

UNITED STATES PATENT AND TRADEMARK OFFICE

AGENCY ADMINISTRATIVE ORDER 214-01

Agency Administrative Order Series

Equal Employment Opportunity Policy and Complaint Processing Procedure

Date of Issuance:

Effective Date:

TABLE OF CONTENTS

Section

- I. Purpose
 - II. Policy
 - III. Scope
 - IV. Complaint Processing Procedure (CPP)
 - A. Introduction
 - B. Definitions
 - C. General CPP Policies
 - D. Pre-Complaint or Informal EEO Counseling
 - E. ADR
 - F. Formal Complaint Process
 - G. Class Actions
 - V. Withdrawals, Settlement Agreements, and Breach of Settlement Agreements
 - VI. Effect on Other Orders
-

I. PURPOSE

This Agency Administrative Order (AAO) establishes the United States Patent and Trademark Office's (USPTO or Agency) policy prohibiting unlawful employment discrimination and provides an overview of the Agency's equal employment opportunity (EEO) complaint process, including complainants' rights and responsibilities.

II. POLICY

A. Prohibited Discrimination to which this AAO's Complaint Procedure (Section IV, below) applies. It is the policy of the USPTO to prohibit discrimination (including harassment¹) in employment because of an individual's:

- Race
- Color
- National Origin
- Religion
- Sex, including sexual orientation,² gender identity, pregnancy or pregnancy-related medical condition(s)
- Disability, including medical and physical disabilities, being regarded as disabled, and/or a history of having a disability
- Genetic Information
- Age (40 years of age and over)
- Reprisal (Opposition to any practice made unlawful by any EEO statute or Participation in any stage of an administrative or judicial proceeding under the EEO laws)

Authority: Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. § 2000e *et seq.*; Equal Pay Act of 1963, *as amended*, 29 U.S.C. § 206(d) *et seq.*; Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. § 621 *et seq.*; Sections 501 and 504 of the Rehabilitation Act of 1973, *as amended*, 29 U.S.C. § 791 *et seq.*; Genetic Information Non-Discrimination Act of 2008 (GINA), 42 U.S.C. § 2000ff *et seq.*

B. Prohibited Discrimination to which this AAO's Complaint Procedure (Section IV, below) does not apply. It is the policy of the USPTO to prohibit discrimination in employment because of an individual's:

- Marital Status
- Parental Status
- Political Affiliation

¹The Agency's Anti-Harassment Policy and Complaint Procedure is Agency Administrative Order 202-955.

²Executive Order 13087 explicitly prohibits discrimination on the basis of sexual orientation. Individuals alleging discrimination based on this Executive Order may also file a complaint under AAO 215-11 (complaint process for EO 13087) and may also file a complaint with the independent Office of Special Counsel (OSC), <http://www.osc.gov/ppp.htm>

- Service or intent to serve in United States Uniformed Services

An individual pursuing a right of action for one of the bases listed in this section must proceed under the auspices of Office of Special Counsel (marital status, parental status, political affiliation) or the Department of Labor (USERRA violations).

Authority: Civil Service Reform Act of 1978, *as amended*, 5 U.S.C. § 2302; Uniform Services Employment and Re-employment Act (USERRA), 38 U.S.C. § 4301 *et seq.*; Executive Order 13152 (May 2, 2000).

- C. Affirmative Programs to Identify and Eliminate Barriers to EEO. It is the policy of the Agency to maintain continuing an affirmative program to identify and eliminate any potential barriers to EEO in the Agency's personnel policies, practices, and terms and conditions of employment.
- D. Prohibition on Retaliation. **NO EMPLOYEE OR APPLICANT FOR EMPLOYMENT SHALL BE SUBJECT TO RETALIATION FOR OPPOSING ANY PRACTICE MADE UNLAWFUL BY ANY EEO STATUTE OR FOR PARTICIPATING IN ANY STAGE OF AN ADMINISTRATIVE OR JUDICIAL PROCEEDING UNDER THE EEO LAWS (otherwise called "reprisal").**
- E. Agency Accountability. It is the policy of the Agency to hold its officials, managers, and employees accountable for violations of this AAO and related misconduct. In the event the Agency finds that an Agency employee has violated this AAO and/or engaged in unlawful employment discrimination or retaliation, it will take appropriate corrective, disciplinary, and/or adverse action.

