

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

General Order No. 15

EQUAL EMPLOYMENT
OPPORTUNITY PLAN
AND
EMPLOYEE DISPUTE RESOLUTION PLAN

APPROVED: OCTOBER 17, 1980
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I. PREAMBLE

A. Statement of Policy

The Judicial Conference of the United States in 1987 directed that each court adopt a plan in conformance with the national policy of providing equal employment opportunity to all persons regardless of their race, sex, color, national origin, religion, age, or handicap.

The Judicial Council of the Ninth Circuit adopts this model plan for all courts of the Ninth Circuit providing equal employment opportunity to all persons or classes of persons regardless of their race, color, national origin, gender, religion, age, disability and/or sexual orientation.

The Judicial Council of the Ninth Circuit directs each court to adopt this model plan and employee dispute resolution procedures or to submit an alternative plan for the review and approval of the Judicial Council of the Ninth Circuit.

Each appointing officer and supervisor will promote equal employment opportunity through a plan encompassing all facets of employment actions and conditions including recruitment, hiring, training, promotion, advancement, and supervision.

Each appointing officer and supervisor will promote a court or office environment free of discrimination and discriminatory harassment. Any instances of discriminatory harassment for which a person seeks relief or assistance should be immediately reported. All employing offices shall address promptly all complaints alleging discrimination or discriminatory harassment and shall pursue resolution of each complaint in accordance with the procedures described in Part B.

Retaliation by an appointing officer or supervisor, or by any other employee against an employee for having filed a discrimination or discriminatory harassment complaint, or against any persons involved in the processing of a complaint such as employee representatives or witnesses, is prohibited and constitutes grounds for disciplinary action. The filing of frivolous or harassing complaints, however, may also be grounds for disciplinary action.

This plan, which will be periodically evaluated, is not intended to modify or reduce the qualification standards for employment in the federal courts as such standards have been approved by the Judicial Conference of the United States.

Neither this plan, nor the employee dispute resolution procedures set forth in Part B, shall constitute a contract or create any legally enforceable obligation. No actions taken or documents created or processed pursuant to this plan or the employee dispute resolution procedures related thereto are discoverable in any court proceeding, except for the conclusion of a reviewing panel in a final decision, made available to the public pursuant to Chapter VIII Section 10 of Part B.

B. Definitions.

1. **Age.** At least 40 years of age at the time of the alleged discrimination except for the age restrictions prescribed by 5 U.S.C. § 8335(b) and 8425(b) and described in the Judiciary Salary Plan and the Court Personnel System, applying to the appointment and retirement of federal probation and pretrial services officers.
2. **Disability.** Formerly referred to as “handicap.” Any physical or mental impairment which substantially limits one or more of a person’s major life activities where there is a record of such impairment or the person is regarded as having such impairment. A qualified disabled person is one who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who meets the criteria for appointment¹.

Certain other conditions that are temporarily disabling such as pregnancy and childbirth are treated as disabilities for purposes of protections afforded under this Plan².

3. **National origin.** National origin includes ethnicity. Employees of the United States courts must be citizens of the United States or citizens of countries with treaty relations with the United States, as defined by the United States Department of State, or persons subject to the Chinese Student Protection Act, 8 U.S.C. §1255.
4. **Gender.** Discrimination on the basis of marital status or parenthood is also categorized as gender discrimination.
5. **A discrimination complaint** is any allegation that a person has been denied employment, promotion or advancement, or has been affected in any other aspect of employment, because of his or her race, color, national origin, gender, religion, age, disability and/or sexual orientation.

A discrimination complaint also includes allegations of restraint, interference, coercion, discrimination, or reprisal because a person has raised an allegation of discrimination or has served as a representative, a witness, or an EDR Coordinator in connection with a complaint. It does not include complaints relating to other dissatisfactions with a person’s conditions of employment which are commonly known as grievances.

A discrimination complaint may only be filed pursuant to the procedures set forth in Part B.

6. **Sexual harassment** is a form of gender discrimination. Sexual harassment is defined as unwelcome sexual advances, such as an overture, an offer, or requests for sexual favors, and other verbal or physical conduct of a sexual nature, when:
 - a. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
 - b. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
 - c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment;³ and
 - d. Such conduct is engaged in either the workplace or outside the workplace, during working hours or after working hours, where there is a direct connection with workplace matters.
7. **Discriminatory Harassment.** Conduct, threats, insinuations, innuendo, or slurs, or other offensive statements or conduct based on race, color, national origin, gender, religion, age, disability and/or sexual orientation directed at an individual or a specific class or group is considered discrimination.
8. **Employment Actions and Conditions.** Includes all employment and personnel decisions, actions, impacts, terms and conditions of a person's employment. Included are the following: recruitment, hiring, promotions, advancement, work assignments, compensation and benefits, training, education, disciplinary actions, terminations, and other such categories.

II. SCOPE OF COVERAGE

This Equal Employment Opportunity Plan applies to all court personnel, and applicants for positions, defined as follows:

1. All judges and their staffs;
2. District clerk of court and staff;
3. All chief probation and chief pretrial services officers and staffs.

