PART 1: INTRODUCTION

I. WELCOME AND COURSE INTRODUCTION

II. TRAINING OBJECTIVES

The Objectives of this training are for Albuquerque Operations Office employees to:

- Understand the basics of Equal Employment Opportunity (EEO) laws and procedures;
- Review Latest Developments in such areas as racial profiling, EEO harassment, disability, affirmative action and religion;
- Identify any real or perceived barriers to inclusion within the workforce; and to Answer your questions about EEO.

WHAT ARE YOUR EEO ISSUES?

Purpose: To determine the EEO issues, problems, and concerns which employees have experienced or wish to discuss.

Direction: Discuss in smaller groups your reaction to Secretary Richardson's talk on racial profiling and also any EEO issues and problems you have encountered or are interested in knowing more about. Also discuss the following: (1) Have you observed anything here at the Albuquerque Operations Office concerning racial profiling or racial stereotyping of any sort? (2) Are there written or unwritten rules here at the Albuquerque Operations Office that permit, or fail to discourage, racial profiling or racial stereotyping of any sort? (3) Do employees in general (and you in particular) feel included at the Albuquerque Operations Office? (4) What can be done to break down any barriers to inclusion? What are your specific recommendations? Record the group's reactions and concerns. Choose a spokesperson to present your group's list.

Bases of Discrimination in Federal Employment

1. **Race**
2. **Color**
3. **Religion**
4. **Sex**
5. **National Origin**
6. **Age**
7. **Physical or Mental Disability**
8. **Equal Pay**
9. **Retaliation**
   - *** Participation**
   - *** Opposition**

[10. Sexual Orientation]

Part 2: The EEO Laws

I. The Laws

A. The Four EEO Laws

1. Title VII of the Civil Rights Act of 1964, as Amended

This is the key federal employment discrimination law, which created the Equal Employment Opportunity Commission (EEOC) and banned discrimination in many areas (such as employment, education, and public accommodations). The EEOC has the authority to administer the Act and to regulate the processing of federal sector complaints

1. Title VII prohibits employment discrimination based upon **race, color, sex** (to include sexual harassment and pregnancy), **religion,** or **national origin.** The discrimination may occur in hiring, promotion, discharge, compensation, terms, conditions and privileges of employment, or in classifying, limiting or segregating employees or job applicants. The Act also prohibits retaliation against those who: (1) Oppose discrimination; or (2) Participate in the EEO process. The Act applies to individual and class complaints of discrimination.

2. The **remedies** available may include back pay, attorney fees and equitable relief such as non-discriminatory placement (hire, reinstatement, promotion, transfer or reassignment) and posting requirements. There is a right to a jury trial and a right to compensatory damages for intentional discrimination. Punitive damages can not be awarded against a federal agency.

3. Administrative remedies must be exhausted before an action can be filed in court. The administrative process is normally begun by a complainant contacting an EEO counselor within an agency for informal counseling within **45 days** after the effective date of the employment action in question or, in the case of a personnel action, within 45 days of the effective date of the action. The administrative complaint, as well as the court complaint, is filed against the head of the agency (and not against an individual supervisor).

2. The Rehabilitation Act of 1973

1. The Rehabilitation Act of 1973, prohibits discrimination against individuals with disabilities. This section requires the federal government to not only treat persons with disabilities fairly but to **affirmatively accommodate** any disability. Remedies may include back pay, attorney fees and equitable relief such as non-discriminatory placement and posting. There is now a right to a jury trial and compensatory damages for intentional discrimination under the Rehabilitation Act.

2. Just as with Title VII, the administrative process must be exhausted before filing a lawsuit. That process is initiated by contacting an EEO counselor for informal counseling within **45 days** and then, after the conclusion of EEO counseling, filing a formal charge of discrimination.

3. The Age Discrimination in Employment Act of 1967

The Age Discrimination in Employment Act of 1967, as amended in 1978 (ADEA), prohibits discrimination in employment against individuals who are at least **40** years of age. With respect to federal employees, there is no upper age limit except for a few safety-related occupations, such as police and air traffic controllers. It is also unlawful to discriminate on the basis of age between two individuals both of whom are within the protected age group (40 years old or older). The administrative process may be is initiated by contacting an EEO counselor for informal counseling within **45 days** and then, after the conclusion of EEO counseling, filing a formal charge of discrimination. It is also possible to go directly to court (and to avoid the administrative process) in an age (or Equal Pay Act) case.

4. The Equal Pay Act

This law prohibits sex based wage discrimination. To establish an Equal Pay Act violation a complainant must show that she or he received less pay than an individual of the opposite sex for substantially equal work, requiring equal skill, effort, and responsibility, under similar working conditions within the same establishment. A complainant need not prove intent to discriminate.

