990). However, there are circumstances where military employees, such as National Guard technicians who perform both military and civilian duties, can come within the Commission's jurisdiction. Such cases revolve around whether the alleged discrimination involves civilian or military duties. See the section later in this chapter discussing "Military Employees"; Chapter 3, "Military Departments."

The Commission's jurisdiction over complaints by federal employees does not extend to employees of state government whose positions are funded by federal grants. *See Kirchner v. Secretary of Agriculture*, 01892984 (1989).

For further discussion of the employees covered by the antidiscrimination statutes, see Chapter 3, "Standing: Failure to State a Claim."

4. Remedial Powers

The Commission's remedial powers are broad. Under 42 USC 2000e-16(b), the EEOC has the authority to grant such "appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section…." Subsection (b) of 29 USC 633a gives the Commission similar powers to grant remedial relief under the ADEA, as does the Rehabilitation Act at 29 USC 794a, which incorporated, by reference, Title VII remedies in cases involving disability discrimination.

The discrimination statutes, as originally passed, were all considered to be remedial or "make whole" statutes. The Commission's remedial powers, while broad, did not encompass such items as punitive damages awards or consequential damages suffered as a result of prohibited discrimination. The focus was on placing the employee who has been determined to have suffered discrimination in the same position he or she would have been in had the discrimination not occurred. The Civil Rights Act of 1991 authorized both punitive and compensatory damages for such items as pain, suffering, humiliation and other nonpecuniary damages. 42 USC 1981a(b). The federal government is exempt from the punitive damages provision, but is subject to the provision for compensatory damages in cases involving intentional discrimination under Title VII and the Rehabilitation Act. *See Jackson v. Postmaster General*, 01923399 (1992).

Although the 1991 Civil Rights Act did not include any provision addressing the retroactivity of its new remedies, the Commission initially issued a policy guidance statement declaring that the remedies were not retroactive and would only apply to intentional discriminatory acts that occur on or after November 21, 1991—the date the legislation became effective. The issue of retroactivity of the new remedies also was considered by several federal courts, with decisions split almost equally on whether or not the provision was retroactive. On April 13, 1993, the EEOC reversed its position and rescinded its earlier policy statement. The issue of the retroactivity of the 1991 Act was decided by the Supreme Court in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed.2d 229 (1994). The Court held that the substantive provisions of the Act were not retroactive and the compensatory damages provision did not apply to discriminatory acts occurring before the effective date of the legislation.

The focus of the original statutes was purely remedial and the new legislation exempted the federal government from punitive damages. The Commission does not have authority to order punitive measures against discriminating officials. In recent years, though, it has taken a much more aggressive posture toward alleged discriminating officials and held that it may review an agency's determination to discipline offending officials as part of its overall mandate to order corrective action. The Commission also has a Memorandum of Understanding with the Office of Special Counsel and refers findings of discrimination to OSC for decisions on whether that office will bring disciplinary action against the appropriate management officials.

While the Commission cannot order punishment of an offending government official, it can, and does, order broad remedial measures. The Commission routinely requires agencies to post Notices of Violation to publicize findings of discrimination. It also routinely orders agencies to provide specific training to managers and supervisors as a measure to correct past discrimination and prevent discrimination in the future.

Section 701(k) of Title VII provides that the prevailing party also may recover reasonable attorney fees and costs. A similar provision appears in the Rehabilitation Act. Although the respective acts make no specific mention of attorney fees in the administrative process, in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 100 S. Ct. 2024, 64 L. Ed.2d 723 (1980), the Supreme Court held that § 701(k) does allow for recovery of fees for representation in the administrative process. *See Patton v. Andrus*, 459 F. Supp. 1189 (D.D.C. 1978). The Commission's authority to award fees in cases involving age discrimination is circumscribed because the Age Discrimination in Employment Act, as applied to federal employees, contains no provision for recovery of fees.

5. Unions

Labor unions fall within the coverage of Title VII. *See* 42 USC 2000e(d)–(e). There is a question as to whether unions fall within the coverage of the Rehabilitation Act since there is no comparable provision in that legislation. However, labor unions are covered under the Americans with Disabilities Act. There also remains a question as to whether federal sector labor unions are covered under the ADEA. Although the ADEA does apply to labor organizations, 29 USC 623(b), only certain portions of the ADEA apply to the federal government. *See* 29 USC 633a(f). It is not clear that the provision relating to labor unions applies to the federal government.

In *Jennings v. American Postal Workers Union*, 672 F.2d 712, 28 FEP 514 (8th Cir. 1982), the court found that a federal employee who alleged that a labor union discriminated against him on a basis prohibited by Title VII could file a complaint of discrimination directly with the EEOC. The court found that section 703(c) of Title VII was controlling. Section 703(c) prohibits labor organizations from discriminating against members on the bases of race, color, sex, religion and national origin, and also prohibits labor organizations from excluding persons from membership on those bases. A complaint cannot be filed with the agency where the employee works, since the agency has no control over any actions the union may take with respect to its members.

