

## PREJUDICE AND DISCRIMINATION

Understanding the meanings and origins of prejudice and discrimination is essential to recognize and correct discriminatory policies and practices.

"All people are prejudiced." - Prejudice is an unfavorable opinion or feelings formed beforehand or without knowledge, thought, or reason.

We regularly make judgments or form opinions without examining all the information. This information, whether correct and incorrect, comes to us through books, news media, television, direct communication and other sources.

We may hold preconceived opinions about people or groups of people. We base our opinions on the ideas communicated by others or exposure to some members of a group. It is important to remember that individuals within a group have their own unique characteristics and abilities.

For example: If you hold an opinion that women do not like to travel in their jobs and, for this reason, you do not select a woman for a job requiring travel. You have committed a discriminatory act (based on your prejudice); this is unlawful.

The "categories" or "groups" protected from discrimination under the laws are:

Race and Color -- any race or color.

National Origin -- any national origin.

Religion -- any religion. (Reasonable accommodations for employee's religious preferences may include changing tours of duty, granting annual leave, etc.)

Sex -- female or male.

Sexual Harassment (sex discrimination) -- is deliberate or repeated unsolicited verbal comments, gestures or physical sexual contact that are unwelcome.

Age -- must be 40 years of age or older.

Physical or Mental Handicap -- a disabled person is an individual who has a physical or mental impairment substantially limiting one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

Coercion and Reprisal - Aggrieved persons, representatives and all witnesses involved in presenting a discrimination complaint are protected against coercion and reprisal. Reprisal is taking an action against an employee because the employee opposed discriminatory practices or participated in the discrimination complaint process. Coercion is trying to influence an employee's testimony or participation in the complaint process.

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## THEORIES OF DISCRIMINATION

There are two theories of discrimination. Adverse impact includes policies and practices that, are not discriminatory in their intent. However, it may have a disproportionately higher adverse impact on certain groups. Examples are:

- Minimum height and weight requirements, when not required for the job, may adversely affect women, or minorities.
- English fluency, when not required for the job.
- Lifting requirements, when not required for the job, may have an adverse affect on women and other groups.

The second theory of discrimination is Disparate Treatment. The employer treats some people differently based on their race, color, national origin, sex, etc. Supervisors and managers may be accused of disparate treatment more often than adverse impact discrimination. Examples of disparate treatment are:

- Providing training opportunities to males only
- Disciplining minority employees for tardiness while not disciplining, or giving lighter penalties to non-minority employees
- Not selecting job applicants 40 years of age or older

Disparate treatment occurs when our stereotyped assumptions (preconceived opinions) about certain groups of people or because you like or dislike certain individuals is acted upon. It is important that you treat all employees equally. Patterns of unequal treatment could lead to a finding of discrimination even though there was no discriminatory intent.

Coercion and reprisal against individuals involved in complaints is also illegal. Evidence that discriminatory intent played any part in employment decisions, proven by direct or circumstantial evidence, which may support an inference that retaliation played a part in the adverse treatment of an employee. Examples are:

Telling a witness that their job situation may be difficult if they testify against management.

Instructing an employee about what testimony to give.

Talking about disciplinary action against an employee who participated in a complaint, or opposed a discriminatory practice, but does not take action, or give lighter penalties to other employees who have committed the same infraction.

When an employee participates in a complaint or opposes a discriminatory practice, a supervisor treats the employee differently from similarly situated non-protesting employees.

Retaliatory motives may be inferred when an employer deviates from its written procedures or past practices to carry out adverse action against a protesting employee.

The employer treats an employee differently before the protected activity, including evidence that the employer began surveillance.

Surveillance often is important, not as proof of adverse treatment, but its presence suggests the possibility of a search for a pre-textual bias for discipline. This suggests that subsequent discipline was retaliatory.

The proximity in time strengthens an inference of retaliatory motive in direct proportion to how close, the adverse action follows the employer's notice of participation in the protected activity.

Coercion and reprisal are illegal. Filing an EEO complaint does not permit an employee to miss work, fail to perform assigned duties, or leave work without notice.

## **DISCRIMINATION COMPLAINT PROCESS**

Employees or applicants for employment who believe they have been discriminated against have a right to file a complaint of discrimination.