To avoid liability an agency must show that the pay differential is justified under one of four exceptions: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production of work; or (4) a differential based on any other factor than sex. *See* 29 C.F.R. §1614.409.

B. Two Family Leave Laws (and an Executive Order)

1. The Family and Medical Leave Act of 1993

Under Title II of the Act federal employees with at least one year of federal service, are entitled, during any 12-month period, to a total of 12 administrative workweeks of job-protected, **unpaid leave** under one or more of the following circumstances:

(1) The birth of the employee's child;

(2) The placement of a child with the employee for adoption or foster care;

(3) When the employee is needed to care for a child, spouse or parent with a serious health condition, and

(4) When the employee is unable to perform the functions of her or his position because of a serious health condition.

"Parent" is defined as biological, adoptive, foster, stepparent or legal guardian. "Serious health condition" is one that involves inpatient care or continuing treatment by a health care provider. It is intended to cover pregnancy (e.g. serious morning sickness), childbirth and stress (e.g. an employee with a heart condition takes time off due to work related stress) but does not cover short term conditions for which treatment and recovery are very brief.

An employee must ordinarily provide 30 days advance notice when the leave is "foreseeable." In an emergency the employee must tell their supervisor as soon as possible. An agency may require an employee to provide medical documentation.

2. On April 12, 1997, President Clinton signed an **Executive Order** expanding family and medical leave for employees of the federal government. He used his executive powers to allow federal workers **an extra 24 hours of leave without pay** each year for school conferences and family members' doctor or dental appointments.

3. The Federal Employees Family Friendly Leave Act of 1994

Under this law, all covered full-time employees can use a total of up to **40 hours of sick leave each year for family care or bereavement purposes.** In addition, a covered full-time employee who maintains a balance of at least 80 hours of sick leave will be able to use an additional 64 hours of sick leave per year for these purposes, bringing the total amount of sick leave available for family care and bereavement purposes to **a maximum of 104 hours per year** for employees who satisfy this condition. President Clinton, by Executive Order, recently extended the total amount of sick leave available for family care and bereavement purposes under this law to **a maximum of 12 weeks per year.**

The law does not address the use of advanced sick leave.

A "family member" is defined as:

1. A spouse (and parents of spouses); 2. Parents;

3. Children, including adopted children and the spouses of children;

4. Brothers and sisters and their spouses;

5. Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.

Sick leave can be used:

1. To provide care or otherwise attend to a family member having an illness, injury or other condition which, if an employee had such condition, would justify the use of sick leave by the employee (such as physical or mental illness, injury, pregnancy, childbirth, or medical, dental, or optical examination or treatment); and

2. To make arrangements necessitated by the death of a family member or to attend the funeral of a family member.

Part time employees or employees with an uncommon tour of duty may use, as a maximum, the amount of sick leave earned within a year. This applies to employees who work a seasonal tour of duty, or less than a full-time schedule.

A supervisor may ask an employee to document her need to care for family members.

Part 3: The Theories

I. The Theories

A. Title VII of the Civil Rights Act

1. Disparate Treatment Theory

Disparate treatment is the most common of Title VII theories of discrimination. Proof of discriminatory motive is critical. The usual disparate treatment case is an individual case and the focus is on the employer's motivation for the action taken and the key factor becomes the reason for a manager or supervisor's employment decision. The employee attempts to prove intentional bias and the employer contends that its actions were based on a legitimate non-discriminatory reason. The employee always has the burden of proof to prove liability in disparate treatment cases.

Employees can prove discrimination by introducing **direct evidence** of a discriminatory motive. For example, in a sex discrimination case, a complainant could introduce evidence that the selecting supervisor stated that "women just cannot work in this warehouse, the work is too strenuous and it would be disruptive to have a woman working here." An example of direct evidence in an age discrimination case would be a selecting manager who told the 59 year old complainant "I would really like to hire you but, to be honest, this outfit needs some young blood." However, in most disparate treatment cases there is no direct evidence of discrimination.

A complainant can also win her case by using **indirect**, or circumstantial evidence.

Most disparate treatment cases involve the following three-step process. Note that at no point in this indirect method is there direct evidence (such as a supervisor saying "OK, OK, I did not select her because of her sex").

a. Raising an Inference of discrimination, the first step.

To prove discrimination an employee must first raise an inference that the action being complained about was discriminatory.

A key Supreme Court case illustrates how an employee can raise the inference that the employment decision was based upon a discriminatory motive. Remember that this is only a first step and that it is often relatively easy.