Article I and Article III judges may not file a complaint pursuant to this plan. Complaints about the conduct of the bankruptcy judge merit selection process should be submitted to the chief judge of the court of appeals. Complaints about the conduct of the magistrate judge merit screening process should be submitted to the chief judge of the district.

For the purposes of this Plan, all chambers and offices will be described as “employing offices.”

III. ORGANIZATION

A. Implementation

Each appointing officer shall implement this plan or such equal employment opportunity plan as has been approved by the Judicial Council of the Ninth Circuit.

B. Appointing Officers

All appointing officers, including the district court, individual judges, and employing office heads must ensure that all vacancies, with the exception of chambers law clerk vacancies, are publicly announced⁴ to attract candidates who represent the make-up of persons available in the qualified labor market and that all hiring decisions are based solely on job-related factors. They should make reasonable efforts to see that the skills, abilities, and potential of each employee are identified and developed, and that all employees are given equal opportunities for promotions and for other advantageous employment actions and conditions.

C. Appointing Officers and Supervisors

All appointing officers must apply equal employment opportunity practices and policies in their employing offices. This includes giving each employee a fair and equal opportunity to demonstrate his or her skills and, where those abilities exceed general performance standards, to be recommended for such personnel actions and awards recognizing such achievements as may be warranted and available.

D. Employment Dispute Resolution (“EDR”) Coordinator

The chief district judge will designate one person to be the Employment Dispute Resolution (“EDR”) Coordinator for each district. Additional EDR coordinators may be appointed by the chief district judge in probation and pretrial services offices to facilitate the administration of the plan.

The EDR Coordinator should be a person committed to the goals of equal employment opportunity with the experience and training necessary to perform the investigative and record-keeping aspects of the position. An appointing officer should not be designated as the EDR Coordinator.

The EDR Coordinator will be responsible for preparing statements, collecting, analyzing, and consolidating statistical data, and submitting an annual EEO report as

described in Sections VI and VII of this plan. The EDR Coordinator will also seek to resolve discrimination complaints informally⁵ and will provide EEO information to the public.

IV. OBJECTIVES

Each employing office executive will develop annual objectives which reflect those improvements needed in recruitment, hiring, promotions, and advancement, and will prepare a specific plan for the EDR Coordinator explaining how those objectives will be achieved.

V. PERSONNEL PRACTICES

A. Discrimination-Free Workplace

All appointing officers will provide a discrimination-free workplace for their employees and applicants. No employing office will tolerate discrimination or discriminatory harassment in hiring or in any employment actions or conditions, on the basis of race, color, national origin, gender, religion, age, disability and/or sexual orientation. Appointing officers should make available to court employees training and education with respect to equal employment opportunity, including, but not limited to, sexual harassment, subject to available funds for such training.

B. Recruitment

All appointing officers will seek qualified applicants who reflect the make-up of all such persons in the relevant labor market. All vacancies, except those for judicial clerkships and externs, will be publicly announced⁶.

C. Hiring

All appointing officers will make their hiring decisions based upon an evaluation of a person's qualifications and ability to perform the duties of the position satisfactorily.

D. Promotion

All appointing officers will promote employees, if promotions are available, according to their experience, training, and demonstrated ability to perform duties of a higher level.

E. Advancement

All appointing officers and supervisors will seek, insofar as appropriate and

reasonably practical, to improve the skills and abilities of employees through cross-training, job restructuring, assignments, details, and outside training.

F. Employee Discrimination Complaints

All appointing officers will adopt the procedures for resolving employee disputes set forth in Part B.

VI. EVALUATIONS

The EDR Coordinator will prepare a compiled annual report for each employing office, summarizing the appointing officers' efforts to provide equal employment opportunities in recruitment, hiring, promotions and advancement. The EDR Coordinator will collect this information through evaluations prepared by all appointing officers, addressing these areas of concern:

A. Recruitment

The report will briefly describe efforts made to bring a fair cross-section of the pool available for the position into its applicant pool, including listing all employment sources used (state employment offices, schools, organizations, etc.). Each appointing officer will also explain the methods used to publicize vacancies.

B. Hiring

The report will identify where recruitment efforts resulted in the hiring of a cross-section of the pool available and will, if known, explain those instances where members of the cross-section did not accept employment with the office when it was offered.

C. Promotions

The report will briefly describe promotional opportunities which occurred and will provide an analysis of the distribution of promotions, including a description of those persons who were promoted to supervisory positions.

D. Advancement

The report will describe what efforts were made to improve the skills and abilities of employees through cross-training, job restructuring, assignments, details, and outside training.

In addition, this evaluation should include information on factors inhibiting achievement of EEO objectives, such as no vacancies or minimal numbers of qualified applicants in the relevant labor market, and on all persons in the court who have received relevant training. This report will also include a breakdown according to the race, gender, color, national origin, and disability of the personnel involved on forms to be provided by the Administrative Office of the United States Courts. The report will cover personnel actions occurring in the year ending September 30 and will be submitted to the Administrative Office by November 1 of each year.

