



Preserving Access to the Legal System:

**Common Errors by Federal Agencies in Dismissing Complaints of
Discrimination on Procedural Grounds**

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Introduction

The U.S. Equal Employment Opportunity Commission (EEOC) developed an agency-wide Strategic Enforcement Plan (SEP) for Fiscal Years 2012-2016 designed to maximize its ability, within the constraints of its resources, to have a sustainable impact in reducing and deterring discriminatory practices in the workplace. Pursuant to this effort, EEOC has adopted a series of coordinated national priorities. Among these priorities is the goal of preserving access to the legal system. Under this priority, EEOC committed to targeting policies and practices that discourage or prohibit individuals from exercising their rights under the employment discrimination statutes, or that impede the EEOC's enforcement efforts. The Commission approved the Federal Sector Complement Plan (FCP) to implement the SEP in the federal sector. One of the strategies the FCP details for preserving access to the legal system in the federal sector is to prevent improper agency procedural dismissals of Equal Employment Opportunity (EEO) complaints.

EEOC's Office of Federal Operations (OFO) has, among other things, the responsibility for evaluating federal sector agencies' EEO programs, operations, and activities. It also adjudicates appeals from federal employees and applicants for employment from the final decisions and orders of federal agencies made under the 29 C.F.R. Part 1614 EEO complaints process. Pursuant to these responsibilities, and as part of its federal sector implementation of EEOC's SEP/FCP priority concerning preserving access to the legal system, OFO is issuing this report, which addresses the most frequent procedural errors committed by federal agencies.

In preparing this report, OFO analyzed its appellate decisions over the past five years on federal agencies' procedural dismissals of EEO complaints brought by employees or applicants for employment. By examining its appellate decisions, reversing procedural dismissals and remanding complaints back to federal agencies for investigation and further processing, OFO's goal is to help identify the most frequent errors by agencies that result in denying federal employees access to the EEO complaints process. Based on the data gathered, OFO expects to develop training and

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other outreach efforts aimed at EEO Directors and staff in federal agencies to reduce ongoing procedural dismissal errors.

Background

Under the 29 C.F.R. Part 1614 EEO complaints process, an aggrieved individual contacts a federal agency's EEO office for counseling to begin the process. A potential federal sector complainant must generally begin the EEO process within 45 calendar days of the date of the event or incident giving rise to the claim of discrimination. If the matter is not resolved during counseling, the agency provides the aggrieved individual with a notice of right to file a formal EEO complaint within 15 calendar days, and the aggrieved individual files his/her formal complaint.

Once it receives a formal EEO complaint, the agency either proceeds with an investigation of the claims of discrimination or dismisses the complaint, in part or in its entirety, for one of the following reasons:

- the complaint fails to state a claim;
- the complaint states the same claim that is pending at or has been decided by the agency or EEOC, or is the basis for a matter pending in federal court;
- the complaint was not timely filed, the complainant did not begin the EEO process in a timely manner or the complaint raises a matter that has not been brought to the EEO counselor's attention and is not like or related to counseled matters;
- the complaint has been raised in an appeal to the Merit Systems Protection Board (MSPB) or has been raised in a grievance proceeding that permits allegations of discrimination to be raised;
- the complaint is moot;
- the complaint concerns a preliminary step to the taking of a personnel action, unless it is a claim of retaliation;

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- the complainant cannot be located or has not responded to a request for relevant information, and the record does not contain sufficient information from which the agency could render a decision;
- the complaint is part of a clear pattern of misuse of the EEO process;
or
- the complaint alleges dissatisfaction with the processing of a previously filed complaint (“spin-off complaint”).

See 29 C.F.R. § 1614.107.

The agency's dismissal of a complaint in its entirety must inform the complainant that s/he has the right to appeal the dismissal to the EEOC. However, a complainant cannot appeal the determination to dismiss only a portion of a formal complaint. S/he must wait to appeal until the agency makes a final decision on the remainder of the complaint.¹

OFO issues appellate decisions on approximately 1,300 - 1,500 agency dismissal decisions each year, reversing over one-third of these dismissals and remanding the complaints back to the agencies for investigation.