III. SCOPE

This AAO applies to all employees, former employees, and applicants for employment at the Agency.

IV. COMPLAINANT PROCESSING PROCEDURE

- A. Introduction. This Complaint Processing Procedure (CPP) applies to all claims arising under the laws listed in 29 C.F.R. § 1614.103: race, color, national origin, religion, sex (including sexual orientation, gender identity, pregnancy or pregnancy-related medical conditions), disability, genetic information, age, and reprisal. This CPP is consistent with the Equal Employment Opportunity Commission's (EEOC) regulations for federal agency discrimination complaint processing found at 29 C.F.R. Part 1614 and the EEOC Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), as revised August 5, 2015, and incorporate those regulations and directives by reference. If there is a conflict between the

provisions of this CPP and the EEOC's regulations, the EEOC's regulations will control.

B. Definitions

1. Office of Equal Employment Opportunity and Diversity (OEEOD). An independent, neutral business unit (BU) of the Agency responsible for processing EEO complaints, administering requests for reasonable accommodation, and overseeing the Agency's affirmative employment programs.
2. Equal Employment Opportunity Commission (EEOC) or Commission. The independent federal agency responsible for establishing regulations to implement the EEO laws, adjudicating federal sector discrimination complaints, and deciding appeals of EEOC or Agency decisions. The EEOC is a completely separate entity from the Agency and OEEOD.
3. Alternative Dispute Resolution (ADR). Any process used to resolve complaints of EEO discrimination outside the CPP. Examples of ADR include, but are not limited to, mediation, early neutral evaluation, and shuttle diplomacy.
4. Final Agency Decision (FAD). A written decision on a formal complaint of discrimination issued by the Agency; it is appealable to the EEOC (or, in limited cases, to the Merit Systems Protection Board (MSPB)). The Director of the USPTO has delegated his/her authority to issue a FAD to the Director, OEEOD.
5. Days. Calendar days.
6. Responding Management Official (RMO). Any Agency management employee, who is not the Complainant, providing information in connection with an allegation of discrimination or retaliation.
7. Protected basis or class. The characteristic(s) protected by the EEO laws on which an individual alleges he/she is being discriminated. *See* II.A, above.
8. Mixed Case Complaint. A complaint of discrimination based on of the bases identified in Section II.A, above, that is related to, or stemming from, an action that may be appealed to the MSPB.
9. Report of Investigation (ROI). The investigative report prepared as the result of an accepted formal complaint of discrimination.

C. General CPP Policies. The following policies apply to all aspects of the CPP:

1. Official Time. Employees participating in the EEO process, including representatives also employed by the Agency, and who are in duty status are entitled to a reasonable amount of Official Time (*i.e.*, work time) to present the complaint and to respond to Agency requests for information. What constitutes a reasonable amount of Official Time is a case-by-case determination. Employees seeking Official Time to participate in the EEO process must request the time in advance from their supervisors and approval is by the supervisor, not OEEOD. However, OEEOD provides recommendations to both employees and supervisors on appropriate amounts of Official Time.
 2. Address of Record Notification. All participants in the CPP must notify OEEOD of any change in their address of record (*i.e.*, mailing address).
 3. Representation. Individuals may designate a representative (either an attorney or a non-attorney) at any time during the CPP. However, individuals may not delay the CPP because they have not obtained representation. Representatives will be sent all communications from OEEOD and the individual will be copied. **The Agency does not provide representatives; all OEEOD employees are neutral and do not represent individuals or Agency officials.**
 4. Duty to Cooperate. All participants in the CPP, including individuals alleging discrimination and/or retaliation, and all Agency employees must cooperate with the CPP. For individuals alleging discrimination or retaliation, failure to cooperate in the EEO process may result in dismissal of their complaint. For RMOs and other Agency employees, failure to cooperate could result in an adverse inference against the Agency, as well as corrective, disciplinary, and/or adverse action.
 5. Use of Agency Property. Complainants and/or complainants' non-attorney representative's use of government property (*e.g.*, copiers, telephones, computers, internet, printers, and email) must be authorized prior to their use by the Agency and must not cause undue disruption of agency operations.
 6. Retention of Records. Upon notification from OEEOD that there is a formal complaint of discrimination, RMOs and other Agency officials must take affirmative steps to avoid the destruction of potentially relevant records.
- D. Pre-Complaint or EEO Counseling. Any USPTO employee, applicant or former Agency employee who believes he/she has been discriminated against based on one or more of the protected bases described in Section II.A, above, must participate in the pre-complaint process prior to filing a formal complaint. At this

stage, the individual is known as the **Counselee**. A Counselee may choose to remain anonymous.