In *McDonnell Douglas Corp. v. Green,* the complainant, an African-American mechanic previously laid off by his employer, responded to the employer's advertisement for mechanics. The employer rejected the complainant on the claimed ground of prior participation in a "stall in" at the workplace. The mechanic positions remained open after the complainant's rejection and the employer continued to seek mechanics to fill the position. The complainant alleged discrimination in his non-selection based upon his race and his prior civil rights activities.

To raise an inference of discrimination (to establish a *prima facie* case in court), the Supreme Court required Mr. Green to show: (1) that he belonged to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications he was rejected; and (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. The purpose of requiring Mr. Green to meet these standards was to demonstrate that the rejection did not result from the two most common legitimate reasons on which an employer might rely, that is, an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons creates an **inference** that the decision was a discriminatory one.

- **"Reverse Discrimination"** - An inference of discrimination arises when an employer passes over a qualified minority for a promotion to a position for which he is qualified. This is not so for white persons because race discrimination against whites (reverse discrimination) is relatively uncommon.

To raise an inference of race discrimination in a promotion case a white person must show "background circumstances that support the suspicion that the defendant is that unusual employer who discriminates against the majority."

To do this requires a showing that: (1) the employer has some reason or inclination to discriminate against whites; or (2) evidence that there is something "fishy" about the facts of the case at hand. A showing that a white person was better qualified for the position than the minority applicant who was selected indicates that there is something "fishy" and raises an inference of reverse discrimination.

b. Legitimate Non Discriminatory Reason, the second step

Once the employee raises an inference of discrimination the employer must articulate a **"legitimate non discriminatory reason"** for the adverse action in order to rebut the inference of discrimination. At this point the reason that a supervisor made her decision becomes the focus of the case. "Why was Susan selected and not John (John says that the reason for his non selection is because of his sex)?"

Note that the burden of proof is always on the employee.

Non discriminatory reasons, of course, vary with the case but include such things as lesser comparative qualifications, attitude problems, personal differences with a supervisor or other employees, lack of diligence, budgetary constraints, and instances of misconduct.

c. Pretext, the third step

If the employer successfully presents a legitimate, non discriminatory reason for the action in question, the employee may still prevail by proving that the employer's articulated reason is shown to be untrue, that it is a **pretext** for discrimination.

If the employee proves pretext then a finding of liability is permissible, although an employee must still prove that the employer intended to discriminate.

• **Comparative evidence** must be sought in every case alleging disparity in treatment on a basis protected by a law enforced by the EEOC. The key question is whether the comparators are **similarly situated** with respect to the complainant. In general, similarly situated means that the persons who are being compared are so situated that it is reasonable to expect that they would receive the same treatment in the context of a particular employment decision.

In a precedential decision the EEOC held that:

"In order for comparative employees to be considered similarly situated, all relevant aspects of (a complainant's) employment situation must be nearly identical to those of the comparative employees." In order to be similarly situated the EEOC has, in varying cases, required that comparative employees must: 1) have come under the same manager's supervision; 2) have performed the same job function; 3) have been disciplined during roughly the same time period; 4) have been subject to the same standards governing discipline; and 5) must have engaged in conduct similar to complainant's without differentiating or mitigating circumstances that would distinguish their misconduct or the appropriate discipline for it." This is a fairly strict standard. For example, an employee in Monterey, California cannot use another employee in Ohio, in the same Agency, with a different supervisor, as a comparator.

2. Accommodation Theory/Religious Discrimination

a. Federal managers are required to accommodate the religious practice of employees and prospective employees unless to do so would create an undue hardship on the conduct of the employer's business. The duty to accommodate is an **affirmative obligation**.

For example, if a newly religious Sabbath observer requests a change in shift so that he does not have to work on Saturdays, a manager must consider accommodation. The manager is not required to violate the terms of an applicable collective bargaining agreement or spend more than a minimal amount of money but could (to the extent that it would be consistent with the collective bargaining agreement) circulate a memo asking for volunteers to switch days with the religious employee.

b. Initially, the plaintiff must raise an inference of discrimination (establish a *prima facie* case). A common way to do so in the context of religious accommodation is for the complainant to prove that:(1) she has a bona fide religious belief that conflicts with an employment requirement; (2) she informed the employer of this belief; and (3) she was disciplined or treated adversely for failure to comply with the conflicting employment requirement.

c. The burden then shifts to the employer to prove that it made a good faith effort to accommodate the employee's or applicant's religious beliefs and if such efforts were unsuccessful, to demonstrate it was unable reasonably to accommodate the beliefs "without undue hardship."

