EEO Supervisor Training: Preventing EEO Complaints

October 2006

NAVOECMA

Agenda

- Equal Employment Opportunity
- Model EEO Program
- Reprisal
- Harassment
- No FEAR Act

Equal Employment Opportunity -- Background

Model EEO Program Goals

- **The existence of a discrimination free work environment characterized by an atmosphere of inclusion and free and open competition for employment opportunities.**
- **A work environment where all workers compete on a fair and level playing field, have the opportunity to achieve their full potential and have a work place that offers equality of access, competition and opportunity.**

Coverage

- **Who is covered under EEO laws and statutes?**
  - All employees, applicants for employment and former employees
    - In certain situations non-employees such as contractor and contingent workers may be covered under the EEO statutes.

EEO Statutes

- **Title VII of the Civil Rights Act of 1964**
  - Prohibits discrimination based on race, color, religion, sex, and national origin.
- **Age Discrimination in Employment Act of 1967**
  - Prohibits discrimination of the basis of age (40 years and older).
- **The Rehabilitation Act of 1973**
  - Prohibits discrimination on the basis of mental and physical disability.
- **Equal Pay Act of 1963**
  - Prohibits sex-based wage discrimination.
- **All statutes prohibit reprisal or retaliation against individuals exercising their rights under the statutes.**

The Proactive Method to Prevent EEO Complaints: Have a Model EEO Program

Model EEO Program

- 1 October 2003 the Equal Employment Opportunity Commission's (EEOC) issued Management Directive 715 (MD-715)
- MD-715 provides federal agencies with guidance and standards for establishing and maintaining effective affirmative programs of equal employment opportunity.

Intent of MD-715

- **To ensure <u>all</u> employees and applicants for employment benefit from equality of opportunity in the federal workplace regardless of race, sex, age, national origin, color, religion, disability or reprisal.**

Six Essential Elements

- **MD-715 provides six essential elements that an agency should incorporate into the design of a model EEO program for effective management, accountability and self assessment. The essential elements are:**

A. Demonstrated commitment from agency leadership.
B. Integration of EEO into the agency's strategic mission.
C. Management and program accountability.
D. Proactive prevention of unlawful discrimination.
E. Efficiency
F. Responsiveness and legal compliance.

Supervisor's Role in the Model EEO Program

- **What you can do:**
  - Communicate Support for and vigorously enforce all EEO policies to your work force.
  - Demonstrate a firm commitment to equality of opportunity for all employees.
  - Ensure EEO Policy Statements, Posters and other material are displayed and available to employees in the workplace.
  - Resolve problems/disagreements and other conflicts in the work environment as they arise.
    - Use and promote Alternative Dispute Resolution (ADR).

Supervisor's Role in the Model EEO Program

- Ensure that you and your employees fully cooperate with EEO office officials such as EEO Counselor's, Staff and Investigators, etc.
- Address concerns, whether perceived or real, raised by employees and follow up with appropriate action to correct or eliminate tension in the workplace.
- Support your activity/command's EEO Program through allocation of mission personnel to participate in community out-reach and recruitment programs.
- Ensure supervisors, managers, and team leaders have effective managerial, communication, interpersonal skills to supervise a diverse workforce and avoid disputes arising from ineffective communication.

Supervisor's Role in the Model EEO Program

- Provide religious accommodations when such accommodations do not cause an undue hardship.
  - Seek help from the EEO office when requests are made.
- Provide reasonable accommodations for qualified individuals with disabilities in accordance with your activity/command's procedures.
- Consider whether any group of employees might be negatively impacted prior to making work place decision.
- Ensure all your employees and supervisors, managers, and team leaders have access to EEO training and information.

Supervisor's Role in the Model EEO Program

- Notify the EEO office of potential barriers to equal employment opportunity in the work environment.
  - A barrier is an agency policy, principle or practice that limits or tends to limit employment opportunities for members of a particular group.
- Assist in implementing the Activity/Command's EEO Action Plans to eliminate identified barriers.
- Promptly comply with SECNAV (NAVOECMA) and EEOC (AJ decisions and compliance orders), Merit Systems Protection Board, Federal Labor Relations Authority, labor arbitrators, and District Court orders.
- Promptly comply with and implement Settlement Agreements.

Supervisor's Message to Employees

- **Encourage your employees to:**
  - Proactively participate in efforts to maintain a work environment that is free from unlawful workplace discrimination.
  - Avoid activities or practices that create an offensive or hostile work environment for their co-workers.
  - Report if they observe or are made aware of possible harassment. They and you have an obligation to immediately inform you, a supervisor at a higher level, their Human Resources Advisor or the EEO office before the harassment becomes severe or pervasive.

Supervisor's Message to Employees

- Inform the EEO Office of potential employment barriers.
- Become members of a Special Emphasis Program committee.
- Use ADR to address issues and disputes.
- Cooperate with EEO officials, such as EEO Counselor's, Staff and Investigators.
- Become aware and read EEO policies.

Conclusion

- **The best way to avoid discrimination complaints is to be proactive.**
- **You must be a role model to your employees and vigorously demonstrate your support and adherence to EEO principles of equality of access, inclusion, opportunity and free and open competition.**
- **The success of the agency's EEO program ultimately depends on individual decisions made by individual managers.**
- **You are responsible for equal opportunity: HR/EEO/OGC serve as consultants/advisors.**

Reprisal Training

Applicable Regulations

- **29 CFR §1614.101(b) states that no person shall be subjected to retaliation for opposing any practice made unlawful by Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), the Equal Pay Act (EPA),or the Rehabilitation Act (Rehab Act), or for participating in any stage of the administrative or judicial proceedings under those statutes.**

Elements of a Reprisal Claim

- **In order to establish a claim of reprisal a complainant has the burden to prove:**
  - Participation in protected activity, i.e. opposition to discrimination or participation in the EEO complaints process.
  - The agency was aware of the protected activity.
  - A subsequent adverse action was taken.
  - A causal connection between the protected activity and the adverse action.

Protected Activity - Opposition

- **The first element of a reprisal claim states that the complaint must have engaged in protected activity either by opposing a discriminatory practice or participating in the EEO Process.**
  - The anti-retaliation provisions make it unlawful to discriminate against an individual because s/he has opposed any practice made unlawful by Title VII, the ADEA, the EPA, or the Rehab Act.
  - A complaint amounts to protected opposition only if the individual explicitly or implicitly communicates a belief that the practice constitutes unlawful employment discrimination.
  - Employees may make broad or ambiguous complaints of unfair treatment. Such a protest is protected opposition if the complaint would reasonably have been interpreted as opposition to employment discrimination .

