April 7, 2015

***VIA* electronic submission to *http://www.regulations.gov*[1]**

Bernadette Wilson
Acting Executive Officer
Executive Secretariat
Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Re: Advance Notice of Proposed Rulemaking, 80 Fed.Reg. 6,669-6,671

Dear Ms. Wilson:

The National Employment Lawyers Association (NELA) respectfully submits the following comments in response to the Equal Employment Opportunity Commission (EEOC) Advance Notice of Proposed Rulemaking (ANPRM), published in the Federal Register on February 6, 2015, 80 Fed.Reg. 6,669-6,671.

NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws, as well as undertaking other advocacy actions on behalf of workers throughout the United States. NELA members represent a substantial number of federal employees, and thus NELA has an interest in potential modifications to the Commission's federal sector regulations.

NELA appreciates the opportunity to provide suggestions concerning the Commission's federal sector complaints process. For the convenience of the Commission, NELA has organized its response to match the question prompts appearing in the ANPRM at 80 Fed.Reg. 6,671.

[1] http://www.regulations.gov/#!docketDetail;D=EEOC-2015-0005.

1. If EEOC were to create a new Federal sector EEOC complaint process, what current elements would you retain or remove, and what new elements would you introduce?

> **a. With respect to a current element you believe should be retained, in what way does that element provide value, efficiency, or fairness?**
> **b. With respect to a current element you believe should be removed, how will its removal improve the process for the complainant, the agency, or both?**
> **c. With respect to a new element, why should it be included, and how will it improve the process for the complainant, the agency, or both?**

NELA's recommended approach for the overall federal sector complaints process is one of incremental revision, not wholesale replacement of the present federal sector complaints system. The present federal complaints system, in its current structure, generally fulfills the important policy goal of working to ensure that the federal government serves as a model employer in the EEO complaints process. Historically, the federal complaints process has been a laboratory for the development of discrimination protections for employees.

The current procedural mechanism promotes fairness in several key respects when compared to litigation in court. Various simplifications in procedures lower overall litigation costs for complainants. The investigative mechanism provides a developed record of factual issues and allegations relevant to a complaint at a lower cost to the parties than a purely adversarial development of the evidence would. The investigation provides the added benefit of developing a record for complainants seeking to litigate claims in federal court (and facing dismissal motions in that forum under the Supreme Court's recent *Iqbal* and *Twombly* caselaw). The Commission's simplified procedures for enforcement of orders and breached settlement agreements provide a far simpler mechanism for redress than would be available to private parties in court. The overall confidentiality of the claims process allows complainants alleging personally sensitive claims, such as sexual harassment, to be able to achieve third party redress from an adjudicative tribunal without the attendant publicity of a public court proceeding. These procedures also ensure that public bodies charged with enforcement of anti-discrimination laws are aware of the pending claims, a public oversight concern abrogated by private sector commercial arbitration. Unlike many private sector employees with claims subject to forced arbitration and class action waiver clauses, the federal sector complaints process preserves complainants' rights to seek class action relief in appropriate cases.

While NELA has various recommendations for various specific reforms, our most significant overall recommendation is that the Commission expand and regularize the use of Alternative Dispute Resolution (ADR) not just at the informal complaint stage, but at all stages of the federal sector complaints process. NELA specifically recommends the inclusion of at least two additional mandatory ADR rounds during the complaints process, one at or around the completion of the Report of Investigation (ROI) and another in the hearing phase (perhaps between the close of discovery and dispositive motions practice). To staff these mediations within the constraints of Commission resources, NELA recommends that the Commission establish a pool of volunteer mediators, which can potentially draw upon volunteers from the private mediation bar, from agency counsel, and from private counsel for complainants. As

attorneys practicing in the field of employment law, NELA members expect that there would be many mediators interested in participating in such a pool of volunteer mediators.

2. Should the process include an investigative stage?

The investigation stage of the complaint process should be retained. The investigation stage ensures that affidavits of the complainant and responsible management officials and witnesses are obtained. Relevant documents are gathered at this stage that help reduce the subsequent work needed and the costs of discovery if the case proceeds to the Commission.

> **a. Should agency personnel investigate complaints filed against the agency?**
> **b. Should agencies pick from a pool of investigators made up of in-house personnel from various agencies so that no agency is investigated by one of its own investigators?**
> **c. Should investigators employed by EEOC conduct all investigations, similar to the process EEOC uses when an aggrieved individual from the private sector files a charge of employment discrimination with EEOC?**

NELA urges that agency personnel not be involved in investigating complaints filed against their own agency. Furthermore, investigators should not come from the Commission since it does not have the resources to conduct investigations. To assure a fair and unbiased investigation, the investigators should either be outside contractors or assigned from a pool of investigators employed by federal agencies such that no agency is investigated by one of its own investigators.

In terms of the investigation process itself, a number of improvements should be made, although the current alternative methods for developing the facts should be continued. Our recommendations include the following:

1. The investigative process should provide sufficient time for preparation of the complainant's affidavit and for complainants to have an adequate opportunity to review management affidavits and prepare a rebuttal affidavit without the threat of dismissal of their cases due to artificially short deadlines. While NELA urges that the current 180-day period from the date of filing of the formal complaint should be retained for investigating claims as discussed below in response to Question 4, many times an investigator is not assigned to the case until well into the 180-day period. As a result, complainants are given unreasonably short deadlines in which to prepare their affidavits, review management affidavits, and prepare rebuttal affidavits under threat of dismissal of their cases. Investigators should be assigned within 30 days from the date the formal complaint is filed.

2. Federal contractors should be produced as witnesses in the investigation. Many agencies have large numbers of contractors working in their offices that were witnesses to or have direct knowledge of the facts of an EEO complaint. Such contractors should be required to cooperate with investigators and provide affidavits to the investigators.

3. Investigators should be required to make reasonable efforts to contact witnesses suggested by the complainant, to obtain documents suggested by the complainant, and to place all complainant

provided documents in the ROI. Investigators too often rush to complete the investigation and do not make a reasonable effort to contact complainant suggested witnesses. At other times, they reach the unwarranted conclusion that such witnesses or documents are redundant or otherwise unnecessary.