VII. ANNUAL REPORT

The EDR Coordinator in each court will submit to the chief judge of the court for his or her approval the annual report for the year ending September 30. The report for the district will consist of the consolidated reports and data received from each reporting employing office.

The report will describe instances where significant achievements were made in providing equal employment opportunities, identify areas where improvements are needed, and explain factors inhibiting achievement of equal employment opportunity objectives. The report will be the same report as that submitted annually to the Administrative Office of the United States Courts.

The individual employing office reports will be submitted to the Judicial Council of the Ninth Circuit. The reports for the bankruptcy court and the probation and pretrial services offices of a district will be consolidated with the report for the district court and submitted to the Administrative Office of the United States Courts.

These consolidated reports will be submitted by the chief judge to the Administrative Office of the United States Courts by November 30 of each year. A copy of the consolidated reports will be submitted to the Judicial Council of the Ninth Circuit.

Copies of the annual EEO reports will be made available to the public upon request.

VIII. DISTRIBUTION AND PUBLIC NOTICE

Copies of these procedures shall be available to all employees and, upon request, to applicants for positions of employment with the United States Courts.

Notes— EEO Plan

1. Further clarification of this definition can be found in 29 CFR § 1614.203. That section provides that “major life activities” means functions such as caring for one’s self, performing manual tasks, walking, seeing, breathing, learning and working. Under the standard of “Reasonable Accommodation” the employing office shall reasonably accommodate to the known physical or mental limitations of a qualified disabled applicant or employee unless the court can demonstrate that the accommodation would impose an undue hardship on the court’s operations. Such accommodations may include, but shall not be limited to: (1) making facilities readily accessible to and usable by disabled persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers and interpreters and other similar actions.
2. HIV infection is considered to be a non-interfering disability absent medical and workplace documentation regarding the extent to which the infection may affect job performance, leave, or conduct.
3. Prohibited unwelcome conduct includes offensive sexual flirtations, suggestive comments, sexual innuendo, unwanted physical contact, impeding or blocking movement, repeated requests or pressure for dates, advances, propositions, insults or verbal abuses of a sexual nature, graphic verbal comments about an individual’s body, sexually degrading words describing an individual, humor and jokes about sex or gender-specific traits, or the display of sexually suggestive objects or pictures. Prohibited discriminatory conduct also includes non-verbal, suggestive, or sexually insulting actions such as leering, whistling, suggestive sounds, and obscene gestures. Prohibited touching includes any unwelcome touching of a sexual nature, pinching, intentional brushing of the body, sexual assault, and coerced sexual acts.
4. A “public announcement” is a reasonable attempt to notify applicants and potential applicants about the existence of job vacancies. In some situations this will involve the placement of a job notice in a widely circulated publication, whereas in others it may simply involve the posting of a notice on bulletin boards in appropriate places. The purpose of a public announcement is to afford all possible applicants, including women and minorities, an opportunity to compete for the position(s) in question. Normally, solicitations for chambers law clerks are made by the Administrative Office. However, in any case in which an individual judge or magistrate judge recruits for a chambers law clerk without the assistance of the Administrative Office, a “public announcement” of the position shall be made, and the announcement shall contain the words “The District Court is an Equal Opportunity employer”.
5. Informal resolutions are solutions to discrimination complaints that are satisfactory to all parties involved that are arrived at through discussion, mediation, and/or other techniques short of a complete processing of a complaint to a written decision. Experience has shown that such resolutions are generally preferable to the parties involved and less disruptive to the work environment than formal decisions rendered in an adversarial context.
6. See Note 4.

EMPLOYMENT DISPUTE RESOLUTION PLAN--
Northern District of California

CHAPTER I -GENERAL PROVISIONS

§ 1 Preamble

This Plan shall be known as the Employment Dispute Resolution Plan (" EDR Plan"). It was adopted by the Northern District of California in accordance with the Judiciary Model Plan adopted by the Judicial Conference of the United States in order to provide rights and protections to employees of the District Court, the Bankruptcy Court, the Probation Service, and Pretrial Services within the Northern District of California which are comparable to those provided to legislative branch employees under the Congressional Accountability Act of 1995.

The Plan supersedes Appendix I("Discrimination and Complaint Procedures") of the current Equal Employment Opportunity Plan ("EEO Plan") applicable to these court units. Claims arising under Chapters II through VII of this Plan, or under Sections I through V of the EEO Plan (Part A), shall be treated in accordance with the procedures set forth in Chapter VIII of this Plan. The duties of the district's EEO Coordinators will be assumed by the Employment Dispute Resolution Coordinators (established in Section 3 of Chapter VIII of this Plan), except that the dispute resolution duties assigned to the EEO Coordinators under the EEO Plan will be replaced by the dispute resolution procedures set forth in Chapter VIII of this Plan.