1. **Timeliness.** The individual must contact OEEOD within **forty-five (45) days** of the incident believed to be discriminatory or retaliatory; or, in the case of personnel action, within 45 days of the effective date of the action.

2. **Methods of Contact.** An individual may contact OEEOD in person, via email, via facsimile, via telephone, or via mail.

In person: OEEOD is located on the Alexandria, Virginia headquarters campus, Madison East, 7th floor, Room A80

Via email: oeod@uspto.gov

Via facsimile: 571.273.0154

Via telephone: 571.272.8292

Via mail: OEEOD, USPTO, PO Box 1450, Mailstop EEO, Alexandria, VA 22313-1450

3. **EEO Counseling.** After an individual has made a pre-complaint, OEEOD has **thirty (30) days** to counsel the case. With the Counselee's written agreement, this period can be extended for the shortest period of time to facilitate effective counseling and can be up to **sixty (60) days; at no time will Pre-Complaint process take more than ninety (90) days.** During the pre-complaint process, the EEO Counselor takes the following actions:

- i. Provides information about the EEO process, including a written notice of the Counselee's Rights and Responsibilities that the Counselee must sign.
- ii. Provides information about ADR and inquires whether Counselee is interested in ADR. If Counselee is interested in ADR, the EEO Counselor approaches the Agency about its interest. The Agency may then offer ADR, which, if Counselee accepts, terminates EEO Counseling. If ADR is not offered or not accepted, EEO Counseling proceeds.
- iii. Conducts a limited inquiry to obtain information about jurisdictional issues, the basis for contacting OEEOD, and other information necessary to facilitate a potential resolution of the matter. The EEO Counselor communicates with both the Counselee and relevant RMOs during the limited inquiry.
- iv. Based on the limited inquiry, the EEO Counselor helps the Counselee and RMOs to understand the issues and resolve the matter. *The goal of EEO Counseling is informal resolution of the issue(s).*

- If the Counselee and Agency agree to a settlement, it must be reduced to writing and the pre-complaint is withdrawn as settled.
 - If, at the end of the EEO Counseling no settlement has been reached, the EEO Counselor conducts a final interview with the Counselee and issues him/her a Notice of Right to File a Formal Complaint. This Notice must be delivered in person or via mail with proof of delivery/receipt.
- E. ADR. ADR is always voluntary. If the Agency offers and the Counselee accepts, the parties proceed to an agreed-upon form of ADR. **Participating in ADR extends the pre-complaint period from thirty (30) to ninety (90) days.** If the matter is not resolved during the ninety (90) day period, the EEO Counselor issues the Counselee the Notice of Right to File a Formal Complaint. This Notice must be delivered in person or via mail with proof of delivery/receipt.
- F. Formal Complaint Process. Any USPTO employee, applicant, or former Agency employee who believes he/she has been discriminated against based on one or more of the protected bases described in Section II.A, above, and has received a Notice of Right to File a Formal Complaint may file a formal complaint of discrimination against the Agency. At all times, the complaint is against the Agency, not against any individual Agency employee or former employee. At this stage, the individual is known as the **Complainant**; a Complainant may not remain anonymous, however, the Privacy Act applies to the CPP.
1. Timeliness. An individual must file a formal complaint of discrimination **within fifteen (15) days after he/she receives the Notice of Right to File a Formal Complaint**.
 2. Choice of Forum. An individual may elect to file a formal EEO complaint; however, the individual may not pursue a formal complaint if he/she has already filed a grievance regarding the same matter under an applicable grievance procedure or has filed an appeal with the MSPB regarding the same matter.
 3. Contents of Formal Complaint. The formal complaint need not be in any particular format, although OEEOD does provide a template form, but it must:
 - i. Be in writing;
 - ii. Be signed;
 - iii. Be dated;
 - iv. Allege the protected basis(es) on which the complaint is brought; and