In *Reardon v. USPS*, 01860152 (1986), the Commission decided that an employee could not file a complaint with his agency alleging that his union had engaged in disability discrimination. The Commission did not decide whether such an employee can file a complaint directly with the EEOC under Title VII, since that issue was not presented. The Commission did note that the Rehabilitation Act contains no provision similar to § 703(c) of Title VII. *However,* 5 USC 7114(a)(1), states:

> A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

Section 7116(b)(4) of Title 5 specifically makes it an unfair labor practice:

> to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;…

Allegations of unfair labor practices fall within the province of the Federal Labor Relations Authority. *See* 5 USC 7118.

However, at least one court has held that federal sector labor organizations are covered entities under the ADA. In *Jones v. American Postal Workers Union*, 192 F.3d 417 (4th Cir. 1999), the court found that a former Postal Service worker could bring suit against the union under the ADA, though it ultimately dismissed the suit for other reasons. Agreeing with the EEOC, which filed an *amicus curiae* brief in the case and relying on *Jennings*, the court in *Jones*, 192 F.3d at 420, found:

> The principal issue in this appeal is whether a labor union that represents federal employees may constitute a labor organization as that term is defined in the Americans With Disabilities Act (ADA), 42 USC §§ 12101–12213, and therefore be subject to suit in federal district court for violations of 42 USC § 12112(a). Because the ADA provides that the term "labor organization" shall have the same meaning given that term in Title VII of the Civil Rights Act of 1964, 42 USC §§ 2000e to 2000e-17, a sister statute, resolution of the principal issue requires us to resolve the antecedent question of whether a labor union that represents federal employees may constitute a labor organization as that term is defined in Title VII. For the reasons that follow, we hold a labor union that represents federal employees may constitute a labor organization as that term is defined in Title VII and by proxy the ADA.

The *Jones* court, *id.* at 423–28, elaborated on this holding:

> As previously stated, Congress defined the term "covered entity" in the ADA as "an employer, employment agency, *labor organization*, or joint labor-management committee," 42 USC § 12111(2) (emphasis added), and expressly incorporated Title VII's definition of "labor organization," *see id.* § 12111(7). For its part, Title VII defines "labor organization" as:
>
> > *a labor organization engaged in an industry affecting commerce,* and any agent of such an organization, *and includes any organization of any kind,* any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and *which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment*, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.
>
> *Id.* § 2000e(d) (emphasis added). Title VII goes on to state in a separate subsection of its definitional section that a labor organization "shall be deemed to be engaged in an industry affecting commerce," if it maintains a hiring office or has fifteen or more members and falls within one of the following five categories:
>
> > (1) is the certified representative of employees under the provisions of the National Labor Relations Act…, or the Railway Labor Act…;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an *employer* or *employers* engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of *employers* within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

Id. § 2000e(e).

The ADA also expressly adopts Title VII's definitions of "commerce" and "industry affecting commerce." *See id.* § 12111(7). Title VII defines the term "commerce" as "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof." *Id.* § 2000e(g). Title VII defines an "Industry affecting commerce" as "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes…any governmental industry, business, or activity." *Id.* § 2000e(h). The ADA also defines "employee" and "employer" in language that closely approximates the definitions of those terms in Title VII. *Compare* 42 USC § 12111(4)–(5) (ADA), *with* 42 USC § 2000e(b), (f) (Title VII). Notably, both the ADA and Title VII's definition of employer expressly exclude the United States or a corporation wholly owned by the government of the United States. *See id.* §§ 2000e(b) & 12111(5).

…

…After considering these points of reference, we conclude that Title VII's definition of labor organization is ambiguous as to whether a labor organization that represents federal employees may be subject to liability under Title VII. First, the initial clause of Title VII's definition of the term "labor organization"—[t]he term 'labor organization' means a labor organization engaged in an industry affecting commerce," 42 USC § 2000e(d)—begs the question of what is the nature of a labor organization for purposes of Title VII. Second, the balance of the definition, which uses the term "employer," defined in § 2000e(b) as excluding the United States or an agency thereof, merely provides a nonexclusive list of organizations, agencies, employee representation committees, groups, associations, or plans that may constitute a labor organization under Title VII. *See West v. Gibson*, 119 S. Ct. 1906, 1910 (1999) [other cites omitted]…

The third circumstance creating ambiguity is that Title VII has a separate section specifically allowing federal employees to sue the United States for unlawful employment discrimination, but does not contain a parallel section addressing labor organizations that represent federal employees. The fourth circumstance creating ambiguity is that although § 2000e(e) declares when a labor organization shall be "deemed" to be engaged in an industry affecting commerce, it does not purport to define the term "labor organization" itself. Fifth and finally, the legislative history of Title VII and the ADA is silent regarding whether a labor organization engaged in an industry affecting commerce and that represents federal employees is subject to their respective proscriptions.

Because we conclude Title VII's definition of labor organization is ambiguous as to whether a labor organization that represents federal employees may be subject to liability under Title VII, we turn to consider the deference this court should afford the interpretation proffered by the EEOC, the agency charged with primary responsibility for enforcement of Title VII. *See Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 441 (4th Cir. 1998). The level of deference that this court should afford the EEOC's proffered interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* (internal quotation marks omitted)….