This Plan is to be implemented in the same manner as the EEO Plan. This district has adopted and implemented this plan based upon the Model Plan adopted by the United States Judicial Conference. All modifications from the Model EDR Plan have been approved by the Ninth Circuit Judicial Council. All future modifications to the EDR Plan must likewise be approved by the Ninth Circuit Judicial Council. A copy of this plan and any subsequent modifications shall be filed with the Administrative Office. The District Court, the Bankruptcy Court, the Probation Office and the Pretrial Services Office shall annually submit reports on the implementation of the plan to the Administrative Office for inclusion in the Director's Annual Report to the Judicial Conference. A copy of these annual reports shall also be provided to the Ninth Circuit Judicial Council.

Policies adopted by offices within this district pertaining to adverse action or general grievance proceedings that do not invoke the rights and protections afforded under this EDR Plan are not affected by the Plan. Further, other local policies relating to rights enumerated under the Plan that are not inconsistent with the rights and procedures established herein will not be affected by the Plan.

This EDR Plan is not intended to duplicate the protections provided for the resolution of complaints of judicial officer misconduct or disability under 28 U.S.C. § 372(c) and otherwise is intended to be the exclusive remedy of the employee relating to rights enumerated under the Plan.

§ 2 Scope of coverage

This Plan applies to all Article III judges and other judicial officers as well as to employees of the courts and employing offices in this district including chambers staffs, court unit heads and their staffs, and bankruptcy administrators and their staffs.

§ 3 Definitions

For purposes of this Plan--

- A. The term "employee" includes all individuals listed in Section 2 of this Chapter, as well as applicants for employment and former employees, except as provided below. The term "employee" does not include externs, applicants for extern positions, applicants for chambers law clerk positions, applicants for bankruptcy judge or magistrate judge positions, private attorneys who apply to represent indigent defendants under the Criminal Justice Act, criminal defense investigators not employed by federal public defenders, volunteer counselors or mediators, ENE evaluators, arbitrators, workers who perform contract work such as consultants and per diem court reporters and interpreters, or other individuals who are not employees of an "employing office" as that term is defined below.
- B. The term "employing office" includes all offices of the Northern District of California, including the offices of clerks of court, chief probation officers, chief pretrial services officers, and any such offices that might be created in the future.
- C. The term "judicial officer" means a judge appointed under Article III of the Constitution, a United States bankruptcy judge, or a United States magistrate judge.
- D. The term "court" refers to the appropriate court (district or bankruptcy) in which is located the employing office which would be responsible for redressing, correcting or abating the violation alleged in the complaint.

CHAPTER II -EQUAL EMPLOYMENT OPPORTUNITY AND ANTI-DISCRIMINATION RIGHTS

§ 1 **General** - Discrimination against employees based on race, color, religion, sex (including sexual harassment), national origin, age (at least 40 years of age at the time of the alleged discrimination), disability and sexual orientation is prohibited. The rights and protections of Sections I through V of the Equal Employment Opportunity Plan (Part A) shall also apply to employees.

§ 2 **Definition** - The term "disability" means--

- A. a physical or mental impairment that substantially limits one or more of the major life activities of an employee,
- B. a record of such an impairment, or

- C. being regarded as having such an impairment.

See 42 U.S.C. § 12102(2).

- § 3 **Special provision for probation and pretrial services officers** - The age discrimination provision of Section I of this Chapter shall not apply to the initial hiring of probation and pretrial services officers. *See* Report of the Proceedings of the Judicial Conference of the United States (March 1991), pp. 16-17.

CHAPTER III -FAMILY AND MEDICAL LEAVE RIGHTS

- § 1 **General** - Office of Personnel Management (OPM) regulations regarding use of sick leave for family or bereavement purposes(5 CFR §630.401) apply to employees in the manner prescribed in Volume I-C, Chapter X, Subchapter 1630.1, Section R, of the Guide to Judiciary Policies and Procedures.

CHAPTER IV -WORKER ADJUSTMENT AND RETRAINING NOTIFICATION RIGHTS

- § 1 **General** - No “employing office closing” or “mass layoff” (as defined in Section 2 of this Chapter) may occur until the end of a 60-day period after the employing office serves written notice of such prospective closing or layoff to employees who will be affected. This provision shall not apply to an employing office closing or mass layoff that results from the absence of appropriated funds.

- § 2 **Definitions**

- A. The term "employing office closing" means the permanent or temporary shutdown of a single site of employment if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees.
- B. The term "mass layoff" means a reduction in force which--
 - 1. is not the result of an employing office closing; and
 - 2. results in an employment loss at the single site of employment during any 30-day period for
 - a. (1) at least 33 percent of the employees (excluding any part-time employees); and
 - (2) at least 50 employees (excluding any part-time employees); or
 - b. at least 500 employees (excluding any part-time employees).

See 29 U.S.C. § 2101.

CHAPTER V -EMPLOYMENT AND REEMPLOYMENT RIGHTS
OF MEMBERS OF THE UNIFORMED SERVICES

§ 1 General - An employing office shall not discriminate against an eligible employee or deny an eligible employee reemployment rights or benefits under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 et seq.