NELA believes that any documents that a complainant believes supports his or her claims should be included in the ROI by the investigator and the agency EEO office. Neither the investigator nor the agency should exclude evidence that *they* may deem irrelevant. Rather, that determination is for the administrative judge to make. In addition, all of the investigator's efforts to contact complainant suggested witnesses should be documented in the ROI. Since the ROI automatically comes into evidence at a Commission hearing, the failure of the investigator to include such affidavits and documents in the ROI puts extra burden and expense on the complainant to obtain such evidence for a Commission hearing. The Commission should also make mandatory provision of a reasonable opportunity for complainants to provide rebuttal based upon the full text of other witnesses' statements for inclusion in the ROI.

4. NELA urges that investigators be required to memorialize in writing in the ROI any failures by the agency to produce requested witnesses or documents, or to provide last known contact information for any witnesses who have left the agency or are otherwise unavailable. It is just as important for the ROI to reflect in writing an agency's failure to cooperate with the investigator as it is to document a complainant's failure to cooperate with the investigator.

5. NELA believes that in order to avoid conflicts of interest and the appearance of bias during the investigation, if agency counsel is involved in advising management officials during an investigation, the same attorney should not also represent the agency in the litigation phase of the case. In addition, agency counsel should not be present or involved with investigators' interviews with and obtaining affidavits from non-management witnesses. Further, agency counsel should be prohibited from requiring non-manager witnesses to submit their affidavits for review by agency counsel and should not advise EEO staff or investigators about what should or should not be placed in the ROI.

6. NELA recommends that the Commission develop simple, standardized forms for the informal complaint process. Agencies should not be permitted to deviate from the use of the Commission's standardized forms, nor should they be permitted to require the complainant to file additional forms as a precondition of the agency's initiating processing of the complainant's informal complaint. Currently, there is no consistency in the documentation various agencies use for the informal complaint process, and NELA members have observed that some agencies include extremely burdensome paperwork requirements (for example, requiring complainants to document and prove their compensatory damages claims far earlier in the complaints process than is called for under Commission precedent). In addition, agencies should be required to treat and document initial inquiries about the EEO complaint process as initiation of an informal complaint and provide persons making such inquiries with the EEOC-approved standardized form which should also explain the process.

7. To avoid unnecessary confusion, agencies whose EEO office also handles non-EEO complaints, such as non-EEO hostile work environment complaints, should be required to

provide a clearly written document explaining the differences in the processes and rights so employees can make an informed choice about which process they want to follow. The document should also make very clear that the employee can elect to pursue both processes and should describe explicitly how the employee can do so. NELA members have observed that under the current regulations, the general practice of some agency EEO offices steers the complainant toward the non-EEO harassment complaint mechanism after their initial conversation and tends to downplay possible identification of bases of discrimination which might place the claim(s) into EEO jurisdiction.

To avoid this situation, NELA recommends that the Commission modify its regulations to specify that all complainants with harassment claims shall be deemed to be simultaneously cross filed under both the EEO complaints process and the non-EEO harassment complaints process unless the complainant expressly states otherwise. This is analogous to present Commission precedent deeming sex-based pay discrimination complaints as filed under both Title VII and the Equal Pay Act. To ensure that complainants are properly encouraged to identify any bases of discrimination that might be present in their complaints across all agencies, the Commission should also prepare a standardized informational brochure for agency EEO offices to issue to all potential harassment complainants explaining these procedural avenues for redress so that complainants can make an informed decision as to how to proceed with their complaints.

8. Unless an investigation is already substantially completed (i.e., all affidavits and rebuttal affidavits have been completed) by an agency or a contractor, agencies should be *required* to stop the investigation as soon as a request for a hearing is received. Once the hearing request is filed, the agency loses the legal authority to continue its investigation. *See, e.g.,* MD-110, Chapter 7, § III.B. Many agencies, however, will continue preparing often slapdash and incomplete reports of investigation even after a request for hearing is filed in an attempt to prevent the agency from being sanctioned with a default judgment. Thus, the EEOC should require agencies to stop their investigation as soon as a request for a hearing is received. This will preserve the record for the administrative judge to determine possible sanctions against the agency for its failure to timely investigate, and will ensure that any supplemental investigation that occurs after the request for a hearing is solely at the direction of an administrative judge as contemplated by the EEOC in MD-110, and is aimed at development of an impartial and appropriate factual record as required by 29 C.F.R. § 1614.108(b) and MD-110, Ch. 6.

9. NELA recommends that the Commission require agencies to distribute ROIs in both hard copy and in digital format (e.g. by CD-ROM).

10. Finally, NELA believes that it would be worthwhile to require agencies to conduct ADR within 30 days *after* a complainant requests a hearing, perhaps using volunteer attorneys from a pool consisting of experienced private and agency attorneys (other than an attorney from the agency against whom the complaint was filed), or regional shared neutrals. At that point in the EEO process, the parties have a clearer view of the claims and evidence developed through the ROI, as well as an understanding that they are about to embark upon a lengthy and expensive process. Often those factors result in more success at achieving a resolution than is possible at the beginning of the EEO process. The Commission does not have the resources to provide such a program, and could devote its ADR efforts to a later point in the process when the case is

approaching a hearing. To support resolution of complaints through ADR further, particularly at the informal complaint stage, NELA recommends that the Commission revise 29 C.F.R. § 1614.501 to clarify that attorneys' fees may be awarded for work at the precomplaint stage, especially for appearances at informal complaint mediations and where the case settles. While not expressly written into § 1614.501, the Commission's prior rulemakings make clear that the present attorneys' fees and costs restriction is imposed by Commission regulation and not statute. *See, e.g.*, 64 Fed.Reg. 33,644, 33,654 (July 12, 1999); 63 Fed.Reg. 8,594, 8,602 (February 20, 1998); *see generally* 29 U.S.C. § 794a; 42 U.S.C. § 2000e-5(k). The Commission has further instructed that fees are potentially available for precomplaint stage representation as part of a settlement agreement. *See Green et al. v. Dept. of Agriculture,* EEOC Appeal No, 01973651 (June 27, 2000); *see also* 64 Fed. Reg. at 37,654. NELA members, however, have experienced agencies rejecting this position, complicating settlement efforts and increasing the burden on the Commission. To avoid this problem, the Commission should codify this guidance into MD-110 and Part 1614.

3. Should the hearing stage be retained?

Yes, the hearing stage should be retained.

The federal sector EEO process must continue as a system of checks and balances. Agencies should remain responsible for self-checking, but statistics demonstrate that Final Agency Decisions (FADs) alone are insufficient to meet Title VII's mandates.

