

UNITED STATES PATENT AND TRADEMARK OFFICE

AGENCY ADMINISTRATIVE ORDER 215-09

Agency Administrative Order Series

Equal Employment Opportunity Complaint Processing

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EQUAL EMPLOYMENT OPPORTUNITY COMPLAINT PROCESSING

I. PURPOSE

This Agency Administrative Order (AAO) provides an overview of the Equal Employment Opportunity (EEO) complaint process for the United States Patent and Trademark Office (USPTO/Agency) and explains complainant rights and responsibilities.

II. APPLICABILITY

This Order applies to requests for EEO counseling, the processing of formal EEO complaints and the issuance of agency decisions regarding EEO complaints from USPTO employees, former USPTO employees and applicants seeking employment with the USPTO. This Order is consistent with the Equal Employment Opportunity Commission (EEOC) regulations for Federal agency discrimination complaint processing codified at 29 Code of Federal Regulations (CFR) Part 1614, and incorporates those provisions of the EEOC regulations and any amendments to those regulations by reference. If there is a conflict between the provisions and/or requirements of this Order and EEOC regulations, the EEOC regulations will prevail.

III. DEFINITIONS

- A. A **Counselee** is any individual who contacts the USPTO Office of Equal Employment Opportunity and Diversity, EEO counseling.
- B. A **Complainant** is any individual who has filed a formal complaint of discrimination.
- C. The **EEOC** is an independent Federal agency responsible for establishing and enforcing laws, regulations, and statutes regarding equal employment opportunity and the processing of EEO complaints; it is also called the **Commission**. EEOC regulations regarding the processing of EEO complaints are found at 29 CFR, Part 1614.
- D. The **Office of Federal Operations (OFO)** is the appellate branch of the EEOC.
- E. **Alternative Dispute Resolution (ADR)** is any process used to resolve complaints of discrimination outside the regular complaint process. It may consist of mediation, neutral evaluation, informal conferences or other processes designed to facilitate settlement or resolution of EEO complaints.
- F. An **EEO Counselor** is an individual certified by the USPTO Office of Equal Employment Opportunity and Diversity who is trained to provide information and resolution assistance to employees, former employees or applicants for employment who believe that they have been subjected to discrimination.
- G. An **informal complaint or pre-complaint** is any issue raised by an individual to the Office of Equal Employment Opportunity and Diversity alleging discrimination where the individual has the intent to proceed in the EEO process. Issues must be raised with OEEOD **within 45 calendar days** of the date of the

event alleged to be discriminatory, or within 45 calendar days of the effective date of a personnel action alleged to be discriminatory.

- H. A **formal complaint** is a complaint filed by an employee, applicant for employment or former employee of the USPTO after that individual has been issued a Notice of Right to File a Formal Complaint. Formal complaints must be filed **within 15 calendar days** of receipt of the Notice.
- I. The **Merit Systems Protection Board (MSPB)** is an independent Federal agency that adjudicates appeals of specific adverse personnel actions when an appellant meets MSPB jurisdictional requirements. MSPB Regulations are found at 5 CFR Part 1201.
- J. **Days** are calendar days.
- K. A **breach** is an allegation that the Agency has not implemented or has violated a provision of a settlement agreement.
- L. A **Class Action** complaint is an allegation that a group of employees, former employees or applicants have been or are being adversely affected by an Agency personnel policy or practice that discriminates against the group on the basis of their common race, color, religion, sex, national origin, age or disability.

IV. APPLICABLE LAWS AND EEOC REGULATIONS AND EXECUTIVE ORDERS

Title VII of the Civil Rights Act of 1964, as amended

Title VII prohibits discrimination based on race, color, religion, sex, or national origin.

Age Discrimination in Employment Act of 1967, as amended

The Age Discrimination in Employment Act (ADEA) prohibits discrimination in employment based on age (40 years or older).

Rehabilitation Act of 1973, as amended

The Rehabilitation Act prohibits discrimination based on mental and physical disability and requires agencies to reasonably accommodate the known physical or mental limitations of qualified employees or applicants with disabilities. The Rehabilitation Act also requires that agencies ensure that individuals with disabilities have access to electronic and information technology that is comparable to the access of individuals who do not have disabilities unless that would place an undue burden on the Agency.