CHAPTER VI -OCCUPATIONAL SAFETY
AND HEALTH PROTECTIONS

§ 1 General - Each employing office shall provide to its employees a place of employment which is free from recognized hazards that cause or are likely to cause death or serious physical harm to employees. Complaints which seek a remedy that is exclusively within the jurisdiction of the General Services Administration (“GSA”) or the United States Postal Service (“USPS”) to provide are not cognizable under this Plan; such requests should be filed directly with GSA or the USPS as appropriate.

§ 2 Court program requirements - The district court, the bankruptcy court, the probation office and the pretrial services office shall implement programs to achieve the protections set forth in Section 1 of this Chapter.

CHAPTER VII -POLYGRAPH TESTS

§ 1 General -No employee may be required to take a polygraph test.

CHAPTER VIII -DISPUTE RESOLUTION PROCEDURES

§ 1 General procedure for consideration of alleged violations - An employee who claims a denial of the rights granted under Chapters II through VII of this Plan shall seek resolution of such claims through the procedures of this Chapter. Generally, the procedural process consists of--

- A. counseling and mediation;
- B. hearing before the chief judge of the court (or a designated judicial officer) in which the alleged violation arises; and
- C. review of the hearing decision under procedures established by the judicial council of the circuit.

§ 2 General provisions and protections

- A. **Confidentiality** - All communications shall be kept confidential except as necessary to resolve matters among the involved parties and/or to implement a settlement.

- B. Prohibition against retaliation** - Complainants under this Plan have the right to be free from retaliation, coercion, or interference because of filing a complaint pursuant to this Plan. Likewise, any person who participates in the filing or processing of a complaint, such as an employment dispute resolution coordinator, mediator, witness, representative, or co-worker, is also entitled to freedom from retaliation. Names of all persons contacted during any phase of the investigation, counseling, mediation or judicial hearing of claims made pursuant to this Plan shall be made available to the complainant upon his or her request.
- C. Right to representation** - Every individual invoking the dispute resolution procedures of this Plan has the right to be represented by a person of his or her choice if such person is available and consents to be a representative. A court employee may accept the responsibilities of representation if it will not unduly interfere with his or her court duties or constitute a conflict of interest, as determined by the representative's appointing officer.
- D. Case preparation** - To the extent feasible, every individual invoking the dispute resolution procedures of this Plan may use a reasonable amount of official time to prepare his or her case, so long as it does not unduly interfere with the performance of his or her court duties.
- E. Extensions of time** - The time periods set forth in this Chapter for counseling and mediation may be extended upon agreement of the employee and the counselor or mediator, as set forth in Sections 5(D) and 6(C) below. The chief judge or other presiding judicial officer may extend the time period in which an employee must file a request for counseling as set forth in Section 5(B)(2) below, and any of the deadlines set forth in Section 7 of this Chapter (Complaint, Review and Hearing) for good cause. If disqualification of any counselor, mediator or reviewing officer is sought pursuant to Section 4, all time periods shall be extended by the number of days required for the Chief Judge of the District or Bankruptcy court, the District Court ADR Coordinator, or the Bankruptcy Court Administrative Manager, as appropriate, to rule on the disqualification and, where necessary, to obtain another counselor, mediator, or reviewing officer.
- F. Records** - At the conclusion of formal and informal proceedings under this Plan, all papers, files, and reports will be filed with the EDR Coordinator for the employing office where the person(s) complained about are employed. No papers, files, or reports relating to a dispute will be filed in any employee's personnel folder, except as necessary to implement an official personnel action.
- G. Election of Remedies** - If an employee or an employee representative files an appeal of an adverse action or a grievance in addition to a claim under this Plan concerning the same or substantially the same subject matter, the employee must elect either (a) the EDR Plan or (b) the grievance/adverse action appeal procedures under which the complaint is to be processed. An employee may not utilize both (a) and (b). Similarly, if a complaint has already been processed under one of these procedures (i.e., the grievance/adverse action appeal procedure or the procedures in this Plan), it may not be the subject of a complaint under the other.
- H. Determining Time Periods**-The word “days” in all filing and other time periods specified in this plan shall mean calendar days, except that if the deadline date falls on a Saturday, Sunday or holiday, the deadline shall be extended to the following court business day.

§ 3 Designation and duties of employment dispute resolution coordinator - The district court, the bankruptcy court, the probation office and the pretrial services office shall each designate a person to serve as EDR Coordinator. The duties of such persons shall include the following:

- A.** to provide information to the employing offices and employees regarding the rights and protections afforded under this Plan;
- B.** to coordinate and organize the procedures and establish and maintain official files of each employing office pertaining to complaints and other matters initiated and processed under the employment dispute resolution plan;
- C.** to perform the counseling of individuals and appropriate investigation of the issues raised in the initial stages of the complaint process, in accordance with Section 5 of this Chapter; and
- D.** to collect, analyze, and consolidate statistical data and other information pertaining to each employing office's employment dispute resolution process.