…[U]nder the circumstances of this case, we believe full *Chevron* deference is appropriate. After reading the EEOC's brief and listening to its presentation at oral argument, we are convinced the EEOC thoroughly considered the statutory interpretation issues at hand. Furthermore, as we will explain in greater detail momentarily, we find its reasoning valid. Additionally, the EEOC's position is consistent with its express agreement in its Compliance Manual with the Eighth Circuit's holding in *Jennings*. *See* EEOC Compliance Manual, Vol. II, § 605, App. 605–N (issued January 29, 1998). Finally, there is no evidence that the EEOC's proffered interpretation is inconsistent with an earlier or later pronouncement.

Having determined that the EEOC's interpretation is entitled to full *Chevron* deference, we must next determine whether the EEOC's proffered interpretation is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. If it is, then we must sustain the EEOC's interpretation. *See Molinary*, 125 F.3d at 235. We have no trouble in concluding that it is. Section 2000e(d) can reasonably be interpreted to mean that, at a minimum, if a labor organization representing federal employees exists for the purpose, in whole or in part, of dealing with the United States or an agency thereof concerning grievances, labor disputes, and the like of the federal employees it represents and is engaged in an "industry affecting commerce" as that term is defined in § 2000e(h), then that labor organization is subject to the proscriptions of Title VII and by proxy the ADA. This interpretation fully comports with Congress' primary purpose in enacting those statutes of eradicating certain employment discrimination. Such an interpretation avoids the anomalous result, surely not intended by Congress, of nonfederal employees being allowed to sue their employer and labor organizations for violations of Title VII and the ADA, but federal employees only being allowed to sue their employer.

There is no dispute in this case that the Defendants represent federal employees and exist for the purpose in whole or in part of dealing with the Postal Service concerning grievances, labor disputes, and the like. Furthermore, the Defendants' significant representational activities on behalf of Postal Service employees fully support the conclusion that the Defendants are engaged in activities in commerce. *See* 42 USC § 2000e(h). Accordingly, the Defendants constitute labor organizations for purposes of Title VII liability and by proxy the ADA.

The court in *Jones*, 192 F.3d at 428–29, rejected the union's argument that the Rehabilitation Act provided the exclusive remedy for federal employees for disability discrimination. Because the union and not the agency was the defendant, the court found no sovereign immunity question presented. Having found that the APWU was covered by subject matter jurisdiction, the Fourth Circuit in *Jones*, *id.* at 429, held:

> Although Jones wins the battle over subject matter jurisdiction, he ultimately loses the war. The district court should have granted the Defendants' motion for summary judgment. The law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee's misconduct, even if the misconduct is related to a disability. [cites omitted] Assuming Butts made the alleged discriminatory comments at issue to Postal Service officials and she represented the Defendants in doing so, there is absolutely no evidence to suggest that the Postal Service discharged Jones for any reason other than the fact that he threatened the life of his supervisor. Because the ADA does not require an employer to ignore such egregious misconduct by one of its employees, even if the misconduct was caused by the employee's disability, we remand this case to the district court for entry of judgment in favor of the Defendants.

In *Bray v. Secretary of Treasury*, 01941865 (1994), the Commission refused to uphold the dismissal of a complaint on the basis of lack of jurisdiction because the disputed actions were taken by union officials. The Commission held that agency employees cannot, acting under the guise of a union, insulate an agency from liability for discriminatory actions.

See also Chapter 3, section on "Standing: Failure to State a Claim—Agency Jurisdiction."

E. CIVIL ACTIONS

Title VII originally provided that complainants may file a civil action in U.S. district court within 30 days of a final decision of an agency or the EEOC, or within 180 days of filing a complaint with an agency or appeal with the EEOC, if no final action has been taken. 42 USC 2000e-16(c). As with complaints in the private sector, federal employees are entitled to a trial *de novo*. *See* 42 USC 2000e-16(d); 42 USC 2000e-5(f) through (k). The procedure also applies to the Rehabilitation Act. 29 USC 794a. Under the 1991 Civil Rights Act, the time for filing a civil action after a final agency decision or final decision of the Commission has been extended to 90 days. 42 USC 2000e-16(c). Although the language of the 1991 Civil Rights Act seems clear, some U.S. district courts have held that the 30-day filing limit still applies in cases on appeal before the Merit Systems Protection Board where discrimination is raised as an affirmative defense. *See, e.g., James v. United States*, 888 F. Supp. 944 (S.D. Ind. 1995) (applying 30-day statute of limitations). The cases are based upon 5 USC 7703, which still contains the 30-day statute of limitations and was not amended by the 1991 Civil Rights Act.

Unlike Title VII and the Rehabilitation Act, an employee who believes he or she is aggrieved under the ADEA has the option of pursuing an administrative complaint with the agency and the EEOC, or filing an action in U.S. district court without exhaustion of the administrative remedies. 29 USC 633a(c). The employee must give the EEOC written notice at least 30 days in advance of filing suit, but not later than 180 days after the alleged discriminatory action.

The new civil rights legislation specifically provides for the right to a jury