¹ A determination not to investigate a portion of a complaint under one of the dismissal grounds is also reviewable by an EEOC administrative judge where a complainant requests a hearing on the remainder of the complaint.

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Methodology

In order to identify the most common errors made by agencies in issuing procedural dismissals that resulted in reversal on appeal, all agencies with 25 or more appellate decisions (affirming or reversing the dismissal) in a fiscal year were considered. From that list, OFO identified the agencies that exceeded the government-wide dismissal reversal rate for that fiscal year. The following tables show the results of this analysis for the five-year period encompassing Fiscal Years 2008 – 2012. Table 1 reflects the total number of appeal decisions of agency dismissals the OFO issued and the number of those decisions reversed and remanded for further action by the agencies.

Table 1*

All EEOC Appeals Decisions from Agency Dismissal Decisions				
FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
1483 Decisions	1290 Decisions	1656 Decisions	1370 Decisions	1548 Decisions
450 Reversals (30.3%)	458 Reversals (35.5%)	613 Reversals (37.0%)	478 Reversals (34.9%)	695 Reversals (44.9%)

*The number of decisions and reversals in this Table reflect the # of procedural decisions the EEOC issued each year. These numbers do not represent agency procedural decisions for each year.

Approximately 800 reversal decisions across the five fiscal years identified in Table 2 were individually reviewed, and the grounds for the dismissal decision and reasons for the reversal on appeal were noted. OFO used this information to reach conclusions about the most common reversible errors in dismissing complaints and the reasons for those reversals.

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Table 2

Agencies with 25+ Appellate Decisions from Dismissals in Fiscal Year That Exceeded the Government-wide Reversal Rate				
FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
<u>Govt-wide Reversal Rate:</u> 30.3%	<u>Govt-wide Reversal Rate:</u> 35.5%	<u>Govt-wide Reversal Rate:</u> 37.0%	<u>Govt-wide Reversal Rate:</u> 34.9%	<u>Govt-wide Reversal Rate:</u> 44.9%
<u>Homeland Security:</u> 64 decisions/ 22 reversals (34.4%)	<u>Air Force:</u> 32 decisions/ 13 reversals (40.6%)	<u>Army:</u> 83 decisions/ 37 reversals (44.6%)	<u>Air Force:</u> 31 decisions/ 12 reversals (38.7%)	<u>Agriculture:</u> 26 decisions/ 12 reversals (46.2%)
<u>Justice:</u> 44 decisions/ 14 reversals (31.8%)	<u>Justice:</u> 26 decisions/ 14 reversals (53.8%)	<u>Homeland Security:</u> 54 decisions/ 23 reversals (42.6%)	<u>Army:</u> 78 decisions/ 31 reversals (39.7%)	<u>Army:</u> 106 decisions/ 48 reversals (45.3%)
<u>Transportation:</u> 49 decisions/ 18 reversals (36.7%)	<u>Transportation:</u> 52 decisions/ 27 reversals (51.9%)	<u>Justice:</u> 55 decisions/ 27 reversals (49.0%)	<u>Homeland Security:</u> 54 decisions/ 23 reversals (42.6%)	<u>Justice:</u> 35 decisions/ 17 reversals (48.6%)
		<u>Navy:</u> 57 decisions/ 26 reversals (45.6%)	<u>SSA:</u> 31 decisions/ 15 reversals (48.4%)	<u>USPS:</u> 783 decisions/ 352 reversals (45.0%)
		<u>USPS:</u> 979 decisions/ 364 reversals (37.2 %)	<u>USPS:</u> 722 decisions/ 253 reversals (35.0%)	<u>Veterans Affairs:</u> 157 decisions/ 75 reversals (47.8%)

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Results

The results of the review of appellate reversal decisions over the five-year period revealed that the agencies studied primarily erred in applying two regulatory grounds for dismissal. In fact, 81% of all appellate reversals studied overturned agency dismissals on one of these two grounds. The grounds identified as the source of the most common problem areas for agencies were: (1) reversals for failure to state a claim under 29 C.F.R. § 1614.107(a)(1), that accounted for about 57% of the appellate reversals, and (2) reversals for failure to comply with applicable regulatory time limits under 29 C.F.R. § 1614.107(a)(2), that accounted for about 24% of the appellate reversals.