Opposition (Continued)

Examples of Opposition

- Threatening to file a complaint alleging discrimination.
- Encouraging other employees to exercise their EEO rights.
- Filing a grievance in protest of alleged discrimination covered under the EEO statutes.
- Complaining about alleged discrimination against oneself or others.
- Refusing to obey an order because of a reasonable belief that it is discriminatory.
- Requesting reasonable accommodation or religious accommodation.

Opposition (Continued)

- **Standards governing application of the Opposition Clause**
  - Manner of opposition must be reasonable.
    - When applying a “reasonableness” standard, the rights of the individual opposing employment discrimination and the public’s interest in enforcement of the EEO laws are balanced against an employer’s need for a stable and productive work environment.
  - Examples of actions courts have found not to be considered “reasonable”
    - Searching and photocopying confidential documents relating to alleged ADEA discrimination and showing them to coworkers.
    - Badgering subordinate employees to give witness statements and attempting to coerce the witness to change their statements.
    - Unlawful activity such as threats of violence to life or property.

Opposition Continued

- **The opposition clause does not require the person be correct in their belief that the agency's employment practice they opposed actually violated Title VII, the ADEA, the EPA, and/or the Rehab Act. The opposition clause protects the individual provided they had a good faith and reasonable belief that a violation of the EEO statutes had or was occurring.**

Opposition (Continued)

- **The person claiming retaliation does not need to be the person who opposed the discriminatory action.**
  - Title VII, the ADEA, the EPA, and the Rehab Act prohibit retaliation against an individual who is closely related to or associated with a person who is or has exercised their statutory EEO rights that would discourage a closely related or associated person from pursuing their EEO rights.
    - For example, it is unlawful to retaliate against an employee because his son, who is an employee, opposed an allegedly unlawful employment practice.
      - Retaliation against a close relative of an individual who opposed discrimination can be challenged by both the individual who engaged in protected activity and the relative, where both are employees.

Opposition (Continued)

- **There is no requirement that the agency that allegedly retaliated against the individual be the same agency where allegedly discriminatory practices were opposed by the complainant.**
  - For example, a violation would be found if an agency failed to hire an applicant because it was aware that she opposed her previous employer's allegedly discriminatory practice.

Protected Activity - Participation

- **The first element of a reprisal claim states that the complaint must have engaged in protected activity either by participating in the EEO process or opposing a discriminatory practice.**
  - Title VII, the ADEA, the EPA, and the Rehab Act make it unlawful to discriminate against any individual because s/he has filed a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, hearing, or litigation under any of the anti-discrimination statutes.

Participation (Continued)

- **While the opposition clause applies only to those who protest practices that they reasonably and in good faith believe are unlawful, the participation clause applies to all individuals who participate in the EEO complaints process.**

- **An agency can be found liable for retaliating against an individual for filing an EEO complaint regardless of the merits or reasonableness of the original complaint.**

Awareness of Activity

- **The second element of a reprisal claim states that the agency must be aware of the complainant's protected activity.**
  - The individual who allegedly retaliated against the complainant must have knowledge of the protected activity.

Adverse Action

- **The third element of a reprisal claim states that an adverse action must have been taken against the complainant.**
  - In order to establish a reprisal complaint the adverse action must be taken after the complainant engaged in protected activity and after the individual the complainant alleges retaliation against them became aware of their protected activity.
    - Examples of Adverse Actions include, but are not limited to:

Denial of Promotions	Refusal to Hire
Demotions	Suspensions
Denial of Job Benefits	Disciplinary Actions
Discharge	Negative Evaluations
Harassment.	

Adverse Actions (Continued)

- **Adverse actions can occur after the employment relationship between the parties has ended (e.g. giving an unjustified negative job reference, refusing to provide a job reference, or informing an individual's prospective employer about an individual's protected activity).**
  - A negative job reference about an individual who engaged in protected activity does not constitute unlawful retaliation unless the reference was based on a retaliatory motive.

Adverse Action (Continued)

- **Retaliatory acts designed to interfere with a person's possible employment opportunities, such as providing a bad reference, are unlawful regardless of whether they cause a prospective employer to refrain from hiring the individual.**
  - The 3rd Circuit court stated, "an employer who retaliates cannot escape liability merely because the retaliation falls short of its intended result."

Adverse Action (Continued)

- **The EEO Statutes prohibit any adverse treatment that is based on retaliatory motive, and is reasonably likely to deter the complainant or others from engaging in protected activity.**

Causal Connection

- **The final element of a reprisal claim is a causal connection between the protected activity and the adverse action.**
  - To establish unlawful retaliation, there must be proof that the agency took an adverse action because the individual engaged in protected activity. Proof can be through direct or circumstantial evidence.

Causal Connection (Continued)

- **Direct evidence of a retaliatory motive is any written or verbal statement(s) by an agency official that s/he undertook an adverse action because the individual engaged in protected activity.**

- **Circumstantial evidence can establish a violation of retaliation if the evidence raises an inference of retaliation and if the agency fails to produce evidence of a legitimate, non-discriminatory reason for the challenged action, or if the reason provided by the agency is a pretext to hide retaliatory motive.**

Casual Connection (Continued)

- **An initial inference of retaliation arises where there is proof that the protected activity and the adverse action were related. Typically the link is demonstrated by evidence that:**
  - The adverse action occurred shortly after the protected activity. An inference of retaliation may arise even if the time period between the protected activity and the adverse action was lengthy, if there is other evidence that raises an inference of retaliation.
  - The person who undertook the action was aware of the complainant's activity before taking the action.

Burden of Proof – Agency

- **The agency must provide a legitimate, non-discriminatory reason for the actions taken.**

Burden of Proof – Complainant

- **Once the agency has met its burden, the complainant bears the ultimate responsibility to prove by a preponderance of the evidence that the agency acted on the basis of a prohibited reason.**

- **Even if the agency produces evidence of a legitimate, nondiscriminatory reason for the challenged action, a violation will still be found if the explanation is a pretext designed to hide the true retaliatory motive.**

  - Typically, pretext is proven through evidence that the agency treated the complainant differently than similarly situated employees or that the agency's explanation for the adverse action is not believable.

  - Pretext can also be shown if the respondent subjected the complainant's work performance to heightened scrutiny after engaging in protected activity.