§4 Disqualification Provision-Any person seeking disqualification or recusal of an EDR counselor or reviewing official shall promptly submit a written statement to the chief judge of the court in which the counselor or reviewing officer in question is employed, explaining the reasons for the requested disqualification or recusal. In determining whether disqualification or recusal is warranted, the chief judge shall consider the factors, circumstances and considerations set forth in 28 U.S.C. § 455. If disqualification or recusal is warranted, the chief judge shall designate another individual to act as the EDR counselor, or reviewing official. Disqualification or recusal of the EDR counselor, or reviewing official of a court shall not be warranted merely because the court is named as a responding party.

Any requests to disqualify a mediator selected from the District Court panel shall be reviewed by that court's ADR Director. Requests to disqualify a mediator selected from the Bankruptcy Court panel shall be reviewed by that court's Administrative Manager. Requests to disqualify mediators shall be acted upon within ten business days.

§ 5 Counseling

- A. Initiating a proceeding; formal request for counseling** - An employee who believes that his or her rights under Chapters II through VII of this Plan have been violated must first request counseling.
- B. Form and manner of requests** -
 - 1.** Employees should first fill out a Request for Counseling Form (a copy of the approved form is attached as Appendix 1). If that form is not available to the employee, she or he should submit a written request for counseling. The employee must list on the form, or in the written request, all of the bases for his/her claim.

2. The Request for Counseling form should be submitted to the EDR Coordinator of the employing office in which the person or persons are employed who the complainant believes have violated his or her rights pursuant to the Plan. The Request for Counseling must be made within 30 days of the alleged violation or within 30 days of the time the employee *first* becomes aware of the alleged violation. Except with permission of the EDR Coordinator for purposes of clarification, requests for counseling may not be amended after they have been submitted. If the employee wishes to seek counseling on issues that were not raised in a Request for Counseling that has already been submitted to the EDR Coordinator, the employee should submit an additional Request for Counseling. Any such additional Request for Counseling must also be timely (that is, submitted within 30 days of the alleged violation or within 30 days of the time the employee first becomes aware of the violation), and new time limits shall apply to the issues raised in it.

C. Procedures

1. **Who may serve as counselor** - Counseling and appropriate investigation shall be conducted by the EDR Coordinator for the employing office in which are employed the person or persons alleged to have violated the complainant's rights pursuant to this Plan, unless that EDR Coordinator is disqualified from serving as counselor under Section 4 of this Chapter, or is otherwise unavailable. In such instances, the chief judge of the court in which are employed the person(s) alleged to have violated the complainant's rights under this Plan shall designate another qualified individual to perform the counseling function.

If the dispute involves an alleged violation of this Plan by a judicial officer, the counselor shall be a judicial officer designated by the chief judge.

2. **Counseling Purposes and Procedure**

A. Purposes -- The purposes of the counseling shall be to discuss the employee's concerns and elicit information regarding the matter which the employee believes constitutes a violation; to advise the employee of his or her rights and responsibilities and the procedures of the court applicable to the employment dispute resolution process; to evaluate the matter after appropriate investigation; and to assist the employee in achieving an early resolution of the matter, if possible.

B. Procedures --The EDR Coordinator shall review the Request for Counseling to ensure that it is properly filed within the scope and time limits of this rule. If it is not properly filed, the EDR Coordinator shall promptly inform the employee and shall attempt to direct the employee to the correct avenue of redress for his/her concerns. If the Request has been properly filed, the counselor shall gather information as appropriate, including meeting with the employee who has filed the request and with other persons involved.

The counselor shall attempt to assist in achieving an early resolution of the matter. If the matter resolves, the counselor shall reduce to writing any settlement achieved

during the counseling process and secure the signatures of the employee, his or her representative, if any, and the member of the employing office who is authorized to enter into settlement on the employing office's behalf. If the matter does not resolve, the counselor shall prepare a summary report of his or her findings of fact in the matter, for the use of a mediator or judicial reviewing officer if the complaint should go forward.

D. Duration of counseling period - The period for counseling shall normally not be longer than 30 days beginning on the date that the request for counseling is received by the EDR Coordinator (or, in the case of an alleged violation of this Plan by a judicial officer, beginning on the date the request for counseling is received by the judicial officer designated by the chief judge to perform the counseling). The counseling period may be extended to a date certain upon agreement of the employee and the counselor. Notice of any such extensions shall be filed with the EDR coordinator for the office in which the person(s) complained about are employed, if that EDR coordinator is not the counselor. Counseling shall be deemed concluded when the counselor and employee agree that it should be concluded, or 30 days from the date that the request for counseling was originally submitted, if that time has not been extended by prior agreement of the counselor and employee as provided for above.

E. Conclusion of the counseling period and notice - The EDR Coordinator or judicial officer who performed the counseling and investigation shall notify the employee in writing that counseling has concluded. As part of the notice, the counselor shall inform the employee of the right and obligation, should the employee choose to pursue his or her claim, to file with the EDR Coordinator of the office in which is employed the person(s) the complainant believes has violated his or her rights under this Plan, a request for mediation in accordance with Section 6 of this Chapter. A copy of the approved form for filing a request for mediation shall be included with this notice.(A copy of the approved form is included as Appendix 2.).