The federal court is not an accessible avenue, particularly for *pro se* litigants, because of its technicalities, delays, and costs. Forcing all complainants into federal court would effectively eviscerate EEO protections for most federal employees and result in gridlock. The federal courts cannot absorb the thousands of federal sector discrimination complaints the EEOC processes each year.

a. If the hearing stage is retained as a matter of right, should the administrative hearing take place after an investigation?

Yes, the hearing should be retained as a matter of right, and should take place after an investigation. The investigative report is essential. If the Commission were to require agencies to identify their representatives earlier in the process (e.g., when the agency produces the ROI or forwards the agency file to the EEOC), the ROI's data could give the parties an opportunity to resolve complaints before assignment to an administrative judge. The investigative report is also a critical building block for the creation of the record, alerting the administrative judge, complainant, and agency of strengths and weaknesses of the claims and the issues with respect to what additional evidence must be developed.

b. If there is a hearing, should the hearing be a continuation of the investigative process, as it is now, or should the hearing be adversarial in nature, such as those conducted by the MSPB?

Substantively, discrimination law is complex with its shifting burdens and varying standards of proof; procedurally, federal sector cases are a quagmire. Most complainants are *pro se*, cannot afford counsel, and are faced with navigating these increasingly complicated substantive and procedural burdens. For the federal sector process to have value, an administrative judge should assist in building the evidentiary record. An administrative judge trained in substantive discrimination law is in a better position to build the record than a *pro se* litigant. Thus, the EEOC process should remain an investigative one where the responsibility for gathering evidence rests ultimately with the administrative judge. *Pro se* litigants typically will be severely prejudiced if they are required to build the record.

The Commission's federal sector jurisprudence is predicated on the assumption that the hearing will be an extension of the investigative process. This approach should be maintained.

> First, the administrative judge must be certain that the investigative record has been adequately developed. Unlike the typical civil employment discrimination trial in federal court, an EEOC hearing is not strictly judicial in nature – it is a quasi-investigatory exercise, as well. It is specifically designed as "an adjudicatory proceeding that completes the process of developing a full and appropriate record." EEO MD-110, at 7-1 [emphasis added]; see also 29 C.F.R. § 1614.109(a) (stating that once a complainant requests a hearing and an EEOC administrative judge is appointed, the administrative judge assumes "full responsibility for the adjudication of the complaint, including overseeing the development of the record"); cf. EEO MD-110, at 7-7 (explaining that "[t]he Commission intends that the [a]dministrative [j]udge will take complete control of the case once a hearing is requested"). Agencies are initially responsible for conducting thorough and complete investigations of complaints of discrimination brought against them. See 29 C.F.R. § 1614.108(b) (instructing agencies to "develop an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint"); and EEO MD-110, at 6-1 (noting that an "appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred"). However, Commission rules recognize that agencies will not always meet their regulatory burden to conduct such comprehensive investigations. The rules thus clarify that "where a hearing is properly requested and where there has been no investigation or there is an incomplete or inadequate investigation, the record in the case shall be developed under the supervision of the [a]dministrative [j]udge." <8> EEO MD-110, at 7-7.

Petty v. Dept. of Defense, EEOC Appeal No. 01A24206 (July 11, 2003).

Maintaining this approach, however, does not mean that building the record must be a time consuming burden for the administrative judge. With a few revisions to the Commission's regulations and practices, the administrative inefficiencies of the process can be significantly reduced, freeing administrative judges to resolve cases through informal resolution and formal adjudication.

It is well recognized that the federal sector process is riddled with administrative inefficiencies, which result in unconscionable judicial delays, typically extending years.[2] Cases frequently stall at a few critical junctures: awaiting a hearing, pending motions to compel, pending summary judgment motions, and pending a decision after hearing. Several offices are participating in a Pilot Program where the administrative judge calls a status conference early in the case to anticipate and resolve issues before those issues cause delay. Practitioners familiar with the Pilot Program find it is increasing efficiency. NELA suggests building on this philosophy with the following:

- NELA recommends reducing administrative judges' administrative burden by allowing them to issue oral orders. NELA proposes that the Commission require agencies to: a) record the status calls/conferences where an administrative judge will issue an oral order on a pending motion; b) reduce the administrative judge's oral order to a draft written order for complainant's approval; and c) provide the recording to the administrative judge and the complainant. With today's technology, this task can likely be accomplished with little or no cost. This process can significantly reduce the time it takes administrative judges to issue written rulings, and allow the administrative judges to invest more time on mediation and hearings. Status calls with oral orders can be applied to all phases, including rulings on the parties' Joint Report (a proposal outlined below), summary judgment, and rulings on the merits.

- NELA recommends mandating the parties' cooperation and exchange of information early in the process and long before the assignment of an administrative judge, modeled on the Initial Discovery Protocols,[3] while still retaining the opportunity for parties to engage in customized case-specific discovery after the initial mandatory disclosures are exchanged. *See* Appendix.

    - At the time the agency serves the agency file, the agency should be *required* to file a designation of representative. Under the current process, agencies are not required to identify a representative until after the issuance of the Acknowledgement and Order (A&O). If the agency assigns an attorney earlier in

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[2] These delays are particularly evident in the Commission's Washington Field Office (WFO). WFO has a practice whereby administrative judges are prohibited from issuing decisions in favor of complainants unless and until the supervisory administrative judge (SAJ) personally reviews the finding, allegedly for "quality control." Notably, the SAJ does not apply this quality control check to decisions in favor of agencies. Not only does this practice have a disparate impact on successful litigants by subjecting them to an additional layer of review and further delay, but it is also inherently chilling to administrative judges who seek to issue findings of discrimination by punishing them with additional scrutiny and preventing them from processing their cases efficiently (which presumably reflects poorly in their performance reviews, especially to the extent that the administrative judges might only receive case credit once the decision is finalized and issued). Judicial efficiency should start with administrative judges having the freedom to issue findings without this additional level of scrutiny.

[3] *Available at* http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf.

the process, the parties can begin exploring settlement and many cases will settle before the judge is assigned.

- **Mandatory meet and confer.** NELA urges that shortly after the complainant requests the hearing, the parties should be *required* to meet (by phone or in person) to discuss key substantive and procedural issues, such as the claims; scope of discovery, disputes and schedule; witnesses; and preservation of evidence. *See* Appendix for a detailed proposal.

- **Joint Report.** NELA proposes requiring the parties to file a Joint Report that includes the following: complainant's identification of the claims; the agency's objections, if any; discovery disputes; discovery schedule; settlement and parties position on early mediation; other issues of import. *See* Appendix for a detailed proposal.