In addition, OFO collected information from the agencies identified in Table 2 regarding whether or not procedural dismissal decisions were issued by a central authority within an agency-wide EEO office or by decision-makers diffused across the agency's field EEO programs. With the exception of the military agencies, all the identified agencies (Department of Agriculture, Department of Homeland Security, Department of Justice, Social Security Administration, Department of Transportation and the United States Postal Service) issued procedural dismissal decisions from a central authority within their agency-wide EEO program. By contrast, the Departments of the Air Force, Army and Navy used a system of diffused authority to issue procedural decisions from their field EEO programs. However, as Table 2 revealed, no clear correlation between whether or not dismissal decisions were issued centrally or by field installations and the reversal rates of those decisions was noted.

Analysis

The review of the reversal decisions during the five-year period revealed some common errors made by agencies when dismissing complaints for failure to state a claim or failure to comply with applicable regulatory time limits. A closer look at these errors is set forth below.

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I. Failure to State a Claim

In order to state a claim under the Commission's regulations set forth at 29 C.F.R. Part 1614, a complaint must allege employment discrimination on a basis set forth in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (race, color, sex, religion, and national origin); the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. (aggrieved individual at least 40 years of age); § 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 et seq. (disability); the Equal Pay Act of 1963 (EPA), as amended, 29 U.S.C. § 206(d) (1978) (sex-based wage discrimination); or Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. § 2000ff, et seq. EEOC Regulation 29 C.F.R. § 1614.103(a) (genetic information) provides that complaints alleging retaliation prohibited by the foregoing statutes are also considered to be complaints of discrimination. Allegations that fail to state a claim are subject to dismissal under 29 C.F.R. § 1614.107(a)(1).

In addition, a claim must concern an employment policy or practice which affects the individual in his or her capacity as an employee or applicant for employment. An agency must accept and process a complaint from any aggrieved employee or applicant who believes that s/he was discriminated against by that agency. The Commission defines an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. [Complainant v. Department of the Air Force](#), EEOC Request No. 05931049 (April 21, 1994). In simple terms, in order to state a viable claim, a complainant needs to allege discrimination on a basis capable of being examined by a designated tribunal under the anti-discrimination statutes in connection with a set of facts that assert a harm or loss related to his/her employment. The evidence in support of this claim will be developed during the investigation and does not need to be referenced in the complaint or during pre-complaint counseling.

The crucial element in a complaint of discrimination is the set of facts alleged, and not the complainant's conclusions concerning the agency's motivation.

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[Complainant v. Department of Defense](#), EEOC Appeal No. 01941890 (May 2, 1994); [Complainant v. United States Postal Service](#), EEOC Appeal No. 0120130458 (April 5, 2013). The Commission has held that a complainant may allege discrimination on all applicable bases and may amend his or her complaint at any time to add or delete bases without changing the identity of the claim. [Complainant v. United States Postal Service](#), EEOC Request No. 05940563 (Jan. 19, 1995); also in agreement with see, [Sanchez v. Standard Brands, Inc.](#), 431 F. 2d 455 (5th Cir. 1970).

The most common errors by agencies in dismissing complaints for failure to state a claim noted in our five-year review concerned the following issues: (1) fragmentation; (2) the proper standard for retaliation claims; (3) improper decisions on the merits; (4) issues of standing; (5) dismissing as a collateral attack on another process; and (6) issues surrounding the cancellation of vacancy announcements. Each of these areas is discussed in further detail below.

Fragmentation – Breaking Up Complainant’s Legal Claim During Complaint Processing

In determining whether a complaint states a claim, the proper inquiry is whether the conduct as alleged by Complainant would constitute an unlawful employment practice under the EEO statutes. [Complainant v. Department of the Treasury](#), EEOC Request No. 05970077 (March 13, 1997). The review of reversal decisions, however, shows that agencies often fail to distinguish between the factual allegations made by a complainant in support of a legal claim and the legal claim itself, which results in the fragmentation of claims that involve a number of different allegations. For complainants, fragmented processing can compromise their ability to present an integrated and coherent claim of an unlawful employment practice for which there is a remedy. For agencies and EEOC, fragmented processing substantially increases case inventories and workloads when it results in the processing of related matters as

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separate complaints. Harassment/hostile work environment claims are particularly susceptible to fragmentation.