Equal Employment Opportunity Commission (EEOC) Case Decisions

Case 1

- **Claim:**
  - Complainant alleged that since she filed an EEO complaint against her 1st level supervisor in 1994, regarding her 1993 performance appraisal, she had been retaliated against by her supervisor as follows:
    - Told her every year, when discussing her performance appraisal and award, that she would never receive an outstanding rating because she filed an EEO complaint against him.
    - Continually reminded her that management had not forgotten the EEO complaint.
    - Told her that management would never see her with good eyes.
    - Informed her that she should be willing to “pay for” filing the complaint.
    - On March 20, 1998, the complainant alleged that her 1st level supervisor used the term “you people” in reference to complainant and another employee, told her that management perceived her as having a negative attitude and was not a team player and allegedly told her that she should be willing to pay for preventing him from receiving an Outstanding rating.

Case 1 (Continued)

Background

- Complainant previously filed an EEO Complaints.
- Allegedly supervisor made remarks regarding her previous EEO complaints.
- Complainant filed an EEO complaint based on reprisal.
- Supervisor testified that he told complainant that her filing of an EEO complaint would affect his performance rating of her.
- Supervisor testified that he feared complainant's EEO complaint reflected poorly on his ability as a manager.

Case 1 (Continued)

Was the Complainant Retaliated Against?

Case 1 (Continued)

- **EEOC Decision**
  - YES

The EEOC concluded that “the supervisor’s conduct could have had a potentially chilling effect on the ultimate tool that employees have to enforce equal employment - the filing of an EEO Complaint…”

Case 1 (Continued)

Order

- 12 hours of EEO training.
- Pay $3000.00 in non-pecuniary compensatory damages.
- Post a notice to employees of the finding of discrimination.
- Pay attorney's fees and costs.

07A10040

Case 2

- **Claim**
  - Complainant alleged that he was retaliated against for protected activity when a manager threatened to file a civil action, on an unknown basis, against him, and stated that his attorney was looking into complainant's assets.

Case 2 (Continued)

Background

- Complainant testified before a Congressional Subcommittee. Named supervisors as perpetrators of sexual harassment and reprisal.
- Following the testimony, a supervisor stated that the complainant had “become too active in the complaints being filed by women” and his lawyers was “looking into” complainant’s assets as a preliminary step to filing a civil action against complainant.
- A witness reported the allegations to both the complainant and a human resources manager.
- Complainant sought EEO Counseling and filed a formal complaint.

Case 2 (Continued)

- **Agency Legitimate Non-discriminatory Reason**
  - Provided no reason for supervisor's statement, however maintained that the actions did not rise to the level of an adverse action.

Case 2 (Continued)

Was the Complainant Retaliated Against?

Case 2 (Continued)

- **EEOC Decision**
  - Yes
    - The threat made is reasonably likely to deter complainant or others from engaging in protected activities.

Case 2 (Continued)

Order

- 16 hours of training for the supervisor who engaged in retaliation and 8 hours for all managers and supervisors at the facility.
- Take preventative steps to ensure appropriate action is taken upon notification of allegations of retaliation.
- Conduct a supplemental investigation on the issue of compensatory damages.
- Post a notice to employees of the finding of discrimination.

01A05085

Case Summary from EEOC

- **Complainant was subjected to retaliation for her prior EEO activity when she was denied leave requests. Complainant subjected to harsher treatment. (August 28, 2003).**
- **Complainant was subjected to reprisal when third line supervisor directed her to report to him about the results of her contact with the EEO Office. (November 18, 2005)**
- **Complainant alleged sexual harassment when a coworker made a lewd comment to her. She was removed from the Special Operations Response Team for reporting the coworker's alleged harassment. Comments were not sufficiently severe or pervasive to constitute sexual harassment, but complainant's temporary removal form SORT team was the product of discrimination. Removal was "reasonably likely to deter complainant and others from engaging in protected activity." (September 30, 2005)**

Recommendations to Supervisors

- **Avoid the presumption of reprisal**
  - Managers must take legitimate, appropriate and timely action to address performance and misconduct issues regardless of whether or not an employee has filed an EEO complaint. If an employee filed a complaint, and is genuinely not performing well, a manager need not excuse bad performance. However, the supervisor's actions may be interpreted as reprisal by the complainant, making it more important that they consult with their Human Resources Advisor (HRA) prior to taking an action. Documentation of the problem and a clear case for the actions are also critical steps prior to taking the action.
    - For example, if an employee engages in an act of misconduct that warrants disciplinary action and management waits to initiate the disciplinary action and finally decides to act the day after the employee has filed an EEO complaint there is a strong presumption of reprisal. However, if management can show that they had initiated the disciplinary action process prior to the protected activity it can establish a better defense against allegations of reprisal.

Recommendations (Continued)

Maintain Good Documentation

- It is very important that management maintain good records and documentation stating the reasons for taking an action. Documents stating the legitimate non-discriminatory reasons for taking an action assist the agency in defending a claim of reprisal.
- If the agency creates a document and is unable to later produce the document and does not have a legitimate reason for why it cannot produce the document, the agency may be subjected to an adverse inference from the EEOC.
  - The EEOC has stated, "…precedent holds that when a party fails to produce relevant evidence within its control, the failure to produce such evidence raises an inference that the evidence, if produced, would prove unfavorable to that party." Therefore, the retention and maintenance of records produced and relied upon by the agency to undertake an action is very important in reducing the agency's liability in an EEO complaint.

Recommendations (Continued)

Comparative Treatment

- Supervisors should treat all similarly situated employees in an equitable manner.
  - When a supervisor takes a disciplinary action against one employee for some violation and not against a coworker who committed the same offense, given the same or similar circumstances, the employees are not being treated the same.
    - For example, If one employee engaged in protected activity and is subsequently treated differently than a similarly situated employee an allegation of reprisal may be raised.
- Similarly situated means that “all relevant aspects of the employee’s employment situation are nearly identical to those of comparative employees…”

Recommendations (Continued)

- **If there is a need to take a personnel action and there is a possibility of a reprisal complaint, we suggest you follow these 5 guidelines:**
  - Do not back away from a legitimate action. If action is not taken or you do not take the necessary steps to correct the performance or conduct issued, it creates the appearance that you are condoning the behavior, which will make it harder to deal with the situation in the future.
  - Do not delay in making a decision. The longer a decision is delayed, the less legitimate a decision may appear to a third party.
  - Be consistent. The best way to defend against reprisal complaints it to treat similarly situated employees in the same manner whether or not they have engaged in protected activity.
  - Always be prepared to back up your decision with legitimate nondiscriminatory reasons. When taking an action it is very important that you maintain the proper documentation to substantiate the action.
  - Contact your Human Resources Advisor (HRA) or the EEO Division for assistance.

Workplace Harassment Training for Supervisors

Why?

