



IMPROVING FEDERAL SECTOR DISCRIMINATION COMPLAINTS SERVICES

by Elizabeth Lytle

We are all aware of the crucial role federal civil rights professionals play in ensuring the EEO process is effective. We also know the federal-sector EEO process is in need of improvement, both to make the process timelier and to increase its credibility among its users, including complainants and RMOs. The EEOC and groups such as the Council of Federal EEO Civil Rights Executives have examined possible ways of improving the process, and discussions have ranged from suggestions that only reform the process to a complete overhaul of the system.

DSZ recently completed an assessment of complaints discrimination services in a federal agency that included interviews of almost 100 stakeholders and customers. While the respondents' views of what works and doesn't work in the discrimination complaints process is based entirely on their experiences with this one particular agency, we believe their insights are valuable to anyone working in the federal employment discrimination arena.

Effective civil rights consultation, advice, and assistance by EEO staff to managers and employees is key to establishing and maintaining a model work environment and preventing discrimination from occurring. We found, through our interviews with stakeholders and customers, that civil rights consultation services are effective when they:

- Provide an understanding of the employment discrimination laws and regulations;
- Provide an understanding of the federal employment discrimination complaints process;
- Help in recognizing and preventing discrimination;
- Help in building skills in preventing discrimination;
- Provide early notification of employment conflicts or concerns to management;

- Provide effective and early resolution approaches, including alternative approaches;
- Provide regular feedback on the outcomes of EEO complaints and conflicts, including sharing across and within lines of business and regions;
- Provide timely responses;
- Provide other helpful resources;
- Ensure a pro-active, neutral role by civil rights staff.

We also found that the delays in the processing of complaints and failures to resolve them have significant negative repercussions on the entire work environment. Specifically:

- The long processing time for employment discrimination complaints undermines the message that civil rights and nondiscrimination are important priorities within the agency.
- The long processing time also undermines the opportunity to resolve the complaint and the underlying issues.
- The failure to resolve complaints quickly negatively affects employee morale and productivity as well as the overall work environment.
- Complaints that lack merit delay processing time and deflect resources from meritorious complaints.

Strong, neutral leadership from civil rights and EEO staff can improve the entire work environment as well as the quality of the experience for stakeholders and customers in the

("IMPROVING FEDERAL" continued on page 6)



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LETTER FROM THE EDITOR:

FROM THE DESK OF MICHAEL NORRIS

Four years have gone by since our last EEO Profile was created. Throughout this duration, I have seen an increased volume of Counselings, the creation of an advanced technological database to store investigative and counseling information for agency clients, and established multiple new client relations.



However, I look at the people who have accomplished these feats as a team for DSZ. Yes, our Counseling volume increased 200 percent, but we have an employee placing her first daughter into Clark University. Yes, the technology has been mainstreamed to ease our workflow, yet we have had two babies born and numerous weddings. How do we maintain such excellence in our products for clients, but also maintain a company value that promotes a strong family unit?

During the Clinton administration under Executive Order 13152, federal employees could not be discriminated against based on their parental status. Key point—the fact that this pertains to federal employees only. However, DSZ has maintained a strong hold on family values before this Executive Order was shaped. As the “baby” of the company, I have noticed that a majority of the employees here not only are women, but women that have children. Wet behind the ears from a BA degree, I assumed that I would hit the ground running in my employment at DSZ. From answering phones, aiding other departments in tasks, to whipping together training based materials, the company has used my skills to get the job done for Agency clients. Yet, I have noticed that the components of DSZ allowed any employee to deal with their life outside of the office doors and to gain opportunities to have involvement in their family. How could an employee have a heavy volume of Final Agency Decisions for that week, yet have time to go to their daughter's final dance recital? How does a parent deal with taking their son to the doctors, yet focus on finishing two Letter of Acceptance/Dismissals in the same day?

(“LETTER FROM EDITOR”) CONTINUES ON PAGE 6

VISITING OLDIES BUT GOODIES IN THE WORLD OF LEGAL PUZZLES

by Tama Zorn, J.D.

Certain legal puzzles seem never to be solved: like death and taxes they are always with us. For federal sector EEO pros, the puzzles include:

- ❖ standard for continuing violations;
- ❖ standard for harassment;
- ❖ standard for determining whether a complainant is disabled
- ❖ prima facie case for retaliation.

There are other puzzles, of course, but revisiting these concepts is worth a trip each year. We'll start by revisiting the continuing violation theory.



Continuing Violation:

Why is it critical: Letters of acceptance (LOA) writers often have a hard time differentiating between issues that should be accepted as continuing violations and issues that are discrete and either timely or untimely. This has a huge impact on the expenditure of resources at the investigative and FAD stage of the EEO process.