Where a complainant has not alleged disparate treatment regarding a specific term, condition, or privilege of employment, EEOC will examine whether a complainant's allegations, when considered together and assumed to be true, are sufficient to state a hostile or abusive work environment claim. See [Complainant v. National Aeronautics and Space Administration](#), EEOC Request No. 05970388 (February 26, 1999). Even if harassing conduct does not involve a tangible employment action such as a disciplinary action or a termination, a complainant may state a claim if the alleged discriminatory conduct was so severe or pervasive that it created a work environment abusive to complainant because of his or her race, gender, religion, national origin, age, disability, genetic information or as a result of retaliatory animus. Complainant v. Department of the Army, EEOC Appeal No. 01933866 (November 22, 1995) (citing [Harris v. Forklift Systems, Inc.](#), 510 U.S. 17, 22 (1993)), request for reconsideration denied, EEOC Request No. 05970995 (May 20, 1999).

Agencies fragment harassment/hostile work environment claims by dismissing each factual incident cited by complainant separately, reasoning that the incident was insignificant and could not have affected complainant's work environment. This, however, fails to consider a claim of a persistent pattern of alleged harassing conduct, where each instance by itself may seem relatively trivial or isolated, but considered together, may allow complainant to prove a hostile work environment. See for example [Complainant v. United States Postal Service](#), EEOC Appeal No. 0120122428 (September 18, 2012); [Complainant v. Department of the Navy](#), EEOC Appeal No. 0120121807 (July 13, 2012); [Complainant v. Department of the Army](#), EEOC Appeal No. 0120121472 (June 12, 2012). EEOC reversals frequently consider both the language in the complaint itself, as well as the information in the related EEO counseling report, to reverse an agency dismissal of a harassment claim. This is true even if complainant did not clearly characterize his/her claim as a harassment/hostile work environment claim.

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Proper Standard for Retaliation Claims

The anti-retaliation provisions of the employment discrimination statutes seek to prevent an employer from interfering with an employee's efforts to secure or advance enforcement of the statutes' basic guarantees, and are not limited to actions affecting employment terms and conditions. [Burlington Northern & Santa Fe Railroad. Co. v. White](#), 548 U. S. 53, 126 S. Ct. 2405 (2006). To state a viable claim of retaliation, a complainant must allege that: 1) s/he was subjected to an action which a reasonable employee would have found materially adverse, and 2) the action could dissuade a reasonable employee from making or supporting a charge of discrimination. [Id.](#) While trivial harms may not satisfy the initial prong of this inquiry, the significance of the act of alleged retaliation will often depend upon the particular circumstances. [See also EEOC Compliance Manual, Section 8, "Retaliation,"](#) No. 915.003 (May 20, 1998) at 8-15 (any adverse treatment that is based upon a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity states a claim); [Complainant v. Department of Homeland Security](#), EEOC Appeal No. 0120112370 (January 19, 2012); [Complainant v. United States Postal Service](#), EEOC Appeal No. 0120112489 (January 27, 2012); [Complainant v. Department of the Army](#), EEOC Appeal No. 0120111275 (December 9, 2011).

Former employees also have standing to bring a claim for actions which occurred post-employment and are alleged to be in retaliation for protected activity engaged in while an employee. [See, Complainant v. United States Postal Service](#), EEOC Appeal No. 0120070788 (March 29, 2007) (complainant stated a viable claim of retaliation when, as a former employee who had engaged in protected EEO activity, he was not selected for a contract position with the agency); [Complainant v. Department of Justice](#), EEOC Request No. 0520070207 (October 12, 2007) (complainant stated a viable claim of retaliation when, as a former employee who had engaged in protected EEO activity, he was not selected for a post-retirement contract position with the agency). [See also, Complainant v. United States Postal Service](#), EEOC Appeal No. 0120110529 (March

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11, 2011); [Complainant v. Department of the Army](#), EEOC Appeal No. 0120103411 (December 14, 2010).