- **Mandatory exchange of evidence followed by discovery.** NELA recommends that shortly after the Joint Report, and even if the Commission has not yet assigned a judge, the parties should be *required* to exchange certain evidence to supplement the ROI and should be *allowed* to initiate discovery. Under this approach, the parties can efficiently use the time (often months or years) awaiting the assignment of a judge. By allowing the parties to initiate discovery independently, and without having to await the judge's A&O, cases are more likely to resolve informally before assignment of a judge. *See* Appendix for a detailed proposal.

- **Modify the motion to compel procedure.** The motion to compel procedure, which is commonly set out in acknowledgment orders, should be changed to *require* meet and confer with opposing counsel within the ten-day period, but stipulate that the motion to compel discovery itself need not be filed until ten days after the parties' meet and confer efforts reach impasse. This modification will encourage parties to take sufficient time to attempt to resolve discovery disputes without being forced to burden administrative judges with rushed discovery motions and/or motions to extend the discovery motions deadline.

- **Meet & Confer Status Conference.** NELA urges that the administrative judge hold a status conference within a week of the Joint Report to issue oral orders clarifying claims, resolving discovery disputes, and setting a discovery and hearing schedule. *See* Appendix.

- **Minimize discovery disputes.** With the above practice, most discovery disputes should be resolved early in the process without requiring the parties to seek extensions pending rulings on claims and discovery. (Until the Commission can assign administrative judges in a more reasonable period of time, this process will at least ensure that when a judge receives a case, the judge can set a realistic hearing date within a few months and issue a bench decision at the hearing or shortly thereafter). *See* also Question 3c, below, regarding summary judgment.

- The Commission should also modify its discovery motions regulations to require one status teleconference before filing of motions to compel discovery. In many cases, these status teleconferences allow administrative judges to adjudicate simple discovery issues, reducing their burden of having to review and adjudicate discovery motions.

- The Commission can further reduce burdens on administrative judges by modifying existing Commission discovery procedures to explicitly address certain common issues, for example:

    - Clarify that the Commission allows all discovery methods permitted in federal court, including Fed.R.Civ.P. 30(b)(6) depositions of a designee on behalf of the Agency as an entity.

    - Strengthen the present language barring invalid Privacy Act objections and further clarify that the Commission does not recognize deliberative process privilege and self-evaluative privilege as valid in the federal sector EEO complaints process.

    - Require in instances where a responding party raises a numerosity or subparts objection to the number of discovery requests that the requesting party be given the opportunity to first cure it by restructuring the discovery requests.

- Agency Offers of Resolution. NELA further recommends that 29 C.F.R. § 1614.109(c)(3) be modified to make clear that in any offer of resolution, the agency may not place requirements on the complainant such as requiring resignation, retirement, or promises not to re-apply that an administrative judge could not impose on the complainant after a hearing. The agency must also describe with reasonable specificity any non-monetary relief in the offer, and Commission guidance should take into account the value of non-monetary relief in determining the size of recovery post-hearing as opposed to focusing solely on monetary relief. Finally, any lump sum or itemization of monetary relief must include the amount apportioned for attorneys' fees, and the regulations should make explicit that the proper comparison for a lump sum offer of resolution, as compared to relief received post-hearing, must take into account attorneys' fees and costs as a separate remedial item, so that an agency cannot argue that a lump sum offer of resolution purporting to include attorneys' fees and costs should be compared to the non-fees monetary relief in isolation.

c. Should there be a hearing as of right only as an alternative to an investigation?

There should be a hearing as of right and not as an alternative to the investigation. The investigations are critical.

d. Should a hearing always be discretionary, and if so, at whose discretion?

The administrative judge's sole discretion as to whether or not to conduct a hearing should be limited to the existing procedural mechanisms of sanctions, dismissals, and summary judgment.

NELA strongly opposes creating any new avenues for denying complainants the opportunity for a merits trial.

Sanctions:

Administrative judges should retain the authority to avoid a hearing through the issuance of sanctions, including default judgment (to sanction the agency) or dismissal of hearing request (to sanction the complainant). The Commission's regulations on sanctions should be revised, however, to clarify that the administrative judge has the discretion to issue sanctions when a party violates an administrative judge's order, fails to comply with the Commission's regulations or Directives, engages in contumacious behavior or misconduct, or takes any other action (or omission) warranting sanctions. Currently the regulations do not specify that a violation of the regulations warrants sanctions or that sanctions are warranted absent a specific order that has been violated. Likewise, the regulations' language on contumacious conduct suggests that an administrative judge may exclude a representative or party from the process only if the misconduct occurs during "the hearing." A fair reading of the intent of the regulations, however, indicates that an administrative judge may exclude a party or representative for any conduct during *the hearing phase.*

Summary Judgment:

NELA urges that the Commission specify in its regulations that judicial discretion should be exercised in favor of holding merits hearings, especially in cases where there are legitimate credibility disputes.

Although summary judgment is a valuable tool in most litigation, discrimination claims are not well suited to summary judgment because issues of intent and motive are typically at play. *See, e.g., Reeves v. Sanderson Plumbing Products, Inc.* 533 U.S. 133, 143 (2000). Intent and motive are the cornerstones of most discrimination claims and must be assessed through live testimony and credibility determinations. The Commission's regulations recognize this limitation, allowing summary judgment only if "a party believes that some or all material facts are not in genuine dispute and *there is no genuine issue as to credibility*…" 29 CFR 1614.109(g)(1)(emphasis supplied). In practice, however, summary judgment is abused and overused in the federal sector process, in some instances as an apparent docket clearing device. This may benefit the individual administrative judge's case closure productivity statistics for performance evaluation purposes, but it burdens the Commission as a whole by increasing the appellate caseload at the Office of Federal Operations (OFO) for handling improvidently granted summary judgment decisions.

Summary judgment is designed to resolve cases where critical facts are uncontested. "In both the federal court system and the administrative process, this dispositive mechanism is designed to facilitate *faster* adjudication of claims where critical facts are uncontested – that is, where the only task remaining is to apply the relevant law to undisputed facts to determine which party should prevail." *Petty,* EEOC Appeal No. 01A24206. In practice, summary judgment motions slow and clog the process, particularly when dispositive motions are filed with no expectation that they will be granted, but instead to delay and increase attorneys' fees.

Summary judgment assumes the record has been fully developed. Because 1) the hearing itself is designed to be an extension of the investigation, 2) many EEO cases involve *pro se* complainants, and 3) proper assessment of the credibility of testimonial evidence requires the administrative judge to observe witness demeanor and body language (which is impossible in the "trial by affidavit" format of summary judgment), there must be a presumption that the record has not been sufficiently developed.