Equal Pay Act of 1963

The Equal Pay Act (EPA) prohibits sex-based wage discrimination. The EPA prohibits agencies from paying employees of one sex lower wages than those paid to members of the opposite sex for equal work performed under substantially similar working conditions.

Genetic Information Nondiscrimination Act of 2008

Title II of the Genetic Information Nondiscrimination Act (GINA) prohibits the use of genetic information in employment, prohibits the intentional acquisition of genetic

information about applicants and employees, and imposes strict confidentiality requirements.

Note: These statutes prohibit retaliation for opposing unlawful practices under them, or for participating in any stage of administrative or judicial proceedings under those statutes.

V. POLICY

The USPTO Office of Equal Employment Opportunity and Diversity will provide EEO counseling, conduct an alternative dispute resolution program, where appropriate, and process formal EEO complaints, hearing requests and appeals in accordance with the applicable laws, statutes, and regulations outlined in this Order.

VI. COMPLAINT PROCESSING PROCEDURES

A. Pre-Complaint Process

Any USPTO employee or applicant for Federal employment, or former employee who believes he/she has been discriminated against because of race, color, religion, sex, age, national origin, physical or mental disability, genetic information, or in retaliation for involvement in prior EEO activity, must take part in the pre-complaint process before filing a formal complaint.

Timeliness

Individuals seeking EEO counseling must contact the Office of Equal Employment Opportunity and Diversity **within 45 days** of the incident believed to be discriminatory, or in the case of a personnel action, within 45 days of the effective date of the action. Contact must be made in person, or via mail, facsimile, e-mail, or telephone through one of the contact options listed below.

**OFFICE OF EQUAL EMPLOYMENT OPPORTUNITY AND DIVERSITY
US PATENT AND TRADEMARK OFFICE
PO BOX 1450
MAIL STOP EEO
ALEXANDRIA, VA 22313**

PHONE NUMBER: 571-272-8292

FACSIMILE: 571-273-0154

E-MAIL ADDRESS: OEEOD@uspto.gov

Representation

A counselee or complainant may designate a representative at any stage of the complaint process, including the pre-complaint counseling stage. However, the

designation of a representative may not cause undue delay to the process or unwarranted expense to the Agency. The USPTO does not provide a representative for employees or applicants for any part of the EEO complaint process. Office of Equal Employment Opportunity and Diversity employees do not serve as representatives for complainants or Agency officials.

Official Time

Employee complainants and their designated representatives, if also employed by the USPTO, may request a reasonable amount of official time to present the complaint and to respond to Agency requests for information, if they are in a duty status. The term *duty status* refers to an employee's normal hours of work. What constitutes a reasonable amount of official time may vary from case to case. Employees seeking official time for EEO-related matters must receive advance approval from their immediate supervisors.

Providing Information

Counsees must provide information regarding their complaints to the EEO Counselor. The EEO Counselor uses the information to look into the matter informally and to try to resolve the issues raised in counseling. If a counsee fails to cooperate with the EEO Counselor, or to provide the information necessary to conduct EEO counseling, the Office of Equal Employment Opportunity and Diversity may close the pre-complaint process.

Maintaining Anonymity

The Office of Equal Employment Opportunity and Diversity will not release the names of individuals making contact with the EEO counselor if the counsee has requested to remain anonymous during the pre-complaint process. However, the identity of the complainant is not kept confidential during the processing of the formal complaint, even if the complainant requests anonymity. At the formal stage, the complaint file may be opened to those parties who are involved and who require access to it, subject to provisions of the Privacy Act.

Rights and Responsibilities

Employees seeking EEO counseling will be provided with a written notice of their rights and responsibilities under the EEO complaint process.

Taking Part in the Pre-complaint Process — Counseling

The EEO Counselor gathers information about jurisdictional issues — for example, the timeliness of the request for counseling — and explains the EEO complaint process. The EEO Counselor also explains the USPTO Alternative Dispute Resolution (ADR) program, when the issue is appropriate for ADR.

EEO Specialists conduct informal counseling inquiries in person, by mail or by telephone. During counseling inquiries, the EEO Specialist usually meets separately with the counsee and other involved parties. The EEO Specialist

makes inquiries of USPTO employees and, when appropriate, supervisors. He or she also reviews relevant Agency regulations and documents, including comparative employee data, to help him or her understand the issues and resolve the matter. USPTO supervisors and managers must cooperate with the EEO Counselor when the Counselor requests to review documents or asks for an interview regarding matters related to an EEO complaint.