Improper Decision on the Merits

Often agencies will base the decision to dismiss a complaint for failure to state a claim by addressing the merits of claim. This will commonly result in a reversal. See [Complainant v. Department of the Treasury](#), EEOC Request No. 05960111 (July 19, 1996); [Complainant v. United States Postal Service](#), EEOC Request No. 05930220 (August 12, 1993); [Complainant v. United States Postal Service](#), EEOC Request No. 05910642 (August 15, 1991). In making this error, agencies use information gathered from management witnesses during the EEO counselor's limited inquiry into Complainant's claim to support the dismissal for failure to state a claim. See for example, [Complainant v. United States Postal Service](#), EEOC Appeal No. 0120083541 (July 26, 2012) (agency erred in dismissing a complaint alleging a discriminatory shift change reasoning that the settlement of a union grievance required rotating assignments); [Complainant v. United States Postal Service](#), EEOC Appeal No. 0120112012 (July 19, 2011) (agency improperly based its dismissal of Complainant's constructive discharge claim on its determination that he voluntarily retired); [Complainant v. Veterans Administration](#), EEOC Appeal No. 0120121729 (July 25, 2012) (agency improperly dismissed Complainant's claim that she was paid less than younger employees based on its determination that her locality pay was set by OPM rules over which the agency had no discretion).

It should be remembered that the limited inquiry conducted by an EEO counselor is not the equivalent of an investigation under 29 C.F.R. § 1614.108. Moreover, following an investigation, a complainant has the right to request a hearing. These rights, designed to fully develop the evidence of record prior to adjudication on the merits, cannot be circumvented at the procedural dismissal stage. Complainants are

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afforded the opportunity through the investigative process to develop their legal claim, including the elements necessary to establish a prima facie case of discrimination.

Standing – Employee or Contractor

In order to have standing to bring an action under the federal sector EEO complaint process, an individual must be a federal employee or applicant for employment. As a result, complaints are often dismissed because the agency determines the complainant is a contractor rather than a federal employee and, therefore, lacks standing. In reviewing these dismissals, EEOC has focused upon the particular facts and circumstances surrounding the individual's relationship with the Agency, and not merely upon whether the Complainant meets the technical definition of an employee. See, for example, [Complainant v. Department of State](#), EEOC Request No. 0520110069 (April 26, 2012) (the fact that complainant worked under a blanket purchase agreement for the agency was not as relevant as the fact that the nature of the working relationship was such that the Agency retained a considerable degree of control over Complainant's job performance, establishing a de facto employer-employee relationship).

In [Complainant v. Department of Health & Human Services](#), EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998), the Commission applied the common law of agency test for determining who qualifies as an "employee." In doing so, the Commission examined a "non-exhaustive" list of factors to examine when determining an individual's status for purposes of stating a claim under the EEOC's regulations. These factors included: 1) the extent of the employer's right to control the means and manner of the worker's performance; 2) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; 3) the skill required in the particular occupation; 4) whether the "employer" or the individual furnishes the equipment used and the place of work; 5) the length of time the individual has worked; 6) the method of payment, whether by time or by job; 7) the manner in which the work relationship is terminated, that is, by one or both parties, with or without notice and explanation; 8) whether annual

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leave is afforded; 9) whether the work is an integral part of the business of the employer; 10) whether the worker accumulates retirement benefits; 11) whether the employer pays social security taxes; and 12) the intention of the parties. EEOC has held that no one factor will be decisive, and it is not necessary to satisfy the majority of factors in order to consider a complainant an employee of the Agency. Rather, the determination must be based on all of the circumstances in the relationship between the parties. Id.