### **STEP 1 -- Pre-complaint Counseling**

Pre-complaint counseling is a prerequisite to filing a formal EEO complaint. The purpose of counseling is to afford both the aggrieved person and the agency an opportunity to achieve an informal and amicable resolution of the matter. This avoids the trauma and cost of formal complaint processing.

The aggrieved person must contact an EEO Counselor within 45 calendar days of the event or action causing the alleged discrimination, or when the aggrieved person became aware of the alleged discrimination. (The aggrieved person has a right to remain anonymous during pre-complaint counseling and supervisors and managers must respect this right.)

The EEO Counselor serves as a bridge between employees and management seeking informal resolution of matters leading to allegations of discrimination. The EEO Counselor may interview supervisors, managers, and employees and examine all pertinent records. The counselor should complete counseling within 30 calendar days of the initial interview with the complainant, unless both parties agree to an extension of not more than 60 calendar days. If the complainant agrees to participate in the Alternative Dispute Resolution (ADR) process, as part of the agency's counseling function, the counseling period will be 90 calendar days.

The primary focus of counseling is the informal resolution of problems. Therefore, all individuals involved in the dispute must assist the counselor to reach an acceptable solution to the problem by considering all possible alternatives.

### **STEP 2 -- Formal Complaint**

If informal resolution fails, the aggrieved person has a right to file a formal written complaint within 15 calendar days after receiving the "Notice of Final Interview" from the EEO Counselor. (Attempts at resolution should continue throughout the complaint process.)

#### **Acceptance of Formal Complaints**

For a complaint to be accepted for processing, the following elements must be present:

Timeliness - Complaints must meet all time requirements or the individual must show that they were not aware of the requirements or circumstances beyond their control prevented filing.

Purview - To be within the purview of the regulations, only an employee, former employee or applicant for employment may file a complaint.

- It must relate to an employment matter under the agency's jurisdiction.

- The alleged discriminatory act must be based on the complainant's race, color, religion, sex (including sexual harassment), age, national origin, handicap, or reprisal in connection with the individual's involvement in a previous discrimination complaint.

Specificity - The complainant must state the issue(s) clearly, to permit a thorough investigation.

Identical Issues - The issues presented may be identical to those filed in a previous complaint by the same person that is pending or decided by the agency previously.

### STEP 3 -- Investigation

If the agency accepts the complaint for processing, it will appoint an Independent Investigator. The Investigator will administer oaths, take sworn affidavits or verbatim testimony transcribed by a court reporter. Management officials must cooperate fully. The Investigator will develop the facts and make a written report for the National Guard Bureau. The complainant will receive a copy of the completed Report of Investigation.

### STEP 4 -- Agency Decision or EEOC hearing

The complainant is advised that within 30 days from receipt of the investigation report, they may receive an immediate final agency decision or a hearing and a decision by the EEOC.

#### EEOC Hearing

The EEOC will appoint an Administrative Judge. The aggrieved person, witnesses, and agency officials will give sworn testimony. The findings provide the basis for the agency decision.

#### Final Agency Decision

The final agency decision will be in writing. The agency's decision is final and there is no further appeal within the agency. However, the aggrieved person has a right to: File notice of appeal with the Equal Employment Opportunity Commission, Office of Federal Operations,

or

File a civil action in U.S. District Court, within 90 calendar days after receiving the agency's final decision or after 180 calendar days from the filing of date of a formal complaint.

#### Remedial Action

When there is a finding that an employee or applicant has been discriminated against, the agency shall provide full relief, such relief may include:

- Notification to employees of their right to be free of unlawful discrimination.
- Commitment to initiate corrective, curative or preventive actions, to insure similar violations do not recur.
- Placement of the victim of discrimination in the position they would have occupied, but for discrimination, or a substantially equivalent position.
- Payment of back pay for any loss of earnings the victim would have received, but for discrimination.
- Commitment that the agency shall cease from engaging in the unlawful employment practice found in the case.
- Payment of compensatory damages. There is a limit to the amount of damages paid.

NOTE: 1. The circumstances of an individual case, may make other options to the administrative process available. These "special procedures" apply in age, mixed case, and Equal Pay Act complaints and when negotiated grievance procedures could apply. Contact the EEO Manager or the Human Resources Office for information.

NOTE: 2. The offending official may be disciplined, however that is the Adjutant General's decision, and not part of a settlement agreement.

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