Summary judgment is not as an appropriate tool in the federal sector EEO program as it is for other claims and in other forums. To the contrary, the current EEOC summary judgment practice delays the processing of cases and overburdens administrative judges with an over active motions docket. Most pending summary judgment motions do not focus on "critical and uncontested facts," but rather on the interpretation of an agency attorney's carefully crafted narrative which, in turn, the *pro se* complainant struggles to challenge.

In this context, summary judgment practice is likely to have an unfair and prejudicial impact when used by agencies against *pro se* litigants who do not develop the record sufficiently. Summary judgment practice is more subject to erroneous application and abuse when complainants are unable to engage in depositions and extensive pre-hearing discovery due to costs or lack of familiarity with litigation and discovery. The *pro se* complainant is less likely to develop needed evidence. In contrast, the respondent agency, which will typically be represented by counsel, is more likely to use the summary judgment process to its unfair advantage. Further, summary judgment expands the need for discovery and discovery motions practice, increasing the adjudicatory burden on administrative judges. The nature of the informational and financial asymmetries in discrimination complaints (especially those where the employer has the Treasury to fund litigation) further tilts the playing field in favor of agencies.

For these reasons, summary judgment motions practice in the EEO federal sector process should be used sparingly. The MSPB prohibits summary judgment in most cases and is, to a great extent, the reason the MSPB processes cases so much faster than the EEOC.

The Commission should consider amending its regulations to limit summary judgment motions practice. Specifically, NELA recommends that the Commission only permit parties to file motions for summary judgment with the explicit leave of the administrative judge after proffer of possible issues for summary judgment, that motions only be permitted on those discrete summary judgment authorized by the administrative judge (as opposes to the "shotgun" all issues summary judgment motion). The Commission should further clarify that parties opposing summary judgment motions are only required to respond to those issues cited in the summary judgment motion itself (and are not required to prove all issues in their case on paper just because a summary judgment has been filed on one or a few issues in the case). The Commission should not impose the requirement that a party who fails to explicitly controvert a factual or legal argument in a summary judgment motion is deemed to have admitted it.

In considering requests to file for summary judgment, the administrative judge may consider:

- Whether critical facts are uncontested (*see Petty*);

- Whether the claims or issues for summary judgment concern intent and motive;
- The extent to which the evidence in the ROI has been developed;
- The extent to which the record has been supplemented during discovery and the meet and confer process (if adopted);
- The extent of the evidence of discriminatory bias or "direct evidence";
- Whether all pending discovery motions to compel have been addressed and resolved (*see Petty*); and
- Any other relevant factors.

In such cases, the administrative judge should be required to hold oral argument and to review all credibility disputes on material issues that may require a hearing. Thus, even if the administrative judge denies summary judgment, the issues to be decided at the hearing will be more clearly focused.

Additionally, NELA is concerned about the fundamental procedural unfairness of present Commission summary judgment opposition deadlines. In practice, many agencies' discovery process gives them the advantage of advance preparation of summary judgment motions, while complainants, who cannot guess what arguments the agency will hypothetically present in their summary judgment motion, are left with a mere 15 calendar days to respond to a summary judgment motion which is oftentimes global in scope. The Commission should expand this response deadline significantly (to at least 30 calendar days) and should instruct administrative judges to liberally grant further extensions when requested.

In the hearing itself, the Commission should modify its regulations to clarify that agencies are also required to produce current agency contract employees as witnesses.

NELA members have observed that case backlogs are especially severe in cases involving classified information that require an administrative judge with a security clearance. Many former administrative judges who had clearances have recently left the Commission. NELA urges that the Commission investigate expansion of the pool of administrative judges with security clearances to help address this backlog.

Finally, NELA strongly favors electronic filing mechanisms, and recommends that the Commission continue its efforts to standardize an effective nationwide e-filing system. The Commission should further clarify its procedural regulations to explicitly allow filing by e-mail at all stages of the federal sector complaints process where applicable.

4. What time limits should be imposed at various stages of the process?

NELA believes that time limits currently imposed in the federal sector process generally favor the agencies. Employees have tight time limits to act and suffer harsh consequences for failing to

meet deadlines. The current regulations, however, provide fewer and less restrictive time limits for agencies to process complaints. In addition to having fewer time limits, the consequences of an agency's failure to abide by those time limits are minor. NELA strongly believes that the playing field must be leveled. Employees should not be held to such short time frames for filing complaints, and the agencies must be firmly held to the time limits imposed. Further, holding agencies accountable for meeting time limits and deadlines helps to reduce the burden on the EEOC should the case proceed to that level.

a. How many days should a complainant have to contact a counselor from the date of the alleged discriminatory matter?

NELA contends that the current time limits imposed for contacting a counselor is overly restrictive on employees, especially when compared to the private sector process. The time period permitted to contact an EEO counselor should be extended from the current 45 days to 180 days, which is the time frame permitted for private sector employees. The current requirement of 45 days not only places employees at a disadvantage, but it also overly burdens the agency with informal complaints. Not all actionable incidents fully develop within 45 days, but an employee may be forced to file an informal complaint in an abundance of caution. A shorter time frame in which a counselor must be contacted does not allow for a "cooling-off" period, nor does it allow time for the matter to be resolved before a more adversarial process must be commenced.

Extending the deadline for contacting a counselor will also allow employees time to utilize any internal complaint and investigative processes an agency may have, such as an Accountability Board or Harassing Conduct Complaint mechanism. This gives the employee and the agency another opportunity to investigate and resolve complaints. If an employee elects to use an agency's internal complaint process, however, the agency should be required to give the employee notice of the employee's rights if his or her complaint involves claims that may be covered by any federal anti-discrimination law. The notice should state that in order to pursue an EEOC claim, the employee must contact an EEO counselor within 180 days of the alleged discriminatory act *regardless of the status of the internal investigation.* This will help address the situations in which agencies delay concluding an internal investigation so that the employee will miss the deadline to contact an EEO counselor. It is critical that the employee be fully apprised of his or her rights from the outset of the process.

Currently, many agencies require far more from complainants than is proper before the agency will accept an informal complaint and initiate processing. These practices often result in dismissals of otherwise timely complaints as untimely. For example, NELA members have seen agencies provide their own pre-complaint paperwork with an agency-imposed requirement that the employee return the paperwork within 24 hours in order to be allowed to pursue his or her complaint. Agencies should be prohibited from requiring any such paperwork as a precondition for initiating a complaint.