The Commission has also recognized that a “joint employment” relationship may exist where both an Agency and a “staffing firm” is deemed as employers. [Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms](#), EEOC Notice No. 915.002 (December 3, 1997). Similar to the analysis in [Complainant](#), a determination of joint employment requires an assessment of the comparative amount and type of control the “staffing firm” and the Agency each maintain over Complainant’s work. Thus, a federal Agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual’s work under the Ma criteria, whether or not the individual is on the federal payroll. See generally, [Complainant v. Dep’t of the Army](#), EEOC Appeal No. 01A45313 (March 16, 2006). It should be noted that the same type of analysis is used for other work relationships with agencies. See, for example, [Complainant v. Department of the Army](#), EEOC Appeal No. 0120101877 (September 21, 2010) (agency found to be employer for the purposes of standing to bring a Part 1614 EEO complaint by a student volunteer).

Collateral Attack on Another Process

The Commission has held that an employee cannot use the EEO complaint process to lodge a collateral attack on another proceeding. See [Complainant v. Department of Defense](#), EEOC Request No. 05970596 (July 30, 1998); [Complainant v. United States Postal Service](#), EEOC Request No. 05940585 (September 22, 1994). A claim characterized as a collateral attack, by definition, involves a challenge to another forum's adjudicatory process, such as the grievance process, the unemployment

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compensation process, or the workers' compensation process. See [Complainant v. Department of Defense](#), EEOC Request No. 05931059 (July 15, 1994) (challenge to agency's appeal of a workers' compensation claim fails to state a claim as an EEO complaint); [Complainant v. United States Postal Service](#), EEOC Request No. 05930106 (June 23, 1994) (challenge to evidentiary ruling in grievance process fails to state a claim as an EEO complaint). In addition, without more, claims concerning a delay in submitting paperwork to another adjudicatory process, or submitting incomplete or faulty paperwork, constitutes a collateral attack on the other process, and should not be adjudicated as an EEO claim. See [Complainant v. United States Postal Service](#), EEOC Request No. 05A01065 (August 15, 2002).

However, simply because a complainant references another process in the complaint or during pre-complaint EEO counseling, does not automatically convert the claim to a collateral attack. If the Complainant is not affirmatively challenging a determination by another adjudicatory body or the agency's actions within the other adjudicatory process, it is unlikely that the claim should be dismissed as a collateral attack. See for example, [Complainant v. Department of Justice](#), EEOC Appeal No. 0120122277 (September 20, 2012) (dismissal improper as a collateral attack on the internal affairs process because complainant was not challenging a determination by the Internal Affairs Division. Rather, Complainant was claiming that the decision to report her to Internal Affairs and request an investigation was made as a result of discriminatory animus and/or in retaliation for her prior EEO complaint activity); [Complainant v. United States Postal Service](#), EEOC Appeal No. 0120120554 (April 18, 2012) (dismissal as collateral attack improper because while the Agency has characterized the complaint as challenging a decision by management to not settle his related grievance, a more correct characterization of the complaint is that management did not take his allegations of harassment seriously by directing an investigation and taking prompt and effective corrective and preventative action. By contrast, complainant alleged a very different reaction from management to the harassment complaints of several female employees); [Complainant v. Department of Homeland](#)

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[Security](#), EEOC Appeal No. 0120111551 (April 4, 2012) (challenge to Agency attorney's actions in contacting the District Attorney to allege Complainant was practicing law without a license was not a collateral attack, but constituted a viable allegation of prohibited retaliation).

Vacancy Announcement Cancelled

Generally, when an Agency cancels a vacancy announcement without making a selection, the Complainant suffers no personal harm that would render her "aggrieved." See [Complainant v. Department of the Army](#), EEOC Request No. 05960752 (November 20, 1998). However, when a Complainant claims that the vacancy announcement was cancelled for a discriminatory motive, and that the cancellation was to avoid giving a Complainant the position, s/he does state a claim. See [Complainant v. Department of the Navy](#), EEOC Request No. 05A00064 (April 24, 2000); [Complainant v. United States Postal Service](#), EEOC Appeal No. 0120114263 (February 24, 2012).