- **Why are we conducting Harassment training:**
  - Non-sexual harassment is the number one claim raised in EEO complainants in the government and the Department of the Navy.

- **EEO training has focused on Prevention of Sexual Harassment. We need to prevent all types of Workplace Harassment.**

Background information on Workplace Harassment

Definition

- **Any behavior based on race, color, religion, national origin, age, sex, or disability that is sufficiently severe or pervasive to alter the conditions of the individual's employment and creates an abusive work environment.**
  - 29 C.F.R. 1614.101(b) prohibits retaliation for anyone who opposes any action made unlawful by the EEO statues or participating in any administrative or judicial proceeding under the EEO statues.
    - Harassment claims may by raised on the basis of reprisal.

Harassment

- **Elements of a Harassment claim:**
  - Individual belongs to a statutorily protected class (i.e. one of the basis covered by the EEO statutes).
  - Individual was subjected to unwelcome verbal or physical conducted.
  - The unwelcome conduct complained of was based on or related to their membership in a protected class, and
  - The conduct affected a term or condition of employment, and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile or offensive working environment.
  - There is a basis for placing liability to the employer.

Examples

- **Harassing conduct may include but is not limited to:**
  - Epithets; slurs; jokes; name calling; obscene gestures or sounds; obscene, vulgar or abusive language, notes or emails; negative stereotypes or threatening, intimidating or hostile acts, that relate to race, color, religion, gender, national origin, age, or disability; and
  - Written or graphic material that belittles or shows hostility or dislike toward an individual group because of race, color, religion, sex, national origin, age or disability and that is placed on walls, bulletin boards, or elsewhere on the employer’s premise or circulated in the workplace.

Hostile and Abusive

- Whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances.
- These may include:
  - **the frequency of the discriminatory conduct;**
  - **its severity;**
  - **whether it is physically threatening or humiliating, or a mere offensive utterance;**
  - **whether it unreasonably interferes with an employee's work performance.**

Conduct Must be Unwelcome

- **In order to establish unlawful harassment the conduct must be unwelcome.**
  - Harassing conduct is unwelcome if it is “uninvited and offensive”.

Severe and Pervasive

- Severe behavior may be a single event or a series of events that a reasonable person would find abusive.
- Pervasiveness can be established through a series of incidents usually over an extended period of time.
- The challenged conduct must be severe or pervasive enough "to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive."

Misconduct

- **Not all incidents of harassment will raise to the level of unlawful harassment.**
- **Inappropriate conduct that is not severe or pervasive enough to be deemed discriminatory, but implicitly or explicitly related to an individuals race, color, sex, national origin, religion, or disability, must be dealt with before the behavior becomes unlawful.**

Who can commit Workplace Harassment

- **Management Officials**
- **Co-workers**
- **Non-employees**

Supervisor Harassment

Vicarious Liability for Unlawful Harassment by Supervisors

- **Employers are subject to vicarious liability for unlawful harassment by supervisors.**
- **Supervisors are agents of the employer; when supervisors act inappropriately, he or she acts on behalf on the employer, thereby placing liability on the employer.**

Who is a Supervisor?

- **An individual qualifies as an employee's "supervisor" if:**
  - has authority to undertake or recommend tangible employment decisions.
  - Has authority to direct the employees daily work activity.
  - Temporarily authorized to direct another employee's daily work.

- **Harassment by a supervisor who does not have actual authority if the employee believed that the harasser had such power.**

Tangible Employment Actions

- **Employers are always liable for a supervisor's harassment if it culminates in a tangible employment actions.**
  - No affirmative defense is available in such cases.

Tangible Employment Examples

- **Tangible employment decisions "are decisions that significantly change another employees employment status".**
- **Examples include but are not limited to:**
  - Hiring
  - Firing
  - Promoting
  - Demoting
  - Undesirable Reassignments
  - Decisions causing a significant change in benefits
  - Compensation decisions
  - Work assignments

Tangible Employment Actions

- **A tangible employment actions is the means by which supervisors bring official power of the employer to bear on subordinates,**
  - Usually inflicts direct economic harm
  - In most instances, can only be caused by a supervisor or other person acting with the authority of the employer.

Hostile Work Environment Harassment

- **When harassment by a supervisor creates an unlawful hostile work environment but does not result in a tangible employment action, the employer can raise an affirmative defense to liability or damages by meeting the following two elements:**
  - The employer exercised reasonable care to prevent and correct promptly any harassment; and
  - The employee unreasonably failed to take advantage of any preventative or corrective opportunity provided by the employer or to avoid harm otherwise.

Employer's Duty to Exercise Reasonable Care

- **Reasonable care generally requires that employers establish, disseminate, and enforce an anti-harassment policy and complaint procedures and to take other reasonable steps to prevent and correct harassment.**

Co-worker Harassment

Co-worker Harassment

- **Where the harassment is committed by a co-worker, an employer is liable where it "knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d).**
- **Equal Employment Opportunity Commission (EEOC) regulations require an employer to take "immediate and appropriate" corrective action once it knows or has reason to know that harassment has occurred.**

Co-worker Harassment

- **An agency is deemed to be on notice when a management level employee learns of the harassment.**
- **The agency may have either actual knowledge or constructive knowledge of the harassment.**
- **Constructive knowledge can be inferred when the harassment was so pervasive that the agency should have known.**

Co-worker Harassment

- **“An employer may be on notice of an employee’s harassment of a co-worker where the employer is aware of other prior instances of harassment by the same individual of others, even if the [complainant] herself did not complaint”. 01A15109**
- **“The Commission found that rumors about the complainant’s sexual activity were so egregious and pervasive that ‘it was inconceivable that agency supervisors would have been unaware of such comments about complainant’s sexual exploits” 0197275**

Co-worker Harassment

- **Once the agency is on notice it has an obligation to investigate and take immediate remedial action to eliminate the harassment.**
- **“Whenever an allegation of a hostile environment is brought to the attention of the employer, it has a duty to investigate such complaints and take action against the offending supervisor if the complaint is found to be meritorious”. 01924585**
- **EEOC has expressed the agency's obligation as being "prompt remedial action reasonably calculated to end the harassment.“**

Agencies Obligation

- **EEOC has held that appropriate remedial action depends on the particular facts of the case; more specifically, the severity and persistence of the harassment and the effectiveness of any initial remedial steps.**
- **Even if the agency takes some remedial action, it may still be liable if the steps are inadequate.**

Remedial Action

- **Examples of what EEOC has found to be prompt remedial action:**
  - Prompt and through investigations.
  - Immediate removal of harasser from work area.
  - Counseling for harasser
  - Taking disciplinary action against harasser.
  - Training for supervisors and employees.
  - Demotions
  - Reduction of wages
  - Transfer or reassignment of harasser.
    - Note: Appropriate remedial action is dependent of the facts of the case, seek assistance from HR.