The goal of counseling is a potential informal resolution to the issue. All settlement discussions are confidential.

- If the matter is not resolved within 30 days from the date an individual contacts the Office of Equal Employment Opportunity and Diversity, the EEO Specialist may request that the counselee agree to extend the counseling period. The extension cannot be longer than 60 days, resulting in no more than 90 total days in the counseling period. All extensions must be in writing.
- If the matter is not resolved at the end of the counseling period, including any extended period, the EEO Counselor conducts a final interview and issues a Notice of Right to File a Formal Complaint. The notice is issued either in person or by mail with proof of delivery/receipt.

B. Alternative Dispute Resolution (ADR)

During counseling, the EEO Counselor may offer an opportunity for alternative dispute resolution, including mediation. Participation in ADR is voluntary. When both parties agree to ADR, an employee will receive official time for his/her participation in ADR. When ADR is offered and accepted by the counselee, the pre-complaint processing period is 90 days from the date of initial contact with the EEO office. If the matter is not resolved within 90 days, the EEO Counselor issues the counselee a Notice of Right to File a Formal Complaint.

C. Formal Complaint Process

Filing Formally in a Timely Manner

A formal complaint must be in writing and signed by the complainant, or an attorney, if the complainant has designated one to represent him/her. EEOC regulations require that EEO complaints against the USPTO must be filed with the Office of Equal Employment Opportunity and Diversity. Complainants may use the form provided in the Notice of Right to File a Formal Complaint or may provide the same information through another format. To be timely, a formal complaint must be postmarked no later than 15 days after receipt of the Notice of Right to File a Formal Complaint, or delivered in person no later than 15 days after receipt of the Notice of Right to File a Formal Complaint.

Prohibition Against Using USPTO Envelopes and/or USPTO Equipment

Complaints may not be mailed in an envelope printed with the official mail indicia of the USPTO or with USPTO funds.

Changing Mailing Addresses

Complainants must notify the Office of Equal Employment Opportunity and Diversity if they change their mailing address; failure to do so may result in dismissal of the formal complaint. Complainants should also notify the Agency immediately if they obtain a representative or change representatives.

Receiving Acknowledgment and Acceptance of the Complaint

The Office of Equal Employment Opportunity and Diversity will acknowledge the receipt of formal complaints and issue a letter either accepting the complaint for investigation, accepting part of the complaint for investigation, or dismissing the complaint for reasons established by EEOC regulations. If a complaint is not accepted, the Office of Equal Employment Opportunity and Diversity will issue a decision explaining the reasons for the dismissal of the complaint and outlining applicable appeal rights. (See “Appealing the Decision” or “Civil Actions” Sections ‘D’ and ‘E’)

Investigation of the Complaint

If the USPTO accepts a complaint or any part of it, the Office of Equal Employment Opportunity and Diversity then assigns the complaint to an EEO complaints investigator. The EEO complaints investigator collects factual information about the accepted issues and prepares a report. Providing information that a complaints investigator requests is mandatory both for complainants and USPTO employee witnesses. Formal complaints may be dismissed if the complainant fails or refuses to provide testimony and/or evidence in support of the complaint.

If a new act of discrimination occurs during the investigation of a complaint, a complainant must initiate contact with an EEO Counselor within 45 days of the date of that new discriminatory act, or if a personnel action, within 45 days of the effective date of the action.

Where a new act of discrimination is like or related to issues already being investigated, the agency may amend the previous complaint to include the new act. Whether a new act of discrimination is ultimately processed as a new complaint, or an amendment to an existing complaint, the complainant must initiate contact with OEEOD within 45 days of the date of the new discriminatory act, or if a personnel action, within 45 days of the effective date of the action.

If a complainant has two or more formal complaints accepted for investigation, the Agency shall consolidate the cases for investigation, after appropriate notification to the complainant. An EEOC Administrative Judge or the EEOC

may at their discretion consolidate two or more complaints of discrimination filed by the same complainant.

The Office of Equal Employment Opportunity and Diversity must complete investigations within 180 days of the date of filing of the formal complaint. The complainant may agree in writing to extend the time up to an additional 90 days. However, when consolidating two or more complaints for investigation, or when amending a complaint under investigation to include like or related issues, the Agency shall complete the investigation within the earlier of 180 days after the last amendment or last complaint or 360 days after the filing of the original complaint.