The counseling period should be limited to 30 days unless ADR is requested. Agencies should not be permitted extensions of the 30-day counseling period. The counseling period was intended to be a short period for clarifying and developing the employee's claim. In keeping with this

purpose, agencies should not be permitted to extend the counseling period and delay the employee's initiation of a claim. Further, *pro se* complainants are often unaware of their right to decline an EEO counselor's request for an extension of the counseling period, which heightens the imbalance and delays the processing of the complaint.

b. How many days should a complainant have to file a complaint following the conclusion of counseling?

NELA contends that the requirement for the complainant to file a formal complaint should be eliminated altogether. Rather than requiring a complainant to file a formal complaint, the complaint should be considered formal at the end of the counseling stage. Complainants should be provided 15 days after receipt of the counseling report to amend or clarify their claims. A complainant should not be required to file any additional paperwork for the complaint to be formalized. A complainant always has the option to withdraw his or her complaint if he or she does not want to continue on to the investigative stage.

The current requirement for complainants to file formal complaint paperwork within 15 days of receipt of the counselor's notice is burdensome on employees and creates an unnecessary procedural hurdle for the employee. The process should be simplified to make it easier and more accessible for *pro se* complainants. Agencies have the advantage of their expertise in the EEO process. The burden should be shifted away from the complainant for continuation of the complaint processing. This will also reduce the burden on the OFO because formal complaints will no longer be dismissed for failure to timely file the paperwork with subsequent appeals of these dismissals.

Employees can be provided an opportunity to clarify or amend claims following the counseling session before the agency can accept or dismiss the formal complaint. Amendment or clarification, however, would not be required. These changes would streamline the process and eliminate litigation over whether the requirements for timely filing were met.

c. If there is an investigative stage, within how many days should the investigation be completed?

NELA believes that the current 180-day investigative period is appropriate. Both the complainant and the agency have an interest in the agency conducting a thorough and complete investigation. Time must be allocated for the complainant to compile evidence, suggest witnesses, and to provide complete answers to the questions posed by the investigator. Additionally, the investigator needs time to locate witnesses, including former employees, request documents from the agency, and obtain any rebuttal statements or supplemental affidavits that may be necessary. For these reasons, the 180-day period is appropriate.

The 180 days provided should be used to fully investigate complaints. In practice, the 180-day investigative period is often abused by agencies. Formal complaints sit for months without being assigned to an investigator, and complainants are given artificially short deadlines for completing affidavits due to the agency's delay. To prevent this, the EEOC should establish time frames for

proceeding with the investigation through the 180-day period. In particular, the agency should be required to assign an investigator within 30 days as discussed in Issue 2.

d. How many days should a complainant and agency have to file an appeal from an agency final action?

NELA contends that the current deadlines for appeals from a final agency action are appropriate and should be kept. It should be clarified, however, that only a Notice of Appeal is due within 30 days of the dismissal, final action, or decision, and that a complainant's brief is not due until 30 days following the filing of the Notice. This is not clear from the regulation. The result is that many *pro se* complainants file supporting briefs at the time of filing of the Notice. It should be made clear that only a Notice of Appeal need be filed within 30 days of the decision or final action.

NELA also believes that the EEOC should address the process for agency dismissals of claims during the formal complaint stage. Many agencies use full or partial dismissals to weed out claims whether appropriate or not. In addition, agencies misstate a claim in a manner that results in dismissal. An internal appeal or reconsideration process would allow the complainant and the agency to work through any misstatements or misunderstandings in the statement of the claims without the involvement of the EEOC. The addition of an internal appeal or reconsideration process would reduce the number of dismissal cases reviewed by OFO, and would avoid the lengthy delay caused by a full appeal of a dismissed claim.

Specifically, to avoid unnecessary appeals for complaints that were not properly dismissed and could be easily remedied, complainants should be allowed 30 days to file a brief requesting the agency to reconsider its dismissal or partial dismissal of claims. An agency's decision to dismiss claims would not be final until after the 30-day period ends. If reconsideration is requested, an agency's Civil Rights Office would have 30 days to issue a final decision on reconsideration. If the agency fails to issue a decision within 30 days, then the dismissal would be reversed and processing of the complete complaint would continue. If the agency issues a decision within 30 days upholding a complete dismissal, the decision would then become a final decision appealable to OFO.

5. What standard of review should apply when EEOC considers an appeal?

a. What standard of review should apply when there is a hearing decision?

NELA generally believes that the Commission's present standards of review for cases in which a merits hearing has occurred (i.e., deference on the administrative judge's findings of fact and *de novo* review on issues of law) and for summary judgment decisions (i.e. *de novo* review on issues of fact and law, construing all facts and inferences in the light most favorable to the party opposing summary judgment) are adequate. Further, these standards align with the standards applied in most courts.

b. What standard of review should apply when there is only an agency decision?

For appellate review of agency dismissals of complaints, NELA contends that the present standards of review (*de novo* review on issues of fact and law, assuming the complainant's pled facts as true) are adequate. If anything, NELA calls upon the EEOC to be more consistent in its application of these principles and, more specifically, to move away from the line of OFO decisions in which certain hostile work environment claims have been dismissed based on alleged failure to state a claim, essentially predicated upon a factual finding as to whether the complainant pled enough facts to meet some standard of showing a sufficiently severe and pervasive hostile work environment.

NELA exhorts the EEOC to continue its present rejection of attempts to import the pernicious *Iqbal* and *Twombly* dismissal caselaw into EEOC proceedings, recognizing the differences resulting from the inapplicability of the pleading requirements of the Federal Rules of Civil Procedure to the federal sector complaints process.

For review of Final Agency Decisions (FADs) with no hearing decision, however, NELA believes that the Commission should review *de novo* on both issues of fact and of law and give no deference to any agency findings of fact. The caselaw underlying deference to the trier of fact is based on several considerations, including the disinterest of the trier of fact and the ability of the trier of fact to physically observe witnesses' testimony (including their demeanor and body language) and base the findings on those direct observations, but those observations are not available to OFO at the appellate level. These considerations do not apply to FADs. FADs are solely issued based on the paper record with no live witness testimony (even in cases where fact-finding conferences are used, the officer issuing the FAD is not typically present at the fact-finding conference itself and is instead relying on the transcripts). As such, OFO would be just as well positioned to review the record evidence as the agency. Further, because FADs are issued by the same agency that would be liable if discrimination or retaliation for protected EEO activity were found, an irreducible conflict of interest exists. This injects bias or the appearance of bias into the proceedings (even where the decisions are issued by the EEO office director at the given agency). These issues call for more careful scrutiny of FADs to ensure effective enforcement of EEO laws in the federal sector.