- v. Allege, at least broadly, the issue(s) on which the complaint is brought.
4. Filing the Formal Complaint. The formal complaint must be filed with OEEOD. It may be filed in person, via email, via facsimile, or via mail.
- In person: OEEOD is located on the Alexandria, Virginia headquarters campus, Madison East, 7th floor, Room A80
- Via email: oeod@uspto.gov
- Via facsimile: 571.273.0154
- Via mail: OEEOD, USPTO, PO Box 1450, Mailstop EEO, Alexandria, VA 22313-1450
5. Acknowledgement. OEEOD will acknowledge receipt of the complaint in writing to Complainant.
6. Decision to Accept or Dismiss the Complaint for Investigation. OEEOD reviews the formal complaint to determine whether it should be accepted in whole or in part for investigation pursuant to the EEOC's regulations.
- i. Decision to Dismiss. If OEEOD does not accept a complaint for investigation and dismisses the complaint in whole, it issues a written decision in the form of a FAD to Complainant explaining the basis for its dismissal and explaining Complainant's appeal rights. This FAD may be appealed to the EEOC. *See* Section IV.F.13, below.
- ii. Decision to Accept. If OEEOD accepts the complaint in whole or in part for investigation, Complainant receives a Notice of Investigation from OEEOD explaining the scope of the investigation and Complainant's rights and responsibilities during the investigative phase of the CPP. Any issue(s) dismissed in a partial acceptance is (are) not immediately appealable to the EEOC.
7. Investigation. After a complaint is accepted for investigation, OEEOD then assigns the complaint to an EEO investigator, who is either a contractor or USPTO employee. The EEO investigator collects evidence in the form of written testimony (affidavits) and documents from Complainant and the Agency to produce a ROI. The process is non-adversarial; however, cooperation is mandatory. *See* Section IV.C.4, above. The ROI contains the evidence and a summary of the evidence; the ROI does not contain any findings of fact or conclusions of law. OEEOD remains responsible for producing a ROI upon which reasonable fact finder may draw conclusions as to whether the Agency has violated one of the covered statutes (*see* Section II.A, *above*); and 2) if a violation is

found, to have a sufficient factual basis from which to fashion an appropriate remedy.

8. Amendments and Consolidation. A Complainant may request to amend his/her formal complaint while it is being investigated to add new, timely (within 45 days of the alleged discriminatory/retaliatory act), like or related allegations of discrimination and/or retaliation. OEEOD will either amend the formal complaint, dismiss the request to amend, or refer the Complainant back for new EEO counseling. If a Complainant has two (2) or more formal complaints pending investigation, OEEOD shall consolidate them for investigation.
9. Completion of Investigation. **OEEOD must complete the ROI on or before the 180th day after the formal complaint was filed;** or, if the complaint was amended or consolidated, within the earlier of 180 days from the latest amendment/consolidation or 360 days from the filing of the formal complaint. This time period cannot be extended by Complainant or the Agency, except in limited circumstances related to sanitization of classified information.

After 180 days have passed from the filing of the formal complaint, Complainant may request a hearing before an Administrative Judge of the EEOC, regardless of whether the ROI is complete or whether the time period for investigation has expired under the regulations. In this circumstance, OEEOD will transmit the complaint file and ROI, per Section IV.F.10.ii, below, as soon as it is complete.

10. Post-Investigative Processing. When the ROI is complete, the Agency will issue it along with the Notice of Right to Request a Hearing to Complainant via Certified US Mail, Return Receipt Requested, unless other written arrangements have been made. Upon careful review of the ROI, Complainant has the following options:
 - i. Withdrawal. Complainant may elect to withdraw his/her formal complaint in its entirety.
 - ii. Request a Hearing. **Within thirty (30) days of receiving the ROI and Notice of Rights,** Complainant may request a hearing with an Administrative Judge (AJ) of the EEOC in the method outlined in the Notice of Rights. Once Complainant elects an EEOC hearing, OEEOD transmits the ROI electronically to the EEOC and provides a copy to the Agency's Office of General Counsel, which represents the Agency before the EEOC. At that time, OEEOD no longer has jurisdiction over the formal complaint.