Requesting a Final Agency Decision, or Requesting an EEOC Hearing

When the report of investigation is complete, the Office of Equal Employment Opportunity and Diversity will send a copy of the investigative file with a notice explaining appeal rights, to the complainant and the complainant's representative, if one has been designated. Within 30 days of the date the complainant receives the report, he/she may request either a hearing before the EEOC or a final USPTO decision on the merits of the complaint without a hearing.

- When a hearing is requested, the Office of Equal Employment Opportunity and Diversity will send the complaint file to the EEOC within 15 days of receipt of the request. The EEOC then takes full jurisdiction over the complaint. Following the hearing, the EEOC judge will send the hearing record, and copies of his or her decision, to the complainant and to the USPTO. The USPTO has 40 days from date of receipt to issue its Notice of Final Action. The final action may be to carry out the judge's decision, in full or in part, or to decline to carry out the judge's decision. If the USPTO decides that its final action will not fully carry out the judge's decision, then the USPTO must file an appeal with the EEOC.
- If the complainant does not request a hearing within 30 days of receipt of the investigative file or if the complainant requests a final decision without a hearing or does not respond to the notice, the USPTO will issue a final decision on the merits of the complaint within 60 days of notice of the election, or within 60 days of the end of the 30-day notice period for the complainant to request the hearing or final agency decision, as applicable.

D. Appealing the Decision

When complaints are not accepted for investigation, the Agency will issue a written final agency decision explaining why the complaint was not accepted. Decisions not to accept formal complaints are appealable to the EEOC Office of Federal Operations (OFO).

E. Civil Actions

A complainant may file a civil action in an appropriate United States District Court:

- Within 90 days of receipt of the USPTO's final agency decision or final action on the complaint, if no appeal has been filed with the EEOC.
- After 180 days from the date of filing of a formal complaint if no appeal has been filed with the EEOC and the USPTO has not issued a final agency decision or a final order.
- Within 90 days after receipt of the EEOC's final decision on appeal.
- After 180 days from the date of filing an appeal with the OFO if there has been no final decision by the EEOC.

Age Discrimination in Employment Act Cases

Complainants alleging discrimination based on age (40 years or older) have the right to file a formal complaint or to bypass the administrative complaint processing procedures and directly file a civil action in an appropriate United States District Court pursuant to the Age Discrimination in Employment Act (ADEA). Complainants who choose to file a civil action under ADEA regulations must provide at least a thirty (30)-day written notice to the EEOC of their intent to do so before filing the civil action.

Equal Pay Act (EPA) Cases

Complainants may choose to file a sex-based administrative complaint of wage discrimination with the USPTO under Title VII. EPA complaints raised with the USPTO Office of Equal Employment Opportunity and Diversity will be processed under the provisions of this AAO.

F. Mixed Cases

Complainants may elect to raise a complaint of discrimination with the Merit Systems Protection Board (MSPB) in what is called a *mixed case appeal* or a complaint of employment discrimination with the Office of Equal Employment Opportunity and Diversity in what is called a *mixed case complaint*, but not both. A *mixed case* is one where an action appealable to the MSPB is combined with a claim of discrimination.

Processing of Mixed Case Complaints

Complainants may receive pre-complaint counseling on mixed case issues, but may not file both a formal EEO mixed case complaint with the Office of Equal Employment Opportunity and Diversity and a mixed case appeal with the MSPB at the same time. What is done first, that is, an appeal with MSPB or filing a formal complaint of discrimination with the Office of Equal Employment Opportunity and Diversity, determines where and how the mixed case claim is processed.

If a mixed case complaint is first filed with the Office of Equal Employment Opportunity and Diversity and is accepted, it will be assigned to a complaints investigator, and the Agency will issue a final agency decision on the merits of the complaint within 120 days from the date the mixed case complaint was filed. Employees filing mixed case complaints do not have the right to a hearing before the EEOC. Appeal rights from the final agency decision will be to the MSPB, not the EEOC.

If an MSPB appeal is filed before a formal mixed case EEO complaint is filed with the Office of Equal Employment Opportunity and Diversity, the Agency will dismiss the EEO complaint and advise the employee to raise any issues of discrimination in his/her MSPB appeal.