6. How can the Commission continue to enhance its ability to ensure agencies' compliance with Federal sector equal employment opportunity requirements and the Federal sector EEO complaint process?

> **a. For example, pursuant to 29 CFR 1614.102(e), should the EEOC conduct Commission meetings from time to time to review agencies' compliance efforts?**
> **b. Also, for example, as part of the complaint process, should the Commissioners from time to time hear arguments on appeals from final agency actions?**
> **c. What value would these and any other related ideas bring to the Federal sector complaint process?**

NELA strongly supports oral argument by the Commission in appropriate cases. Many cases heard by the Commission have an impact far beyond the individual complainant. Oral argument

provides an opportunity for the Commission to give the appropriate weight and consideration to cases that may be at the forefront of civil rights litigation or that may have widespread implications for federal employees. The Merit Systems Protection Board has embraced procedures that allow for oral argument and submission of *amicus* briefs before the Board. *See* 5 C.F.R. § 1201.117(a)(2). This would also be appropriate and beneficial for the EEOC. It would allow important issues to be fully briefed and it would provide the Commissioners an opportunity to engage the stakeholders in a discussion of the merits of the law that is not possible through briefing. Oral argument would also highlight the EEOC's dedication to providing leadership and guidance to federal agencies on all aspects of the federal government's equal employment opportunity program.

NELA promotes the Commission's efforts to monitor agency compliance with EEO programs by enhancing its "naming and shaming" activities. Agencies must be held publically accountable for their shortcomings in compliance under 29 C.F.R. 1614.102(e). This is a strong tool for the EEOC to wield as agencies feel the pressure of negative publicity. NELA encourages the Commission to issue press releases and correspondence to the White House and Congress citing federal agencies and subunits with the worst *per capita* discrimination rates, citing EEO offices with the highest reversal rates for improper complaint dismissals, citing federal agencies and subunits with repeated offenses within the same offices or subunits after a finding of discrimination, and other such offenses as appropriate.

Also, under 1614.102(e), the Commission should engage in greater longitudinal statistical tracking to assess the impact of discrimination claims both in terms of follow through on judgments (e.g., percentage of remedial training implemented, and percentage of responsible management officials (RMOs) on whom agencies choose to impose discipline after findings of discrimination) and discrimination recidivism rates (e.g., percentage of claims against same agency subunits or offices within 5 or 10 year period after findings of discrimination). NELA practitioners have generally experienced that RMOs are rarely held accountable after a finding of discrimination. Many times any training required as a result of a decision is merely the same training that is provided to employees on an annual basis. If an agency's general practice is to continue with the *status quo* following a decision in favor of a complainant, it does little to further the goals of the Commission in enforcing these laws. An agency must understand that a decision finding discrimination calls for real corrective action, and if no such action is taken the Commission will learn of it.

These active enforcement efforts help further the federal government's role as a model employer. Those agencies that fall noticeably short of that goal should be held publically accountable for those shortcomings.

7. When discrimination is found, what enforcement mechanisms can EEOC use to ensure agency compliance?

NELA recommends retention of the overall structure of the present enforcement mechanisms, but we believe strengthening those mechanisms would improve compliance with Commission decisions and with settlement agreements enforceable by the Commission.

The chief enforcement mechanism that needs strengthening is for individual liability for managers who engage in unlawful discrimination. The reports from the Commission's African-American Working Group[4] and Women's Working Group[5] both flagged the lack of discipline and accountability concerning such managers as a major limitation on the Commission's enforcement efforts. Under present statute, the issue of personal liability for managers who engage in discrimination is straightforward: they should be subject to discipline up to removal, 5-year debarment from federal service, and a $1,000 civil fine for commission of a prohibited personnel practice under 5 U.S.C. § 2302(b)(1). *See, e.g.,* 5 U.S.C. § 1215(a)(3)(A). Traditionally, the Commission has only authorized its administrative judges to order agencies to consider possible discipline against managers who illegally discriminate against federal workers. NELA members have rarely seen such discipline imposed. The 2014 Memorandum of Understanding (MOU) with the U.S. Office of Special Counsel (OSC),[6] however, gives the Commission the opportunity to expand its enforcement efforts. NELA calls upon the Commission to follow up on this MOU by instructing its administrative judges to actively consider referrals of managers who violate anti-discrimination laws to OSC for possible prohibited personnel practice prosecution under the MOU as one of the standard remedial options within administrative judges' authority.

In many cases, the same violation of a Commission order and/or a settlement agreement can constitute both actionable reprisal and a breach claim. NELA members have often had difficulty when seeking to file both of these claims at agency EEO offices due to the apparent confusion as to the overlap between the two separate causes of action. To avoid this confusion, the Commission should modify its regulations to clearly instruct agency EEO offices that in all cases when a complainant has a reprisal and a breach claim, the EEO office shall treat them as two separate and independent, simultaneously cross filed claims – one for reprisal and one for breach – and process the two claims accordingly.

While the deadline issue is chiefly discussed under Issue 4 of the ANPRM, for purposes of enforcement proceeding, NELA recommends extending the deadline for initiating breach enforcement actions under 29 C.F.R. § 1614.504 to at least 90 calendar days, if not longer.

No enforcement mechanism is effective if it is impracticably slow. Since almost all effective enforcement of breaches under 29 C.F.R. § 1614.504 occurs at OFO instead of at the agency level, the time frame to get the case to OFO decision is crucial to effective breach enforcement. With current case backlogs, it can often take years for OFO to decide a breach issue. To help expedite processing of breach cases (which often are fairly binary issues of whether or not a given provision of a remedial order or settlement agreement was implemented, and thus not as hard to adjudicate as many other issues handled by OFO), NELA recommends that the Commission reexamine its internal workflow processing at OFO to ensure that these cases are adjudicated expeditiously. One option for cases with remedial orders is for the Commission's point of contact for breach issues be the Compliance Officer already designated to oversee

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4 http://www.eeoc.gov/federal/reports/aawg.cfm.

5 http://www.eeoc.gov/federal/reports/women_workgroup_report.cfm.

6 http://www.eeoc.gov/laws/mous/eeoc_osc.cfm

implementation of the remedial order (as opposed to the breach claim going into the general OFO "in-box").