§ 6 Mediation

A. Initiation - Within 15 days after receipt by the employee of the notice of the conclusion of the counseling period, the employee may file a request for mediation with the EDR Coordinator of the employing office in which is employed the person(s) the complainant believes has violated his or her rights under this Plan. The request must be made in writing, using the form sent to the employee pursuant to Section 5(E) above, and must state only the claim(s) presented in the original Request for Counseling. Failure timely to pursue mediation will preclude further processing of the employee's claim under any other provisions of this Chapter.

B. Procedures -

- 1. Designation of mediator** - As soon as possible after receiving the request for mediation, if the request for mediation does not allege that a judicial officer has violated rights protected by this Plan, the EDR Coordinator shall contact the district court's Director of ADR or the Bankruptcy Court Administrative Manager, depending on which court is the employer of the person(s) the complainant alleges

has violated his or her rights under this Plan, to designate a mediator. Within ten business days, the Director of ADR or the Administrative Manager shall provide the complainant and the EDR Coordinator with written notice that a mediator has been designated. The EDR Coordinator shall provide the mediator with copies of the employee's Request for Counseling and Request for Mediation, as well as a copy of the summary statement prepared by the counselor pursuant to 2(B) above. The EDR Coordinator shall provide the parties with the summary factual report prepared pursuant to Section 2(B). "The parties" shall be the complainant and his or her representative, if any, and the unit executive of the employing office against which the claim was made, or his or her designee, which may not include the EDR Coordinator who performed the counseling.

If the request for mediation alleges that a judicial officer has violated rights protected by this Plan, the mediator shall be a judicial officer designated by the chief judge.

2. **Who may serve as mediator** - If the request for mediation does not allege that a judicial officer has violated rights protected by this Plan, the Director of ADR shall select a mediator from among those trained as part of the District Court's ADR program. The Bankruptcy Court Administrative Manager shall select a mediator who is an active member of that court's panel. Mediators shall serve at no cost to the complainant.
3. **Mediation Procedures** - The mediator shall set a date or dates for the mediation. The Mediator may meet separately and/or jointly with the employee and his or her representative, if any, and with an authorized representative or representatives of the employing office to discuss alternatives for resolving a dispute, including any and all possibilities of reaching a voluntary, mutually satisfactory resolution.
4. **Confidentiality** - The mediator and any other persons attending the mediation shall treat as confidential all written and oral communications made in connection with or during any mediation session. All such communications shall be extended the protection afforded by FREvid 408 and FRCivP 68. In addition, unless otherwise stipulated by all parties and the mediator, it shall be prohibited to disclose any written or oral communication made by any party, mediator or other participant in connection with or during any mediation to anyone not involved in the attempt to resolve the claims brought by the complainant.

The mediator may ask the parties and all persons attending the mediation to sign a confidentiality agreement on the form provided in Appendix 3.

5. **Form of settlement** - The mediator shall insure that any settlement achieved during the mediation process is reduced to writing, and secure the signature of the employee, his or her representative, if any, and the member of the employing office who is authorized to enter into settlement on the employing office's behalf.

- C. **Duration of mediation period** - The mediation period shall normally not be longer than 45 days, beginning on the date the request for mediation is received. The mediation period may

be extended to a date certain upon agreement of the mediator and the parties. The mediator shall give the EDR coordinator notice of any such extensions. The parties are required to attend at least one mediation session. Thereafter, the complainant or the mediator may serve written notice on the EDR coordinator and the parties that mediation is concluded, and indicate whether or not the matter or matters that form the basis for mediation have been resolved.

D. Conclusion of mediation period and notice - If, at the end of the mediation period, the parties have not resolved the matter that forms the basis of the request for mediation, the EDR Coordinator shall provide the employee and the employee's representative, if any, with written notice that the mediation period has concluded. The notice shall also inform the employee of his or her right to file a complaint under Section 7 of this Chapter.

§ 7 Complaint, review and hearing

A. Complaint-Not later than 15 days after receiving written notice of the end of the mediation period, unless time is extended by the Chief Judge of the court where the person(s) the complainant believes has violated his or her rights under this Plan are employed, pursuant to Section 2(D) of this plan, the employee alleging a violation of the EDR Plan who has participated in counseling and mediation may file a complaint. The complaint must be in the form approved by the court (see approved form in Appendix 4), and must be filed with the chief judge of the court of the employing office which is the respondent to the complaint. The respondent in all complaints shall be the employing office which would be responsible for redressing, correcting or abating the violation(s) alleged in the complaint. No individual shall be named as a respondent in the complaint.

B. Review of complaint pleadings

- 1. Reviewing official** - The complaint and any other documents shall be reviewed by the chief judge of the court, or by another judicial officer of the court designated by the chief judge. In the event the chief judge is unavailable to serve under this subsection or has disqualified or recused himself or herself pursuant to § 4 of this Chapter, the chief judge will designate another judicial officer to serve as the reviewing official.
- 2. Review procedures** - After notice to the complainant and an opportunity to respond, the chief judge or designated judicial officer may dismiss in writing any complaint that is found to be frivolous, unduly repetitive of a previous complaint, that fails to state a claim upon which relief may be granted, or that makes claims that were not advanced in the original request for counseling.