Governing Rule: National R.R. Passenger Corp. v. Morgan, 122 S. Ct. 2061, 88 FEP Cases (BNA) 1601 (2002). **The Supreme Court unanimously rejects the continuing violation doctrine when applied to a series of discrete acts.** “[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges.” 122 S. Ct. at 2067. “Each discrete discriminatory act starts a new clock for filing charges alleging that act.” Id. at 2072. “Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify.” Id.

The Supreme Court ruled that hostile environment claims where the unlawful employment practice cannot be said to occur on any particular day but can occur over a series of days or perhaps years can be continuing violation claims. Hostile environment claims include both racial and sexual harassment. “Provided that an act contributing to

the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.”

Difference: Hostile environment claims include an alleged chain of treatment/behavior involving the same actors, at least one of the acts occurring within 45 days of contacting an EEO Counselor. Sexual and racial harassment claims involving epithets, behavior, etc., are classic examples.

When complainants allege a continuing violation and start listing performance appraisals or non-selections, the LOA writer should determine whether these discrete acts are each timely and have been specifically counseled. The use of the term “continuing violation” by the Complainant or his/her attorney cannot cure the “Morgan” demand that we distinguish between discrete employment actions and patterns of harassing behavior when we apply time considerations to a claim. Discrete acts must be timely filed and don’t become timely because we allege they are “harassment”.

Outcome of Correct Practice: Diminishing investigative resources can be spent on timely issues. Dismissals of untimely claims should occur at the LOA stage, saving investigative dollars. Where there is a question of timeliness that cannot be resolved at the LOA stage, investigators should be tasked with clarifying timeliness questions so that FAD writers can consider whether dismissals are or are not legally appropriate.

Next Issue: But what about the continuing violation of harassment? What standard do we apply to accepting and articulating harassment claims?

MEETING EEOC EXPECTATIONS IN INVESTIGATIONS

by Tama Zorn, J.D. and Sonya Williams

On June 23, 2004 EEOC's Office of Federal Operations issued a brief report on time and cost considerations to the heads of federal agencies. Among the report's findings:

- ❖ High levels of inefficiency and delay in issuing letters of acceptance;
- ❖ Confusing and inefficient procurement processes.
- ❖ Inadequate complaint tracking systems leading to confusion and delay.

DSZ has addressed these concerns with our clients. We offer the following services to assist you.

1. Letters of Acceptance writing and training. At DSZ, we believe that the function of the Letter of Acceptance (LOA) is absolutely integral to protecting the integrity of the EEO process and to improving the delivery of EEO services. With the proposed changes in 29 C.F.R. 1614 the importance of this process has only increased.

The Letter of Acceptance has multiple critical purposes:

- To assure that agencies commit resources to the fair investigation of complaints that meet the standards for formal EEO complaints as outlined in the regulations and the Management Directives;
- To assure that agencies acknowledge and articulate their obligations to complainants with regard to timeframes, appeal rights, and all steps that assure equitable participation in the process;
- To assure that complainants meet their minimum obligations to participate in the EEO process.
- To assure that all parties to a complaint, including complainant, agency and investigator, understand which issues must and will be fully and appropriately addressed in a fair investigation;
- To provide formal appeal rights as well as a written avenue through which to argue and

resolve any differences in the perceptions of the complainant and the agency with regard to whether the complaint indeed meets minimum mandatory regulatory requirements with regard to content and timeframes.

Since the Letter of Acceptance plays such a critical part in the process, it is important that the agency be able to produce the best Letters of Acceptance possible. How can this be done? With good training. DSZ's [Letter Of Acceptance training course](#) reflects our commitment to assisting agencies in training their EEO Specialist in Writing complete, concise, sound Letters of Acceptance. DSZ believes that now, more than ever, training in Letters Of Acceptance writing is a key to effective EEO program management.

We also offer a textbook on Writing Letters of Acceptance, that can be ordered from our web site as well. We have written hundreds of letters of acceptance for various agencies and they have been well-received and supported. We provide you with responsible and defensible letters within two weeks from receipt of assignment. Contact Sonya Williams at swilliams@dsz.com or Tama Zorn at tzorn@dsz.com

2. Procurement - The GSA Supply Schedule encourages the use of Best Value bidding and of Blanket Purchase Orders (BPOs) to simplify procurement activity. We are always happy to provide bids and/or Best Value technical proposals to compete for your work, as are other competent contractors represented on the schedule. Contact Sonya Williams at swilliams@dsz.com if you have procurement questions or need assistance.

3. Tracking System - DSZ has developed and maintains a web-based tracking system that is first rate and geared toward federal sector EEO case management. It is a proprietary system and, if you are interested in exploring it for your agency, please contact Ellen Delany or Sonya Williams at erdelany@dsz.com or swilliams@dsz.com.

DSZ can help you address and cure some of the problems EEOC has identified as causing unacceptable delays in the EEO investigative process. We look forward to helping you!