The duty to accommodate an employee in the area of religion is less than the accommodation obligation in the area of disability.

3. Retaliation Theory

It is unlawful to discriminate against an individual who has **"opposed"** a prohibited practice, filed a charge, testified or **"participated"** in an investigation, proceeding or litigation under federal sector EEO laws.

In determining whether a supervisor has a retaliatory motive for an adverse action against an employee Courts examine:

(1) How the employee was treated compared to other, similarly situated employees who were not involved in the EEO process;

(2) A comparison of how the employee was treated before and after involvement in the EEO process, including whether the employee was subjected to greater scrutiny; and

(3) The closeness in time between the employer's knowledge of the employee's EEO participation or opposition and an adverse action.

4. Disparate Impact Theory

Employment decisions are unlawful if they are based upon neutral criteria that result in a significantly lower rate of selection of members of a protected class, unless the use of the criteria is justified by business necessity. The employer has to prove that there is an essential, business reason for a neutral barrier that disproportionately excludes minorities and/or women.

For example, the Supreme Court found disparate impact discrimination in a landmark case in the 1960's in which a facially neutral high school degree requirement for a laborer position disproportionately excluded blacks (at that time in North Carolina 30% of blacks had high school degrees, while 70% of whites had high school degrees) and there was no showing that the high school degree criteria was an essential requirement for the position.

Weight lifting (such as a strength requirement to be a firefighter) and height requirements (such as a minimum height requirement to be a police officer) and employment tests that are used to screen applicants have all been attacked as neutral barriers under the disparate impact theory which does not require proof of intent to discriminate.

5. National Origin Discrimination

a. "Speak English only" rules

The EEOC's National Origin Discrimination Guidelines state that, as the primary language of an individual is often an essential national origin characteristic, the EEOC will presume that a rule that requires them to speak-English-only at all times in the workplace violates Title VII.

The EEOC's regulations state that an employer may have a rule that requires employees to speak only in English at certain times where the employer can show that the rule is justified by business necessity because this rule is also presumed to have a disparate impact based upon national origin.

b. Foreign accent

"Denying employment opportunities as a result of a foreign accent which causes communication difficulties may be a cover for unlawful discrimination, and will accordingly be subject to **close scrutiny,**" and an adverse employment decision may be predicated upon an employee's foreign accent (an accent other than English) "only where it **interferes materially with job performance,**" which requires an analysis of:

(1) **Communication demands** (The level and type of communication demands on the job);

(2) **An intelligibility assessment** (Whether the individual's speech was fairly evaluated from the perspective of a non-prejudiced listener); and

(3) **Potential interference** (The potential difficulties presented by the individual's speech intelligibility, including how individuals with whom the individual interacted in the workplace could make provision for any difficulties in understanding the employee and whether, as individuals became more familiar with the accent, listener understanding would increase).

Disparate Treatment, Disparate Impact or Accommodation ?

1. A male employee's requests a meeting and then tells his Branch Chief that his immediate supervisor does not afford him the same training afforded to female employees.

2. A female employee asserts that she has been singled out by her male employees for abusive treatment. She alleges that they make demeaning comments about her appearance and make false criticisms about her work.

3. Martin Miller says that he is an alcoholic. It is Friday afternoon and he has asked his supervisor for time off to attend an in-patient treatment program for 30 days. Martin wants to "get on a plane tomorrow" to fly to Los Angeles to enter a well-known treatment center for alcohol abuse. Martin has a very important project pending that must be completed one week from today.

Part 4: Disability Discrimination

The Important Questions

- Does The Employee Have A Disability?
- Does The Agency Know Or Have Reason To Know Of The Disability?
- Is The Employee A Qualified Employee With A Disability?
- Has The Employee Articulated A Reasonable Accommodation?
- Have the Employee and the Employer Engaged in an Interactive Process to Find a Reasonable Accommodation?
- Would An Accommodation Impose An Undue Hardship On The Agency's Operation?

I. Claims of Disability Discrimination

A. Note the need to be careful in our use of terminology. Use "disability" not "handicap." The derivation of the word "handicap" is from old England where individuals with disabilities were viewed as begging with their "cap in hand." In 1992 Congress passed a federal law that requires the substitution of the term "individuals with disabilities" for "handicap."

B. Under the Rehabilitation Act of 1973, all Federal departments and agencies in the Executive Branch must: **(1) not discriminate against an individual with a disability** (such as not hiring someone as a receptionist because of their facial disfigurement or their being in a wheelchair); and also **(2) make reasonable accommodation to qualified individuals with disabilities** unless to do so would create an undue hardship. The reasonable accommodation obligation is more than just fair or evenhanded treatment. It is an affirmative obligation to accommodate.