- iii. **Request an Immediate FAD.** Within **thirty (30) days of receiving the ROI and Notice of Rights**, Complainant may request an immediate FAD from the Agency. The Agency must issue the FAD, along with an explanation of any appeal rights, **within sixty (60) days after the FAD was requested.**

If Complainant does not make any election within thirty (30) days of receiving the ROI and Notice of Rights, the Agency must issue a FAD, along with any explanation of appeal rights, **within sixty (60) days after the expiration of the thirty (30) day election period.**

11. **Mixed Case Complaint Processing.** A formal complaint alleging discrimination or retaliation for action that is also appealable to the Merit Systems Protection Board (MSPB) is a “mixed case complaint.”³ An individual may file a mixed case complaint under the CPP or file a “mixed case appeal” to the MSPB, but not both. There is no right to a hearing with an Administrative Judge of the EEOC on a “mixed case complaint.”

In the event that a “mixed case complaint” is accepted for investigation, the Agency will investigate the complaint in the same manner as any other discrimination complaint (*see* Section IV.F.7, *above*), except for the following:

- i. The Agency must complete the investigation within one hundred twenty (120) days of when the case became a “mixed case complaint.”
- ii. Upon completion of the investigation, the Agency will notify Complainant that it will issue a FAD within forty-five (45) days; however, the FAD must not issue later than 120 days after the filing of the “mixed case complaint.” In the event that the Agency does not issue the FAD within 120 days after the filing of the “mixed case complaint,” the Complainant may appeal the claim to the MSPB or file a civil action.
- iii. If the Complainant is dissatisfied with the Agency’s FAD on the “mixed case complaint,” he/she may appeal to the MSPB (not the EEOC) **within thirty (30) days of receiving the FAD.**

If a complaint is only partially “mixed,” *i.e.*, one or more of the claims was not otherwise appealable to the MSPB, the Agency will issue a FAD only on the “mixed case” portion of the complaint and provide the Complainant with a Notice of the Right to Request a Hearing before an administrative judge of the EEOC on the remainder of the case.

³MSPB appealable actions include: removal, demotion, suspension for 15 days or more, and denial of a within-grade-increase (WIGI). *See* 5 CFR §1201.3.

12. Post-EEOC Processing. Following the EEOC's adjudication of the case, the EEOC will transmit any orders and/or decisions to Complainant and the Agency for further action.

i. Dismissal of Hearing Request and Remand for FAD. The Agency will issue a FAD on any case remanded for a FAD **within sixty (60) days after the remand order was received**.

ii. Final Order. **Within forty (40) days of receiving the EEOC's decision**, the Agency will issue its Final Order, along with any notice of appeal rights, either implementing the AJ's decision in whole or in part or declining to implement the AJ's decision. If the Agency decides not to fully implement the AJ's decision, it must file an appeal with the EEOC.

13. Appeals. After the Agency has taken final action on a formal complaint, Complainant may appeal that decision to the EEOC's Office of Federal Operations (OFO). Appeals must be filed within **thirty (30) days** of receipt of the Agency's final action (FAD or Final Order). Upon receiving notice of an appeal, OEEOD electronically transmits any necessary complaint files to OFO. OEEOD may provide support for its reason(s) it did not accept a complaint for investigation; however, the Office of General Counsel represents the Agency regarding all FADs and Final Orders issued on the merits of formal complaints.

14. Civil Actions. Complainants may elect to file a civil action in an appropriate United States District Court under the following circumstances:

- Regulatory

i. **Within ninety (90) days of receiving the Agency's final action (FAD or Final Order)** on the complaint, if no EEOC appeal filed.

ii. **After 180 days from the date of filing the formal complaint**, if no EEOC appeal was filed and the Agency has not issued a FAD or Final Order.

iii. **Within ninety (90) days of receiving the EEOC's final decision on appeal**.

iv. **Within 180 days from the date of filing the EEOC appeal**, if OFO has not issued a final decision on the appeal.