NEW AND ON THE HORIZON

by Tama Zorn, J.D.

Along with visiting the tried and true tongue twisters of employment, such as continuing violation, new and challenging concerns are always ahead of us. Below are two issues affecting disabled employees that may raise red flags.

Safety for the Disabled Employee

Have you developed an emergency evacuation plan that includes input from disabled workers and accounts for how you will address their needs in case of emergencies? We all need to be more conscious of security considerations. While every federal agency should have had an evacuation plan that specifically addresses the security of disabled employees, it is highly likely that many agencies are at least reviewing those plans. Considerations should include:

- Input from disabled employees. They are best able to tell you their concerns and help select best practices.
- Distribution of the plan and widespread publicity so that all employees know what to expect and how to respond to an emergency.

Consideration of disabled employees is the strongest reason to develop and implement appropriate policies. However, equal employment obligations also trigger this question. There have been cases involving disabled employees who have felt that their evacuation in times of emergency has been inappropriate and not only raised safety issues but also issues of disparate treatment: their able-bodied co-workers were better treated and protected than were they.

Accessible buildings

The Supreme Court decision in Tennessee v. Lane decided on May 17th, 2004 would not seem to be relevant to our federal clients. The heart of the decision is whether the rights of disabled users of state courts trump states' rights. The Respondent paraplegics filed this action for damages and equitable relief, alleging that Tennessee and a number of its counties had denied them physical access to that State's courts in violation of Title II of the Americans with Disabilities Act of 1990 (ADA), which provides: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity," 42 U.S. C. §12132.

The safety and accessibility of federal public buildings directly affects disabled employees. Many federal courthouses are still not barrier-free or disabled-friendly. While the obligation for the federal government to provide accessibility goes back to the Rehabilitation Act of 1973, you will still find accessibility questions being raised. These include the obvious ones of physical access but also "unhealthy" building questions: buildings with mold and allergy-triggers that make it impossible for asthmatics and others with respiratory challenges to safely work within their walls. Perhaps the Lane case will trigger some close looks at federal government building accessibility.

(“IMPROVING FEDERAL” CONTINUED FROM PAGE 1)
employment discrimination complaint process. Such leadership includes:

- Developing and implementing policy and strategies that identify and intervene early in potential civil rights problems;
- Monitoring and assessing the nature, status, and disposition of employment discrimination complaints;
- Publishing statistical data on employment discrimination complaints, consistent with the reporting requirements of the No Fear Act;
- Developing strategies for active listening and honest dialogue among civil rights staff, managers, and employees;
- Developing communication strategies, such as expansion of websites and publications on civil rights concerns, including what to consider when making key employment decisions and questions frequently asked EEO on selected topics.

Education and skill-based training for both managers and employees can also be an important component to improving the effectiveness of the federal employment discrimination process. Core curriculum should include:

- Conflict Resolution;
- Overview of the federal employment discrimination complaint process;
- Impermissible Discrimination and How It Can Occur;
- Recognizing and Preventing Discriminatory Harassment;
- Preventing Retaliation;
- Preventing Discrimination When Making Employment Decisions;
- Alternative Avenues of Redress;
- Reasonable Accommodation and the Interactive Process for Achieving It.

Finally, improvements in complaints processing procedures and processing time are critically important. The quality of letters of acceptance has a huge impact on the conduct of investigations and on the writing of final agency decisions. Uniform standards, consistent with the law, for continuing violations, hostile work

environment/harassment, and what constitutes a claim must be adopted and implemented in writing letters of acceptance. Complaints that do not state a claim should be dismissed at either the agency stage, before the complaint is investigated, or after a hearing request is submitted. These changes can strengthen the complaint process and help ensure the process is more responsive to all involved.

(“LETTER FROM EDITOR” CONTINUED FROM PAGE 2)

The flexibility that DSZ has parallels the goals that EO 13152 established. Recently, an employee had a baby. Working from home, coming to work a couple of hours with the baby, transferring tasks to other employees—all were options used. Another employee went through the option of legalizing guardianship for a child and needed time for court proceedings. It is not a second thought as to granting time for the events.

DSZ understands that we are not only employees giving a high quality product back to our client, but that we also juggle our family lives with work. Over the four years I have worked here, I have watched daughters graduate into high school, newborns visiting the office, and children growing from 3 feet to 5. Yet in this same time, DSZ has not stopped moving forward; the company has grown in work volume, kept up with technology, and maintains its excellence in productivity and client relationships.

Therefore, I turn to the federal government for whom the Executive Order was written. How do you do the juggle? How do your employees maintain family life while effectively moving your tasks to the next level? Are you seeing an increase in complaints that deal with family issues? We would like to hear your thoughts, opinion and your agencies' approach in this issue.

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