One of the long-term limitations of enforcement in breach of settlement agreement proceedings under 29 C.F.R. § 1614.504 was the unavailability of a money damages remedy in cases where the breach would not be properly cured by specific enforcement or by rescission of the agreement and restoration of the *status quo ante.* This remedial gap has proven problematic in many categories of settlements common in federal sector practice, for example, settlements providing clean records and neutral references. In a recent line of cases, the U.S. Court of Appeals has stepped into this gap with an expanding line of cases under the Tucker Act. *See VanDesande v. United States*, 673 F.3d 1342 (Fed. Cir. 2012); *Holmes v. United States*, 657 F.3d 1303 (Fed. Cir. 2011). NELA members have observed agencies trying to negate this remedial avenue contractually. Further, agency counsel have often been observed attempting to negotiate various settlement agreement breach provisions that purport to deviate from 29 C.F.R. § 1614.504 in a number of ways (e.g., provisions setting additional notice requirements, purporting to limit breach claims to situations where the complainant is wholly blameless *vis a vis* the breach, provisions purporting to limit settlement enforcement to specific performance and negate restoration of the *status quo ante* as a remedy, and provisions purporting to negate the Commission's authority to award fees if breach is found). To avoid these issues, the Commission should, by regulation, void as contrary to public policy provisions barring Tucker Act enforcement of federal sector EEO settlement agreements and provisions purporting to contractually deviate from or to modify the enforcement mechanisms found at 29 C.F.R. § 1614.504.

NELA appreciates the opportunity to comment on the Advance Notice of Proposed Rulemaking, and wishes to thank the Commission for its attention and consideration.

Respectfully submitted,

Terisa E. Chaw
Executive Director

Attachment: Appendix

Appendix

Proposal for Meet & Confer

1. Within 30 days of submission of the agency file, the parties shall meet and confer on the following issues:
    a. The scope of the complainant's claim(s);
    b. The agency's objections to complainant's statement of claims;
    c. The scope of the complainant's damages;
    d. The agency's defense(s), including, in disparate treatment cases, the agency's proffered non-discriminatory reasons;
    e. Witnesses expected to testify at hearing;
    f. Obligations to preserve evidence, including prompt agency notice to complainant when witnesses are expected to leave federal employment;
    g. Scope of discovery;
    h. Discovery disputes;
    i. Timing of discovery, including depositions (if any);
    j. Format of discovery (e.g., PDF, native format, paper);
    k. Settlement, including whether they would agree to participate in early mediation;
    l. Whether a bifurcated damages hearing is appropriate and whether depositions of expert damages witnesses should be bifurcated ;
    m. A proposed schedule for the close of discovery, summary judgment (if appropriate), settlement conference, pre-hearing reports, and hearing; and
    n. Other issues relevant to the hearing.

Proposal for Joint Report

1. Within 45 days of the agency's submission of the agency file, the parties shall submit to the administrative judge a Joint Report which shall identify the following;
    a. Complainant's summary of the claims and the Agency's objections (if any);
    b. If there are discovery disputes and, if so, a summary from each party;
    c. A schedule for filing and disposing of motions, such as motions to compel or judgments without a hearing;
    d. The parties' proposed discovery and hearing schedule;
    e. Whether a bifurcated damages phase is appropriate;
    f. The status of settlement and whether the parties have agreed to a stay of discovery and early mediation; and
    g. Other relevant issues.

Proposal for Mandatory Exchange of Information

1. Within 60 days of submission of the agency file, the parties shall exchange information and documents including, but not be limited to, the following:

a. Complainant must provide to the agency the following information:
(1) the name and contact information of all individuals who are likely to have discoverable information and the subjects of that information for each person;
(2) a description of damages claimed, including a computation of each category of damages; and
(3) if complainant has applied for disability benefits and/or social security disability benefits after the adverse action, whether any application has been granted, and the nature of the award, if any.

b. Complainant must provide the following documents:
(1) a copy (or, if not available, a description by category and location) of all documents, electronically stored information (e.g., emails, electronic files) and tangible things that complainant may use to support complainant's claims or defenses, unless the use would be solely for impeachment;
(2) all communications concerning the factual allegations or claims at issue in this lawsuit between the complainant and the agency.
(3) claims, lawsuits, administrative charges, and complaints by Complainant that rely upon any of the same factual allegations or claims;
(4) diary, journal, and calendar entries maintained by the Complainant concerning the factual allegations or claims;
(5) documents regarding damages, including:
(i) efforts to mitigate;
(ii) documents concerning: (i) communications with potential employers; (ii) job search efforts; and (iii) offer(s) of employment, job description(s), and income and benefits of subsequent employment;
(iii) all documents and evidence, on which each damages computation is based, including materials bearing on the nature and extent of injuries suffered; and
(iv) any other document(s) upon which the complainant relies to support the Complainant's claims.

c. The Agency must provide to the complainant the following information:
(1) the name and contact information of all individuals who are likely to have discoverable information and the subjects of that information for each person; and
(2) a statement of its defenses and reasons for taking the personnel action(s) at issue.

d. The Agency must provide to the complainant the following documents:
(1) All communications concerning the factual allegations or claims at issue in this lawsuit among or between:
(i) The complainant and the agency; and

(ii) The complainant's manager(s), and/or supervisor(s), and/or the agency's human resources representative(s).

(2) The complainant's personnel file, performance file, and disciplinary file, in any form, including files concerning the complainant maintained by the complainant's supervisor(s), manager(s), or the agency's human resources representative(s).

(3) Documents relied upon to make the employment decision(s) at issue. Depending upon the case, these may include:
   (i) in non-selection/non-promotion claims, the selection file;
   (ii) in discipline claims, the disciplinary file;
   (iii) in reasonable accommodation claims, the reasonable accommodation file;
   (iv) in disparate pay claims, comparative salary histories, position descriptions and performance criteria; and
   (v) in performance claims, the performance file.

(4) Workplace policies or guidelines relevant to the adverse action in effect at the time of the adverse action. Depending upon the case, those may include policies or guidelines that address:
   (i) Discipline;
   (ii) Performance;
   (iii) Promotion;
   (iv) Harassment;
   (v) Discrimination; and
   (vi) Retaliation.

(5) Responses to claims, lawsuits, administrative charges, and complaints by the complainant that rely upon any of the same factual allegations or claims as those at issue in this lawsuit.

(6) Claims of discrimination filed against the principal agency witnesses.