C. To demonstrate that he is **entitled to coverage by the Rehabilitation Act**, an employee must show the following:

1. He is a person with a disability:

EEOC regulations define a person with a disability as one who:

(1) Has a physical or mental impairment that substantially limits one or more of such person's major life activities;

(2) Has a record of such an impairment; or

(3) Is regarded as having such an impairment.

- A person is not a person with a disability if he has minor disabilities or temporary conditions. (E.g., a back which occasionally acts up, a broken arm, a normal pregnancy, etc.).

- It is the employee's obligation, in most instances, to submit sufficient medical evidence to establish the disability. Normally, medical opinion letters that are conclusory and brief are insufficient.

2. He is a "qualified person with a disability."

A qualified person with a disability (QPD) is defined as a person with a disability:

a. Who satisfies the requisite skill, experience, education and other job-related requirements of the employment position which such individual holds or desires; and

b. 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.

For example, a woman with dwarfism who applies for a job on an assembly line is a QPD because there is an accommodation (the provision of a stool or platform for her to stand on while working) that would enable her to safely perform the essential aspects of the job of an assembly line worker.

3. The disability caused the misconduct or performance problem, if the contested employment decision involves misconduct or performance. For example, it is difficult to see any connection between a leg disability and a removal for inability to type, or between a sight impairment and removal for theft.

4. He has articulated (expressed) a "reasonable accommodation" (e.g., elimination of lifting requirement, reassignment to another job etc.,) under which the employee believes he can perform the essential duties of his position. This articulation requirement involves a minimal showing since such information is generally regarded as more within the knowledge of the employer. Nonetheless, the strong recent trend is to emphasize that it is **an interactive process** and the employee must cooperate.

5. The agency has knowledge of the condition that gives rise to the disability: An agency has an obligation to accommodate only a disability that it knows about or should know about.

D. Reasonable Accommodation.

Assuming that the employee demonstrates that he is entitled to coverage, the agency **must reasonably accommodate** the employee **unless** it can show that the accommodation would impose an "undue hardship" on the operation of its program.

- An Agency must make reasonable accommodation to the known physical or mental limitations of an applicant or employee who is a qualified individual with a disability unless the Agency can demonstrate that the accommodation would impose an undue hardship on the operations of its program.

- The agency's **affirmative obligation** of **reasonable accommodation** requires an agency to "level the playing field," to consider and then provide a reasonable accommodation unless it would be an undue hardship. Reasonable accommodation does not require that an individual with a disability who applies for a position be given a job. The requirement is for the agency to provide an accommodation that would enable the individual with a disability to compete for the job. In the example above of the woman with dwarfism who applied for a job on an assembly line, the accommodation of a platform enables her to compete and then her qualifications are compared with those of other applicants and a selection is made based upon the qualifications of the applicants.

1. What is Reasonable Accommodation?

Reasonable accommodation is any modification or adjustment to a job, an employment practice, or the work environment, or the way things are usually done, that makes it possible for an individual with a disability to enjoy equal employment opportunity in being able to attain the same level of performance or to enjoy benefits and privileges of employment as are available to an average similarly-situated employee without a disability.

The law requires reasonable accommodation in three aspects of employment.

a. The application process

Reasonable accommodation must be considered in the job application process to enable a qualified applicant to have an equal opportunity to be considered for a job.

• EEOC Examples[1]

(1) A person in a wheelchair may need an accommodation if an employment office or interview site is not accessible. (2) A person with a visual disability or a person who lacks manual dexterity may need assistance in filling out an application form.

b. Accommodation to perform the essential aspects of a job

Reasonable accommodation must be provided to enable a qualified applicant to perform the essential functions of the job she is seeking, and to enable a qualified employee with a disability to perform the essential functions of a job currently held.

c. Accommodation to ensure equal benefits of employment

Reasonable accommodation must be provided to enable an employee with a disability to enjoy benefits and privileges of employment equal to those enjoyed by similarly situated non disabled employees.

• EEOC Example

Employees with disabilities must have equal access to lunchrooms, employee lounges, rest rooms, meeting rooms, and other employer-provided or sponsored services such as health programs, transportation and social events.

[1]"EEOC Examples" in the text are derived from the policy guidance the EEOC has issued interpreting the Americans With Disabilities Act (ADA), such as the EEOC's ADA Technical Assistance Manual, an excellent reference.

- An employee must be able to perform the essential aspects of her job, with or without an accommodation.

- An agency is not required to create a job as an accommodation.

- If there is more than one possible accommodation then the agency (not the employee) chooses which accommodation will be provided.