II. Failure to Comply with Applicable Regulatory Time Limits

EEOC Regulation 29 C.F.R. § 1614.107(a)(2) provides that an agency shall dismiss a complaint that fails to comply with the applicable time limits for requesting EEO counseling or for filing a formal EEO complaint, unless there is adequate justification for extending the time. Section 1614.105(a)(1) requires that complaints of discrimination should be brought to the attention of the EEO Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five (45) days of the effective date of the action. Section 1614.106(b) provides that a formal complaint must be filed within 15 days of the date of receipt of the notice of the right to file issued by the EEO counselor. As discussed below, when agencies dismiss complaints for failure to comply with these regulatory time limits, there are four common areas where EEOC reverses the dismissal decision. These areas are: (1) the agency's failure to meet its burden of proof; (2) the effective

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date of an action or reasonable suspicion; (3) "Lily Ledbetter" issues; and (4) failure to consider a valid excuse.

Failure to Meet Burden of Proof – No or Inadequate Evidence in the Record

Where there is an issue of timeliness, "[a]n agency always bears the burden of obtaining sufficient information to support a reasoned determination as to timeliness." [Complainant v. Department of Energy](#), EEOC Request No. 05930703 (January 4, 1994) (quoting [Complainant v. Department of Defense](#), EEOC Request No. 05920506 (August 25, 1992)). In addition, in [Complainant v. Department of the Army](#), EEOC Request No. 05920623 (January 14, 1993), the Commission stated that "the agency has the burden of providing evidence and/or proof to support its final decisions." See also [Complainant v. Department of Defense](#), EEOC Request No. 05910837 (January 31, 1992).

Since many timeliness decisions involve a determination of when complainant received the notice of right to file a formal complaint, in order to meet its burden of proof, the record developed by the agency must contain adequate evidence, not mere assertions, establishing the date of receipt. Many reversals of dismissal decisions result from the agency's failure to develop an adequate evidentiary record on this point. This evidence must establish that complainant or his or her attorney was personally served (usually by showing the notice was signed for), or that the notice was delivered to the complainant or his or her attorney's address of record. Notice of delivery from the postal service or another delivery service must include the street address, not just the city and state, where the delivery was made.

Effective Date or Reasonable Suspicion

As already discussed, EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination should be brought to the attention of the EEO Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five (45) days of the effective date of the action. EEOC frequently reverses agencies because of a failure to

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count the 45-day period from the effective date of a personnel action, even if the complainant was notified of the impending action in advance. For example, the 45-day period for a termination will begin from the effective date of the termination, and not necessarily from receipt of the notice of termination (although complainant can certainly seek counseling at that point).

However, sometimes complainants do not develop a reasonable suspicion of discrimination until after the effective date of a personnel action. In that case, the agency may extend the 45-day period. Thus, the time limitation is not triggered until a complainant reasonably suspects discrimination has occurred. See [Complainant v. Department of the Navy](#), EEOC Request No. 05970852 (February 11, 1999). The Commission will look at what, if anything, a complainant has learned between the date of the original incident and the event which first triggers the complainant's suspicion in making a determination as to whether the complainant meets the "reasonable suspicion standard." See [Complainant v. United States Postal Service](#), EEOC Appeal No. 0120120499 (April 19, 2012); [Complainant v. Department of Veterans Affairs](#), EEOC Appeal No. 0120114072 (February 23, 2012); [Complainant, et al. v. United States Postal Service](#), EEOC, Request No. 05A60449 (May 4, 2006); [Complainant v. Department of Air Force](#), EEOC Appeal No. 01973587 (July 10, 1998), citing [Complainant v. United States Postal Service](#), EEOC Request No. 01952036 (1996).

When a complaint does not involve a claim regarding a particular personnel action, but rather a claim of ongoing discriminatory harassment, the Commission cites to the Supreme Court ruling that a complaint alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period. See [National R.R. Passenger Corp. v. Morgan](#), 546 U.S. 101, 117 (2002); [EEOC Compliance Manual, Section 2, Threshold Issues](#) at 2-75 (revised July 21, 2005). See also, [Complainant v. United States Postal Service](#), EEOC Appeal No. 0120122428 (September 18, 2012); [Complainant v. Department of Homeland Security](#), EEOC Appeal No. 0120122331 (September 11,

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2012); [Complainant v. Department of the Navy](#), EEOC Appeal No. 0120120501 (April 10, 2012). Therefore, as already noted, it is critical that an agency properly recognize a claim of ongoing harassment/hostile work environment, rather than fragmenting complaints into seemingly separate, unrelated claims.