Appropriateness of Agency Action

- **The remedial steps must be effective in eliminating the harassment.**
- **The agency should make follow-up inquiries to ensure the harassment has not resumed and the victim has not suffered retaliation.**

Non-employee Harassment

Non-employee Harassment

- **“An agency may be responsible for the acts of non-employees, with respect to harassment of its own employees in the workplace, where the agency (or its agents or supervisory employees) know or should have known of the conduct and failed to to take immediate and appropriate corrective action.” 01A2388**

Equal Employment Opportunity Commission (EEOC) Case Decisions

Case 1

- **Claim:**
  - On the bases of race (African American) and sex (female) she has been harassed as follows:
    - On February 22, 2002, a shouting match and "heated words" were exchanged between complainant and a white male Writer-Editor (CW) when he expressed concerns about complainant not providing him with required work support
    - On February 23, 2002, CW said to complainant in a telephone conversation "these black n----rs" and "he will take care of things in his own way;"

Case 1 (Continued)

- **Background**
  - CW expressed he was upset at a meeting. Complainant was outside the office, CW glared at her and stamped his feet in a frightening manner.
  - Complaint had a telephone conversation with CW in which he used the term “black n----rs” several times. Complaint hung up.
  - Complainant reported incident to the Acting Director.
  - Acting Director moved CW out of the office and issued CW a memorandum explaining where he could go in the office.

Case 1 (Continued)

- Acting Director viewed CW sitting in common area near complainant's desk. She sent CW two letters specifying the parameters of where he could walk in the office.
- A proposed suspension of thirty days was issued, which was eventually reduced to a letter of caution.

- CW stated he never ceased to behave in a professional manner. He alleged there was a hostile work environment toward men in the office.
- CW stated denied using denigrating racial slurs.

- Another co-worker stated, CW pointed to a bottle of correction fluid and stated "this is how black people get rid of people like you and me, white-out, get it."

What did EEOC Decide?

Case 1 (Continued)

Complainant was Harassed

- The Commission has previously noted that the use of the racial epithet "n----r" is a "highly charged epithet" which "dredge[s] up the entire history of racial discrimination in this country." In another case a single incident of verbal abuse and negative comment concerning Japanese people sufficient to constitute race and national origin discrimination.

Was the Agency Held Liable?

Case 1 (Continued)

- **No.**
  - Agency's response to complainant's report of harassment was prompt and appropriate, sufficient for the agency to avoid liability.

01A43603

Case 2

- **Claim**
  - On the bases of religion and prior EEO activity the complainant was harassed from May 28, 1996, through the present, when the complainant was denied a reasonable accommodation of her religion when her alternative work schedule (AWS), was terminated. (in part)

Case 2 (Continued)

- **Background**
  - Complainant filed formal complaints on May 23, 1996 and on September 3, 1996.
  - Complainant requested religious accommodation. Supervisor (S1) and other management officials (RMO) were upset and frustrated by request.
  - At the end of Ramadan, RMO called food that complainant brought in as “pagan”.
  - S1 overheard and tolerated remarks made by at least two managers who, expressed doubt that complainant was Muslim.
  - A manager asked S1 if complainant would be required to bring in a written statement from her “priest”, proving her religious faith.
  - S1 instructed complainant to obtain documentation from her mosque describing when religious observances were held. This was note rquired of several Jewish employees.
  - RMO was upset that complainant had not revealed her need for religious accommodation during her initial job interview and by not doing so, falsified her job application.

What did EEOC Decide?

Case 2 (Continued)

- **Complainant was Harassed**

- **The incidents at issue were sufficiently severe or pervasive to create a hostile work environment on the bases of complainant's religion and prior EEO activity.**

Was the Agency Held Liable?

Case 2 (Continued)

- **Yes. The agency failed to establish an affirmative defense.**

- **Order:**
  - EEO training all managers and supervisors at facility.
  - Pay $1,300 in compensatory damages.
  - Attorney Fees
  - Consider taking disciplinary action against employees identified as being responsible for the harassment.
  - Post Notice.

01993859

Case Summary from EEOC

- **The Commission affirmed that complainant had been subjected to hostile work environment discrimination based on race (African-American) when a noose was placed in his work area. (February 10, 2006).**

- **EEOC found that incidents were a co-worker pressing his pants against complainant's buttocks as if he wanted to have sexual relations with him, later that same day grabbing complainant's arms, squeezing his muscles, and making a groping gesture were sufficiently severe and pervasive so as to state a claim of harassment. (January 20, 2004).**

- **The Commission found that management failed to take effective action to stop 3 co-workers from harassment based on complainant's disability (multiple sclerosis). Complainant was subjected to a constant pattern of rude remarks, shunning, and a lack of cooperation with regard to her work. Management either used the harassing behavior to pressure complainant to work overtime, or at least acquiesced in it so as not to lower the co-workers' productivity. (September 26, 2003).**

Recommendations for Supervisors

- **Model appropriate behavior.**
  - Model behavior which is expected of all employees.
- **Pay attention to the workplace.**
  - Be vigilant of the work environment and be aware of indicators of potential problems.
    - In appropriate jokes.
    - Treatment of employees by co-workers
    - Employees being singled out.
- **Take employee complaints seriously**

Recommendations

- **Take immediate and appropriate corrective action when you witness or are made aware of inappropriate behavior.**
  - Follow up on corrective measures to ensure they are effective and behavior is eliminated.
- **Treat employees fairly**
- **Promote the Model EEO Program**
- **Contact the HR Office or the EEO Office for assistance.**

Conclusion

- **“What is, is not always right, and reasonable people can take justifiable offense at comments that the vulgar among us, even if they are a majority, would consider acceptable.” King v. Hillen**

No Fear Act:

Notification and Federal Employee Anti-Discrimination and Retaliation Act of 2002

Training Module

Prepared by:

Naval Office of EEO Complaints Management & Adjudication

October 2006

Overview of No Fear Act

- **Title: Notification and Federal Employee Anti-Discrimination and Retaliation Act of 2002 (effective 10/01/03)**
- **Three titles:**
  - Title I – General Provisions
  - Title II – Federal Employee Discrimination and Retaliation
  - Title III – EEO Complaint Data Disclosure

Policy

- “A Federal agency may not discriminate against an employee or applicant with respect to the terms, conditions or privileges of employment on the basis of race, color, religion, sex, national origin, age, disability, marital status or political affiliation.
- Discrimination on these bases is prohibited by one or more of the following statutes: 5 U.S.C. 2302(b) (1), 29 U.S.C. 206(d), 29 U.S.C. 631, 29 U.S.C. 633a, 29 U.S.C. 791 and 42 U.S.C. 2000e-16.