- Providing a reasonable accommodation is an interactive process, between the agency and the employee, who must cooperate with the agency.

2. Basic Principles of Reasonable Accommodation

(1) A Reasonable Accommodation must always take into consideration two unique factors:

(i) The specific abilities and functional limitations of a particular applicant or employee with a disability; and

(ii) The specific functional requirements of a particular job.

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(2) A Reasonable Accommodation must be effective.

(3) The Reasonable Accommodation obligation applies only to accommodations that reduce barriers to employment related to a person's disability.

(4) A Reasonable Accommodation need not be the best accommodation available as long as it is effective.

(5) An employer is not required to provide an accommodation that is primarily for personal use.

(6) An employer may provide accommodations beyond those required by the Rehabilitation Act.

(7) An employer is only obligated to provide an accommodation to the known limitations of an otherwise qualified individual with a disability.

(8) An employer may request documentation of the need for an accommodation

(9) Reasonable accommodation is prospective

3. Examples of Reasonable Accommodation

- Job restructuring by reallocating or redistributing marginal job functions.
- Part-time or modified work schedules.
- Giving the individual time off from work.
- Providing the individual with a modified work schedule.
- Altering when or how an essential job function is performed.
- Acquiring or modifying equipment or devices.
- Physical changes to the workplace.
- A job coach.
- Allowing an employee to provide equipment or devices that an employer is not required to provide.
- Adjusting supervising methods (such as adjusting the level or structure of supervision).
- Adjusting or modifying employment ("paper and pencil") tests, training materials or policies.

- Providing qualified readers or interpreters.
- Making facilities readily accessible to and usable by individuals with disabilities.
- Permitting use of accrued paid leave or unpaid leave for necessary treatment.
- Providing reserved parking for a person with a mobility impairment.
- Permitting an individual with a disability the opportunity to provide and utilize equipment, aids or services that an employer is not required to provide as an accommodation.
- Reassigning employees to "equivalent" vacant positions.

4. Technical Assistance

a. The Job Accommodation Network 800-526-7234

The Job Accommodation Network (JAN) is a free consulting service which provides information and advice to employers and people with disabilities on custom job and worksite accommodations. JAN will suggest possible accommodations and even provide local vendors of specialized equipment.

b. GSA's Center for Information Technology Accommodation

Another free source of information and assistance is GSA's Center for Information Technology Accommodation (tel. 202-501-4906). The Center provides information on the use of technology to accommodate individuals with disabilities, including the use of computers in the workplace. The Center has pioneered effective technology-based business practices that insure inclusion and full participation in the workplace by individuals with disabilities, and also worker retraining, aging, illiteracy, office ergonomics, and high demand, non-traditional information environments. The Center's office in Washington, D.C. has voice activated computers, computers that can read aloud, ergonomically designed keyboards and screens that respond to the gaze of an eye.

5. Job Accommodation Ideas

The following is from a fact sheet issued by the Job Accommodation Network (JAN) of the President's Committee on Employment of People With Disabilities. The fact sheet is based upon information in JAN's data bank.

a. The Cost of Reasonable Accommodation

31% of Accommodations cost nothing.

50% of Accommodations cost less than $50.00.

69% of Accommodations cost less than $500.00.

88% of Accommodations cost less than $1,000.00.

b. Reasonable Accommodation Problems and Solutions

The cost of the solution is in parenthesis.

Problem: A person had an eye disorder. Glare on a computer screen caused fatigue.

Solution: An anti-glare screen was purchased. ($39.00)

Problem: A person with a learning disability worked in the mail room and had difficulty remembering which streets belonged to which zip codes.

Solution: A rolodex card system was filed by street name alphabetically with the zip code. This helped him to increase his output. ($150.00)

Problem: A plant worker had difficulty using the telephone due to a hearing impairment that required use of hearing aids. It was suggested that he take a lower paying job that does not require telephone use.

Solution: A telephone amplifier that worked in conjunction with his hearing aids was purchased. He kept the same job. ($48.00)

E. As to undue hardship, an agency could show, for example, that eliminating a weight lifting requirement from a job imposes undue hardship because it needs employees to be able to handle all functions of the job and elimination would have a serious impact on the efficiency of its operation. Likewise, an agency could refuse to hire an individual for a specific arduous position if accommodation would require hiring a full time physician to care for the individual and require providing on site medical facilities not normally available.

By regulation, the factors that should be considered by the agency in determining whether accommodation would impose an undue hardship include :

(1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget;

(2) The type of agency operation, including the composition and structure of the agency's work force;

(3) The nature and the cost of the accommodation.