Pay Claims – Lilly Ledbetter Issues

Agencies may err in dismissing pay claims on timeliness grounds by failing to analyze the matter under the [Lilly Ledbetter Fair Pay Act of 2009](#), Pub. L. No. 111-2, 123 Stat. 5 (“the Act”), which became effective on January 29, 2009. The Act applies to all claims of discrimination in compensation, pending on or after May 28, 2007, under Title VII, the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq., Title I and Section 503 of the Americans with Disabilities Act of 1990, and Sections 501 and 504 of the of the Rehabilitation Act of 1973. With respect to Title VII claims, Section 3 of the Act provides that:

. . . an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or part from such a decision or other practice.

Therefore, each time a complainant is issued a paycheck that reflects an alleged discriminatory compensation decision or practice, a new filing period is triggered. Section 3 of the Act provides that back pay is recoverable for Title VII violations up to two years preceding the “filing of the charge” or the filing of the complaint in the federal sector, where the pay discrimination outside the filing period is similar or related to pay

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discrimination within the filing period. See for example, [Complainant v. United States Postal Service](#), EEOC Appeal No. 0120111817 (March 29, 2012).

Failure to Consider A Valid Excuse

EEOC Regulation 29 C.F.R. § 1614.604(c) provides that the time limits in the federal EEO complaints process are subject to waiver, estoppel and equitable tolling by both the agency and the EEOC. The Commission has consistently held, in cases involving physical or mental health difficulties, that an extension is warranted where an individual is so incapacitated by her condition that she is unable to meet the regulatory time limits. See [Complainant v. United States Postal Service](#), EEOC Request No. 05980475 (August 6, 1998); [Complainant v. United States Postal Service](#), EEOC Request No. 05920700 (October 29, 1992). Beyond health concerns, there are many other reasons why a time limitation period should be extended, most commonly because the complainant was unfamiliar with the EEO complaint process. See for example, [Complainant v. Department of the Army](#), EEOC Appeal No. 0120120759 (May 1, 2012) (Complainant's delay should be excused when EEO counselor advised her to first go to another office).

EEOC Regulation 29 C.F.R. § 1614.105(a)(2) specifically provides for extensions of time where the complainant shows s/he was not notified of the relevant time limits and was not otherwise aware of them. Agencies have the burden of providing evidence in the record supporting dismissal decisions such as affidavits attesting to EEO posters in complainant's work area or training records showing complainant was notified of EEO complaint limitation periods. See for example, [Complainant v. Department of Veterans Affairs](#), EEOC Appeal No. 0120120084 (March 21, 2012). Even with such evidence, a dismissal may be reversed. For example, in [Complainant v. Department of the Army](#), EEOC Appeal No. 0120081802 (May 15, 2008), the Commission reversed even though complainant had received EEO training because she was a minor child at the time of the incidents that formed the basis of her complaint and there was no evidence that her

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parents, who were her legal guardians, had any knowledge of the time frames for EEO processing.

Conclusion

In furtherance of EEOC's Strategic Enforcement Plan, OFO analyzed its appellate decisions over the past five years on appeals from federal agencies' procedural dismissals of EEO complaints. The annual reversal rate for agency procedural dismissals government-wide over the five-year period ranged from 30% to 45%. By examining its decisions to reverse procedural dismissals, OFO's goal was to help identify the most frequent errors by agencies that result in denying federal employees access to the EEO complaints process.

The data showed that over three-quarters of the appellate reversals studied overturned agency dismissals on one of these two grounds: (1) reversals for failure to state a claim under 29 C.F.R. § 1614.107(a)(1), that accounted for about 57% of the appellate reversals, and (2) reversals for failure to comply with applicable regulatory time limits under 29 C.F.R. § 1614.107(a)(2), that accounted for about 24% of the appellate reversals. As demonstrated by the statistics in Tables 1 and 2 of this report, agency errors in procedurally dismissing federal sector EEO complaints appears to be a growing problem. Based on the data gathered and discussed in this report, OFO expects to develop training and other outreach efforts aimed at EEO Directors and staff in federal agencies to reduce ongoing procedural dismissal errors.