Purpose of Act

- The Act requires that "Federal agencies be <u>accountable</u> for violations of antidiscrimination and whistleblower protection laws."
- The Act also requires that DON inform current employees, former employees and applicants for employment, of the rights and protections available under Federal antidiscrimination, whistleblower protection and retaliation laws.

What are Your Rights?

Existing Rights Unchanged

- Pursuant to section 205 of the No FEAR Act, neither the Act nor any notice issued in compliance with the Act, creates, expands or reduces any rights otherwise available to any employee, former employee or applicant under the laws of the United States, including the provisions of law specified in 5 U.S.C. 2302(d).

EEO
Discrimination Complaint Process

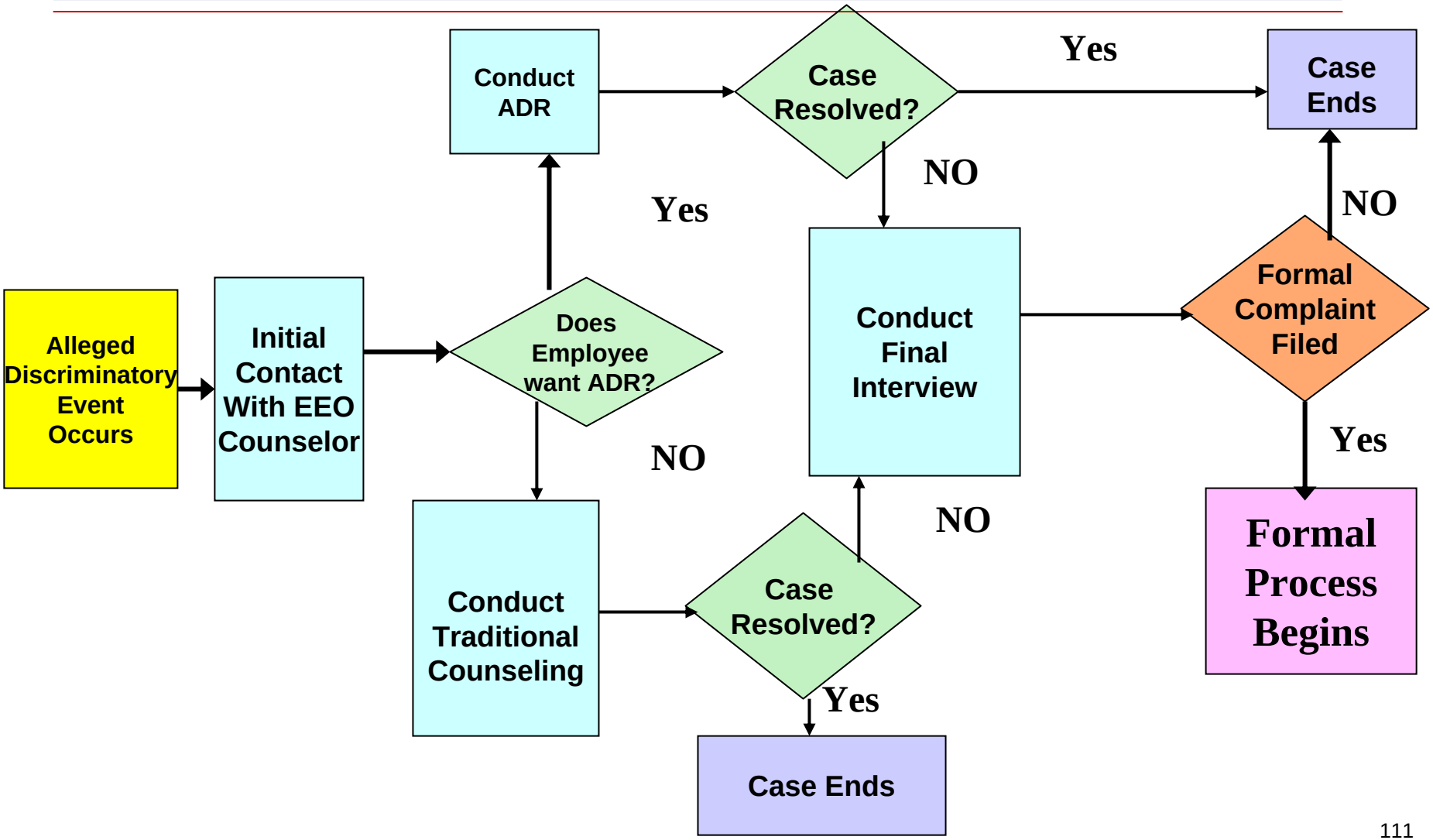
EEO Statutes

- **Title VII of the Civil Rights Act of 1964**
  - Prohibits discrimination based on race, color, religion, sex, and national origin.
- **Age Discrimination in Employment Act of 1967**
  - Prohibits discrimination of the basis of age (40 years and older).
- **The Rehabilitation Act of 1973**
  - Prohibits discrimination the basis of mental and physical disability.
- **Equal Pay Act of 1963**
  - Prohibits sex-based wage discrimination.
- **All statutes prohibit reprisal or retaliation against individuals exercising their rights under the statutes.**