- Statutory

i. Age Discrimination Employment Act (ADEA). ADEA complaints may be filed against the Agency under the CPP or be filed directly

- against the Agency in US District Court; however, Complainants must provide a **thirty (30) day** written notice to the EEOC of their intent to file a civil action prior to filing the case.
- ii. Equal Pay Act. Equal Pay Act complaints (alleging sex-based wage discrimination) may be filed against the Agency under the CPP and/or be filed directly against the Agency in US District Court.
- G. Class Action. An EEO complaint brought by a group of individuals who allege that they have been or are being adversely affected by an Agency personnel policy or practice that discriminates against them based on a common protected category.
1. Counseling a potential class action. Class actions are counseled in the same manner as individual pre-complaints. However, during Counseling, a Counselee raising class action allegations is counseled on the requirements necessary for a class action:
- i. a class agent (class member acting for the class during the CPP);
 - ii. an “adequate” class representative (an individual who can fairly and adequately protect the class’ interests; he/she need not be an attorney);
 - iii. questions of facts common to the class (“commonality”);
 - iv. claims that are typical of the class claims (“typicality”); and
 - v. potential class so numerous that consolidation of individual complaints is impractical (“numerosity”).
2. Certification of Formal Class Action Complaints. **Within thirty (30) days of receiving a class action formal complaint**, OEEOD sends the formal complaint to the EEOC for certification consideration, along with the Counselor’s Report, a designation of Agency representative, and other material related to the complaint. If the EEOC does not certify the class complaint, the Agency will notify all affected individuals of their right to proceed with their complaints individually under the CPP. If the EEOC certifies the class action, the Agency may appeal the EEOC’s certification decision to OFO.
3. Certified Class Action Complaints. **Within fifteen (15) days of final certification by the EEOC**, OEEOD must notify all class members of the certification through “all reasonable means.” OEEOD will identify any open complaints that meet the class criteria; those complaints may be subsumed in the class or held in abeyance until class certification and a final definition of the class is determined. Individuals may not opt out of the class and pursue an individual complaint; however, they may decide not to be part of the class action or to request individual relief.

V. **WITHDRAWALS, SETTLEMENTS, AND ALLEGED SETTLEMENT BREACHES**

- A. **Policy.** It is the Agency's policy to make reasonable efforts to resolve EEO complaints at the earliest possible time in, and throughout, the CPP.
- B. **Withdrawals.** An individual may voluntarily withdraw his/her complaint, regardless of its stage in the CPP, at any time.
- C. **Settlements.** All settlements of EEO complaints must be reduced to writing and comply with the Agency's AAO on Settlement Procedures for Employment and Civil Rights Matters (AAO 217-01). All settlements must be knowing and voluntary and shall be binding on both parties. Settlements of all EEO complaints must be received by OEEOD for record-keeping purposes.
- D. **Alleged Breach of Settlement Agreement (Breach).**
- i. **Within thirty (30) days** of when the complainant knew or should have known an alleged breach occurred, he/she must notify the Director of OEEOD in writing of the alleged Breach.
 - ii. In the Breach allegation, Complainant may request specific implementation of the Settlement Agreement or that the settled complaint be reinstated for further processing from the point processing ceased.
 - iii. The Agency shall work to resolve the matter and respond to Complainant's alleged Breach, in writing, within **thirty-five (35) days** of receiving the notification of alleged Breach, including any determination whether Breach occurred; the Agency has delegated this authority to the Director, OEEOD.
 - iv. **Within thirty (30) days** of receiving the Agency's written determination of the matter, if Complainant is dissatisfied with the Agency's determination, he/she may appeal the determination to OFO. Complainant may also appeal the alleged breach directly to OFO **after thirty-five (35) days** of notifying the Director of OEEOD if the Agency fails to respond to the notification of alleged breach.
 - v. **Within thirty (30) days** of receiving notice of the appeal, the Agency may submit a response to OFO.

VI. EFFECT ON OTHER ORDERS

This Order supersedes AAO 215-09, dated November 21, 2009; AAO 214-01, dated November 21, 2009.

ISSUED BY:

Bismarck Myrick

Bismarck Myrick
Director, Office of Equal Employment Opportunity
and Diversity

7/5/2017

Date

APPROVED BY:

Joseph Matal

Joseph Matal
Performing the Duties and Functions of the Under
Secretary of Commerce for Intellectual Property and
Director of the United States Patent and Trademark Office

7.24.17

Date

OFFICE OF PRIMARY INTEREST: Office of Equal Employment Opportunity and Diversity