G. Filing Both a Complaint and a Grievance

USPTO employees may not file both a formal EEO complaint and a grievance over the same matter. When this occurs, the Office of Equal Employment Opportunity and Diversity will dismiss the EEO complaint if the written (formal) grievance was filed first.

H. Class Actions

When allegations of discrimination involving a group of employees, former employees or applicants are raised, the allegations are processed by the Office of Equal Employment Opportunity and Diversity as a potential class action complaint. Initially, class action complaints are processed in the same manner as individual complaints of discrimination. The allegations must be raised with an EEO counselor within 45 days of the date that the action alleged to be discriminatory occurred, or if the allegation involves a personnel action, within 45 days of the effective date of the personnel action. The EEO counselor will provide the individual raising the class action allegations with a written list of his/her rights and responsibilities, and the counseling period will last 30 days without a voluntary extension by the employee of up to 90 days. At the end of the counseling period, if resolution has not been successful, the Office of Equal Employment Opportunity and Diversity will issue a Notice of Right to File a Formal Complaint within 15 calendar days of the receipt of the Notice. However, there are substantial differences in both the counseling and formal complaint processes.

During counseling, the individual raising class action allegations will be advised that there are specific “prerequisites” or requirements that must be met in a class action complaint. These include:

- A class agent: The class member who acts for the class during the processing of the complaint;

- An “adequate” representative: The class must be represented by an individual(s) who can fairly and adequately protect the interests of the class; the representative need not be an attorney;
- Questions of fact that are common to the class (“commonality”);
- Claims that are typical of the class claims (“typicality”); and
- A potential class that is so numerous that the consolidation of individual complaints is impractical (“numerosity”).

Within 30 days of receipt of a class action formal complaint, the Office of Equal Employment Opportunity and Diversity will send the formal complaint to the EEOC for certification consideration. Accompanying the complaint will be the counselor’s report, a designation of the Agency representative, and any other material related to the complaint. The Agency must also take steps to preserve any potential evidence related to the allegations of class discrimination.

If the EEOC certifies the class complaint, the Agency will identify any active complaints that would fall within the definitions of the class complaint; those complaints may be subsumed in the class, or held in abeyance until the class certification and final definition is determined. The Agency may appeal the EEOC certification determination to the OFO. After certification is finalized, the class action complaint is processed differently than individual formal complaints. Within 15 days of notification by the EEOC that the class has been certified, the Agency must notify all class members of the certification of the class complaint through “all reasonable means.” Although individuals may not “opt out” of the class, they may decide not to be a part of the class action or request individual relief, if granted.

When the EEOC does not certify the class complaint, the Agency will notify any individual complainant of his/her right to proceed with his/her individual complaint through the individual formal complaint process.

I. Withdrawals, Settlements, and Breaches

- EEO complaints may be withdrawn or settled at any stage of the process. Settlements must be consistent with the USPTO Agency Administrative Order on settlement processing. If a complaint is withdrawn at any point in the process, it must be in writing and signed by the complainant or counselee, and his/her attorney, when applicable. The USPTO policy is to make reasonable efforts to resolve EEO complaints throughout the EEO process.
- EEOC regulations specify the procedures to follow if either party believes that a settlement agreement has been breached. Generally, the complainant must raise an allegation of breach of a settlement with the Office of Equal Employment Opportunity and Diversity within 30 days of when the complainant knew or should have known of the incident believed

to breach a settlement. The Office of Equal Employment Opportunity and Diversity will address all timely raised allegations of settlement breach and provide written responses to counselees or complainants as soon as practicable after receiving written notice of the alleged breach. If the complainant disagrees with the conclusions of the Office of Equal Employment Opportunity and Diversity regarding breach allegations, he/she may appeal the decision to the EEOC.

VII. EFFECT ON OTHER ORDERS

This Amended Order supersedes: DAO 215-9 dated October 19, 1992.

ISSUED BY:



Bismarck Myrick
Director, Office of Equal Employment Opportunity and
Diversity

10-12-2010
Date

APPROVED BY:



David J. Kappos
Under Secretary of Commerce for Intellectual Property and
Director of the United States Patent and Trademark Office

12/10/10
Date

OFFICES OF PRIMARY INTEREST: Office of Equal Employment Opportunity and
Diversity/Office of Human Resources