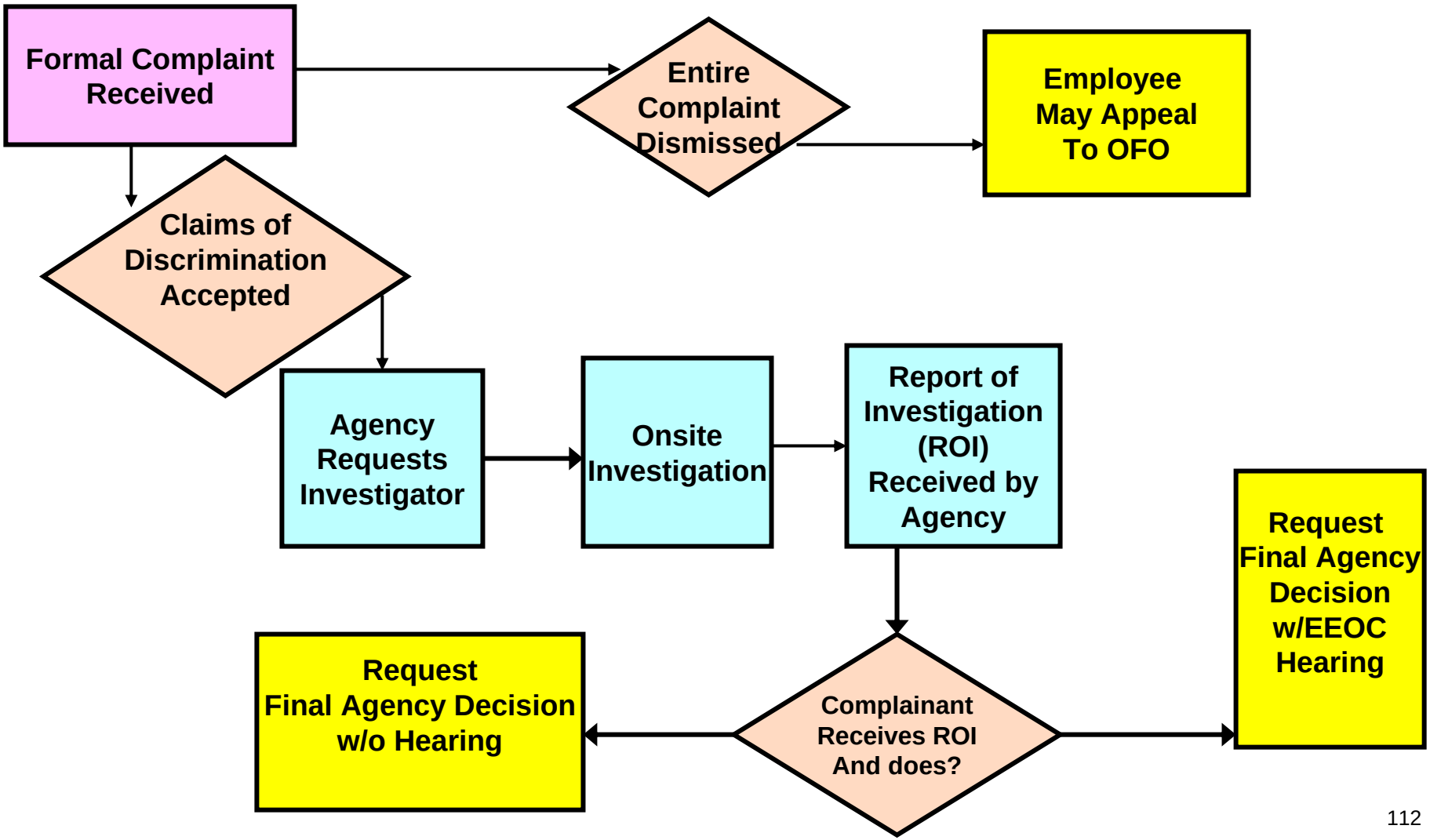
EEO Discrimination Complaints

- **If you believe that you have been the victim of unlawful discrimination on the basis of race, color, religion, sex, national origin or disability, you must:**
  - Contact an Equal Employment Opportunity (EEO) counselor within 45 calendar days of the alleged discriminatory action; or,
  - In the case of a personnel action, within 45 calendar days of the effective date of the action, before you can file a formal complaint of discrimination with your agency. See, e.g., 29 CFR 1614.
  - Every individual alleging discrimination must first go through the pre-complaint or counseling phase of the DON EEO discrimination complaint process.

PRE-COMPLAINT PROCESS



FORMAL PROCESS



Other Circumstances

- If you believe that you have been the victim of unlawful discrimination on the basis of age, you may either contact an EEO counselor as noted above or give notice of intent to sue to the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged discriminatory action.
- If you are alleging discrimination based on marital status or political affiliation, you may file a written complaint with the U.S. Office of Special Counsel (OSC). In the alternative (or in some cases, in addition), you may pursue a discrimination complaint by filing a grievance through your agency's administrative or negotiated grievance procedures, if such procedures apply and are available.

Who Do You Contact?

- **Local EEO Office**
  - EEO Office: 243-8163

- **Office of Special Counsel**
  - U.S. Office of Special Counsel at 1730 M Street NW., Suite 218, Washington, DC 20036-4505 or online through the OSC Web site — http://www.osc.gov

Whistleblower Protection Act

Whistleblower Protection Laws

- A Federal employee with authority to take, direct others to take, recommend or approve any personnel action must not use that authority to take or fail to take, or threaten to take or fail to take, a personnel action against an employee or applicant because of disclosure of information by that individual that is reasonably believed to evidence:
  - violations of law, rule or regulation;
  - gross mismanagement;
  - gross waste of funds;
  - an abuse of authority;
  - or a substantial and specific danger to public health or safety,
- Unless disclosure of such information is specifically prohibited by law and such information is specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.
- Retaliation against an employee or applicant for making a protected disclosure is prohibited by 5 U.S.C. 2302(b)(8). If you believe that you have been the victim of whistleblower retaliation, you may file a written complaint (Form OSC-11) with the U.S. Office of Special Counsel at 1730 M Street NW., Suite 218, Washington, DC 20036-4505 or online through the OSC Web site: http://www.osc.gov.

Examples of Protected Whistleblower Disclosures

- **Violation of Law, Rule or Regulation**
- **Substantial and specific danger to public health or safety**
- **Gross Waste of Funds**
  - More than a debatable expenditure.
- **Gross Mismanagement**
  - An action that creates a risk of significant adverse impact on the accomplishment of an Agency's mission.
- **Abuse of Authority**
  - An arbitrary or capricious exercise of power that injures another, or benefits the abuser or others.

Whistleblower Disclosures

- No Requirement that employee go through Chain of Command.
- Whistleblower's personal motivation does not affect reasonableness of a disclosure.
- Employee or applicant is protected if employer mistakenly believes he or she is a whistleblower.
- Disclosure is **not** protected (unless made to the Special Counsel or Inspector General), where the disclosure is:
  - Prohibited by law, or
  - Required by Executive Order to be secret for National Security or Foreign Affairs reasons.

Office of Special Counsel Role in Whistleblower Protection

- The Office of Special Counsel (OSC) provides a secure channel through which current and former federal employees and applicants may make confidential disclosures.
- OSC evaluates the disclosures to determine whether there is a substantial likelihood that one of the conditions listed above has been disclosed.
- If such a determination is made, OSC has the authority to require the head of the agency to investigate the matter.
- To make a disclosure contact:

  U.S. Office of Special Counsel
  1730 M Street, N.W., Suite 218
  Washington, DC 20036-4505

  Phone: (202) 254-3640

  Toll Free: 1-800-572-2249

  Hearing and Speech Disabled: Federal Relay Service 1-800-877-8339

Responsibilities

- Agency Heads, and officials with delegated personnel management authority are responsible for:
  - Preventing prohibited personnel practices.
  - Complying with and enforcing civil service laws, rules and regulations
  - Ensuring that employees are informed of their rights and remedies.