An undue hardship is an action that requires "Significant difficulty or expense" in relation to the size of the employer, the resources available and the nature of the operation. The decision as to whether an accommodation would be an undue hardship must be made on a case-by-case basis.

The concept of undue hardship includes any action that is:

- Unduly costly;
- Extensive;
- Substantial;
- Disruptive; or
- That would fundamentally alter the nature or operation of the business.

1. "Undue hardship" is defined as an action requiring significant difficulty or expense, when considered in light of such factors as:

a. The nature and the cost of the accommodation;

b. The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

c. The overall financial resources of the employer; the overall size of the business of a covered entity with respect to the number of its employees; the number, type and location of its facilities; and

d. The type of operation or operations of the employer, including the composition, structure and functions of the workforce of the employer; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the employer's work force. Also a factor is the impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

- An employer is not required to provide a reasonable accommodation if it would impose an undue hardship on the operation of the business. However, if a particular accommodation would impose an undue hardship, the employer **must consider whether there are alternative accommodations** that would not impose an undue hardship.

F. Exclusions. Certain claims are **excluded** from coverage. Homosexuality and bisexuality are not impairments and as such are not covered disabilities. The enumerated exclusions include transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, sexual behavior disorders, gender identity disorders not resulting from physical impairments, compulsive gambling, pyromania, kleptomania, psychoactive substance use disorders resulting from current illegal drug use, and current illegal drug use.

G. Claims of Drug and Alcohol Disability Discrimination

1. In General

• An individual who is currently engaging in the illegal use of drugs is not an "individual with a disability" under the Rehabilitation Act or the ADA when the employer acts on the basis of such current illegal drug use. 29 C.F.R. §1614.203(h); ADA §510.

The illegal use of drugs means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substance Act. This includes the use of illegal drugs and the illegal use of prescription drugs that are "controlled substances."

• EEOC Example

Amphetamines can be legally proscribed drugs. However, amphetamines, by law, are "controlled substances" because of their abuse and potential for abuse. If a person takes amphetamines without a prescription that person is taking drugs illegally.

• **What does "current" drug use mean?** It means that the illegal use of drugs occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an ongoing problem. It is not limited to the day of use, or recent days or weeks, in terms of an employment action, and this must be determined on a case-by-case basis.

An applicant or employee who tests positive for the illegal use of drugs cannot immediately enter a drug rehabilitation program and then avoid the possibility of discipline or termination by claiming that she is now in rehabilitation and is no longer" currently" using drugs.

• An employer may prohibit the illegal use of drugs and the use of alcohol at the workplace.

• Employees may be required to follow the Drug-Free Workplace Act of 1988 and rules set by Federal agencies pertaining to drug and alcohol use in the workplace.

• It is not a violation of the ADA for an employer to give tests for the illegal use of drugs.

• **Employees who use drugs or alcohol may be required to meet the same standards of performance and conduct that are set for other employees.**

2. Individuals Who Are Protected

The "current illegal drug user" exclusion from Rehabilitation Act and ADA coverage **does not exclude** an individual who:

1. Has successfully completed a supervised drug rehabilitation program (or has otherwise been rehabilitated successfully) and is no longer engaging in illegal drug use;

2. Is participating in a supervised drug rehabilitation program and is no longer engaging in illegal drug use; or

3. Is erroneously regarded as engaging in the use of illegal drugs but is not engaging in such use. However, if an employer did not regard the individual as an addict, but simply as a social user of illegal, drugs, the individual would not be "regarded as" an individual with a disability and would not be protected by the ADA.

• Persons addicted to drugs, but who are no longer using drugs illegally and are receiving treatment for drug addiction or who have been rehabilitated successfully, are protected from the ADA from discrimination based upon **past drug addiction.**

An employer may not discriminate against a drug addict who is not currently using drugs and who has been rehabilitated, because of a history of drug addiction.

• The exclusion from the definition of "disability" of an individual currently engaging in the illegal use of drugs when an employer acts on the basis of such use does not apply to an individual who has a **record** of illegal use of drugs but no longer uses drugs illegally or who is **erroneously regarded** as engaging in such use.

• However, a person who casually used drugs illegally in the past, but who did not become addicted, is not an individual with a disability based upon that past drug use. In order for a person to be "substantially limited" because of drug use she must be addicted to the drug.

3. Alcoholism

• A person who is an alcoholic is an "individual with a disability" under the Rehabilitation Act and the ADA.

• An agency must consider reasonable accommodation for an employee who has an **alcoholism** disability (such as time off to attend treatment for alcoholism).