C. Hearing procedures

- 1. Hearing officer** - If the chief judge or designated judicial officer does not dismiss the complaint under the preceding subsection, the chief judge or designated judicial officer, acting as the hearing officer, shall hold a hearing on the merits of the complaint unless he or she determines that no material factual dispute exists.

- 2. Specific provisions** - The presiding judicial officer may provide for such discovery and investigation as is necessary. In general, the presiding judicial officer shall determine the time, place, and manner of conducting the hearing, including the extent, if any, to which the Federal Rules of Evidence shall apply. However, the following specific provisions shall apply to hearings conducted under this Section:
- a.** the hearing shall be commenced no later than 60 days after the filing of the complaint, unless time is extended pursuant to Section 2(D) of this plan;
 - b.** the complainant and the head of the office against which the complaint has been filed must receive written notice of the hearing; such notice shall also be provided to the individual alleged to have violated rights protected by this Plan;
 - c.** at the hearing, the complainant will have the rights to representation, to present evidence on his or her behalf, and to cross-examine adverse witnesses; the employing office will have the rights to present evidence on its behalf and to cross-examine adverse witnesses provided, however, that the presiding judicial officer may exclude evidence if its probative value is outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence;
 - d.** a verbatim record of the hearing must be kept and shall be the sole official record of the proceeding;
 - e.** in reaching his or her decision, the chief judge or designated judicial officer shall be guided by judicial and administrative decisions under the laws related to Chapters II through VII of this Plan and by decisions of the judicial council of the appropriate circuit under Section 8 of this Chapter;
 - f.** remedies may be provided in accordance with Section 9 of this Chapter where the hearing officer finds that the complainant has established by a preponderance of the evidence that a substantive right protected by this Plan has been violated;
 - g.** the final decision of the chief judge or designated judicial officer must be issued in writing not later than 30 days after the conclusion of the hearing, unless time is extended pursuant to Section 2(D) of this plan; and
 - h.** all parties, or any aggrieved individual, shall have the right to written notice of any action taken as a result of a hearing.

§ 8 Review of decision - A party or individual aggrieved by a final decision of the chief judge or designated judicial officer, or by a summary dismissal of the complaint, may petition for review of that decision. Such review must be requested in writing to the Judicial Council of the Ninth

Circuit no later than 30 days following the date of the final decision of the chief judge or the designated judicial officer or following the date of a summary dismissal of the complaint. Any review will be conducted by the members of the Executive Committee of the Ninth Circuit Judicial Council or their designees. The decision of the Executive Committee shall be based on the record created by the hearing officer, and the decision of the chief judge or designated judicial officer or summary dismissal shall be affirmed if supported by substantial evidence.

§ 9 Remedies

- A.** Where judicial officers acting pursuant to section 7 or 8 of this Plan find that a substantive right protected by this Plan has been violated, they may order a necessary and appropriate remedy. A remedy may be directed at correcting a past violation, prospectively insuring compliance with the rights protected by this Plan, or both. A remedy shall be tailored as closely as possible to the specific violation involved.
- B.** Remedies which may be provided to successful complainants under this Plan include, but are not limited to:
1. placement of an employee in a position previously denied;
 2. placement in a comparable alternative position;
 3. reinstatement to a position from which previously removed;
 4. prospective promotion to a position;
 5. priority consideration for a future promotion or position;
 6. back pay and associated benefits, including attorney's fees, where the statutory criteria of the Back Pay Act, 5 U.S.C. § 5596, are satisfied;
 7. records modification and/or expungement;
 8. "equitable" relief, such as temporary stays of adverse actions;
 9. granting of family and medical leave; and
 10. accommodation of disabilities through the purchase of specialized equipment or the restructuring of duties and work hours.
- C.** Remedies which are *not* legally available include:
1. payment of attorney's fees (except as authorized under the Back Pay Act);
 2. compensatory damages; and
 3. punitive damages.

§ 10 Record of final decisions - The conclusion of the reviewing panel in any final decisions reached in accordance with the provisions of §8 of this Chapter shall be made available to the public from the Office of the Circuit Executive upon written request. Only in the event the panel determines that all or portions of the entire decision should be made public shall additional portions of the decision be made available to the public. The reviewing panel, in the interests of justice and of fairness to the parties, may determine not to make available to the public the conclusion of any final decision if public disclosure would compromise the integrity or legitimate confidentiality of the parties or the court, or to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense, or for any other reason that the administration of justice may require.

§11 Annual Report-The EDR Coordinator for each employing office will prepare an annual report for the fiscal year, indicating:

1. The number and type of alleged violations for which counseling was conducted.
2. The number and type of alleged violations for which mediation was conducted.
3. The number and type of complaints filed;
4. The number and type of hearings conducted;
5. The number and type of final decisions rendered reflecting the number for which some relief was granted.
6. With respect to all the data supplied in items 1 through 6 above, the allegations or complaints shall be reported according to the Chapter(s) of the EDR Plan involved and, with respect to allegations or complaints under Chapter II, according to the type(s) of discrimination alleged.