Merit Systems Principles

- Recruit, select, and advance on the basis of merit after fair and open competition
- Treat employees and applicants fairly and equitably
- Provide equal pay for equal work; reward excellent performance
- Maintain high standards or integrity, conduct and concern for the public interest.
- Use human resources effectively and efficiently
- Retain or separate employees on the basis of their performance.
- Provide employees with effective training and education
- Protect employees from reprisal for lawful disclosures.

12 Prohibited Personnel Practices

- Generally stated, § 2302(b) provides that a federal employee authorized to take, direct others to take, recommend or approve any personnel action may *not*:
  - Discriminate against an employee or applicant based on race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation;
  - Solicit or consider employment recommendations based on factors other than personal knowledge or records of job-related abilities or characteristics;
  - Coerce the political activity of any person;
  - Deceive or willfully obstruct anyone from competing for employment;
  - Influence anyone to withdraw from competition for any position so as to improve or injure the employment prospects of any other person;
  - Give an unauthorized preference or advantage to anyone so as to improve or injure the employment prospects of any particular employee or applicant;
  - Engage in nepotism (*i.e.*, hire, promote, or advocate the hiring or promotion of relatives);

12 Prohibited Personnel Practices

- Continued:
  - Engage in reprisal for whistleblowing
  - Take, fail to take, or threaten to take or fail to take a personnel action against an employee or applicant for exercising an appeal, complaint, or grievance right; testifying for or assisting another in exercising such a right; cooperating with or disclosing information to the Special Counsel or to an Inspector General; or refusing to obey an order that would require the individual to violate a law;
  - Discriminate based on personal conduct which is not adverse to the on-the-job performance of an employee, applicant, or others; or
  - Take or fail to take, recommend, or approve a personnel action if taking or failing to take such an action would violate a veterans' preference requirement; and
  - Take or fail to take a personnel action, if taking or failing to take action would violate any law, rule or regulation implementing or directly concerning merit system principles at 5 U.S.C. § 2301.

Freedom from Reprisal

Retaliation for Engaging in Protected Activity

- A Federal agency may not retaliate against an employee or applicant because that individual exercises his or her rights under any of the Federal antidiscrimination or whistleblower protections laws listed above.
- If you believe that you are the victim of retaliation for engaging in protected activity, you must follow, as appropriate, the procedures described in the Antidiscrimination Laws and Whistleblower Protection Laws sections or, if applicable, the administrative or negotiated grievance procedures in order to pursue any legal remedy.

Applicable Regulations

- 29 CFR §1614.101(b) states:

  "No person shall be subjected to retaliation for opposing any practice made unlawful by Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), the Equal Pay Act (EPA),or the Rehabilitation Act (Rehab Act), or for participating in any stage of the administrative or judicial proceedings under those statutes."

Elements of Reprisal Claim

- First Element:
  - Individual expressed opposition to discriminatory practice; or,
  - Individual participated in the discrimination complaint process
- Second Element:
  - Agency (Management) aware of protected activity.
  - The individual who the complainant alleges reprised against them must have knowledge of their protected activity.
- Third Element:
  - Agency must have taken an adverse action after the complainant engaged in the protected activity
  - Examples of Adverse Action: Denial of promotion, award, position; disciplinary action; negative evaluation or, harassment.
- Fourth Element:
  - Complainant must demonstrate a “Causal Connection” between the adverse action and the protected activity.

Protected Activity: Opposition to Discriminatory Practice

- **Opposition to a discriminatory practice .**
  - The anti-retaliation provisions make it unlawful to discriminate against an individual because s/he has opposed any practice made unlawful by Title VII, the ADEA, the EPA, or the Rehab Act.
  - A complaint amounts to protected opposition only if the individual explicitly or implicitly communicates a belief that the practice constitutes unlawful employment discrimination.
  - The opposition clause does not require the person be correct in their belief that the agency's employment practice they opposed actually violated Title VII, the ADEA, the EPA, and/or the Rehab Act.
  - The opposition clause protects the individual provided that they had a good faith and reasonable belief that a violation of the EEO statutes had or was occurring.

Protected Activity: Participation in the EEO Process

Participating in the EEO process.

- Title VII, the ADEA, the EPA, and the Rehab Act make it unlawful to discriminate against any individual because s/he has filed a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, hearing, or litigation under any of the anti-discrimination statutes.
- While the opposition clause applies only to those who protest practices that they reasonably and in good faith believe are unlawful, the participation clause applies to all individuals who participate in the EEO complaints process.
- An agency can be found liable for retaliating against an individual for filing an EEO complaint regardless of the merits or reasonableness of the original complaint.

Disciplinary Actions

- Under the existing laws, each agency retains the right, where appropriate, to discipline a Federal employee who has engaged in discriminatory or retaliatory conduct, up to and including removal.
- If OSC has initiated an investigation under 5 U.S.C. 1214, however, according to 5 U.S.C. 1214(f), agencies must seek approval from the Special Counsel to discipline employees for, among other activities, engaging in prohibited retaliation.
- Nothing in the No FEAR Act alters existing laws or permits an agency to take unfounded disciplinary action against a Federal employee or to violate the procedural rights of a Federal employee who has been accused of discrimination.

Additional Information

- Contact the CNFJ EEO Office at 243-8163 OR 243-9579 if you have questions regarding this training or require information on the EEO process
- For further information regarding the No FEAR Act regulations:
  - Refer to 5 CFR 724
  - EEO Office servicing your location
  - Website: http://www.donhr.navy.mil/NoFearAct.asp.
- Additional information regarding Federal antidiscrimination, whistleblower protection and retaliation laws can be found at:
  - EEOC Website: http://www.eeoc.gov
  - OSC Website: http://www.osc.gov

- **This concludes your "EEO Supervisor Training: Preventing EEO Complaints". click on this hyperlink, type your name in the body of the email that appears then click "Send".**

Commander, U.S. Naval Forces, Japan

Regional Equal Employment Opportunity Office

Certificate of Training

NAME

Having completed the 1.5 hour on-line course

"EEO Supervisory Training: Preventing EEO Complaints"

is awarded this certificate

As a testimonial of successful completion