• Generally, an employee who is an alcoholic, to make out a facial showing that he is a qualified person with a disability, must show that he was able to perform the essential functions of his position prior to the events that triggered his removal (or other disciplinary action). In addition, the employee must show that there are plausible reasons to believe that the disability of alcoholism can be accommodated. The agency would then have to show that it could not reasonably accommodate the disability. *Thomas v. Brown,* EEOC No. 03920144 (11-23-93).

• An employer may discipline, discharge or deny employment to an alcoholic whose use of alcohol impairs job performance or conduct to the extent that she or he is not a "qualified individual with a disability.

4. Casual Drug and Alcohol Use

A recreational or occasional user of drugs or alcohol does not meet the definition of an individual with a disability. In order to prove that dependence on drugs or alcohol is a disability an employee must prove that he had lost the ability to control his behavior and was more than just a person who occasionally misused drugs or alcohol.

5. Direct Threat in Alcoholism and Drug Cases

An employer may fire or refuse to hire an individual with a history of alcoholism or illegal drug use if it can demonstrate that the individual poses a **"direct threat"** to health or safety because of the high probability that he or she would return to the illegal drug use or alcohol abuse.

The employer must be able to demonstrate that such use would result in the high probability of substantial harm to the individual or others which could not be reduced or eliminated with a reasonable accommodation, which, in such cases, could be to require periodic drug or alcohol tests, to modify job duties, or to require increased supervision.

An employer must make an individualized determination and cannot prove a "high probability" of substantial harm simply by referring to statistics indicating the likelihood that addicts or alcoholics in general have a specific probability of suffering a relapse.

I. AIDS/HIV and Infectious Diseases

An individual with AIDS and/or who is HIV positive (has the virus that causes AIDS) is most likely an individual with a disability. The U. S. Supreme Court, in the *Abbott* case, stated that a woman of child bearing age who is HIV positive, without any of the symptoms of AIDS, is an individual with a disability because of a substantial limitation on reproduction, which was found to be a major life activity. **A person with an infectious disease is not an "otherwise qualified individual with a disability" if he "poses a significant risk of communicating an infectious disease to others in the workplace."** Whether a person with an infectious disease is otherwise qualified requires an individualized inquiry into the nature, duration and severity of the risk, as well as the probabilities the disease will be transmitted and will cause varying degrees of harm.

For example, a medical technician with AIDS whose job was to assist with surgery in a hospital was not "otherwise qualified" and his termination was upheld. A school teacher or a clerk would, in all likelihood be "otherwise qualified" and their termination for having AIDS would likely be reversed by the courts as a violation of the Rehabilitation Act .

J. Severe Hearing Impairments

The EEOC, in a precedential case in 1995 (*Feris v. EPA),* held that: "For a severely hearing impaired employee who can sign, reasonable accommodation, at a minimum, **requires providing an interpreter** for safety talks, discussions on work procedures, policies or assignments, and for every disciplinary action so that the employee can understand what is occurring at any and every crucial time in his or her employment career, **"whether or not she asks for an interpreter."**

Ms. Feris, who is deaf, worked at EPA headquarters. The EEOC found that the failure of EPA to provide a full time sign-language interpreter at critical times, such as important staff meetings and training sessions was disability discrimination.

K. Misconduct Cases

- An agency does not have to excuse an employee's misconduct as a form of reasonable accommodation where the **misconduct** would result in discipline or discharge if committed by another employee. The agency can hold a person with a disability to the **same standards of conduct** as a person who is not disabled.

- The agency can also hold a person with a disability to the **same standards of performance** as a person who is not disabled.

Disability Discrimination Exercise

1. Maria Garcia works as a secretary. She has always been marginal in her performance that she ascribes, in part, to the difficulty she has typing because of an arthritic condition. Her arthritis has gotten worse and she now has great difficulty in using her computer as a word processor. She has recently missed deadlines that were set on some important projects. She has suggested that someone else do the typing (it is an essential aspect of the job) and she has let her supervisor know that she is well aware of the protections of federal discrimination law. What should her supervisor do?

Part 5: A Closer Look At EEO Harassment Claims

Considerations in an EEO Harassment Complaint

- Did the conduct occur?
- Was the conduct because of a person's sex, race, color, national origin, age religion or disability?
- Was the conduct unwelcome?
- Did the conduct create a hostile environment ?
- Was the employer on notice of the conduct?
- Did the employer take prompt and appropriate corrective action?

- 44% of all women and 19% of all men surveyed reported that they experienced some form of sexual harassment.
- Relatively few victims take formal action (grievances, complaints, etc.).
- The most effective informal action is telling the harasser to stop.
- The least effective informal action is ignoring the harasser.

I. The Definition Of Harassment

"Harassment" is conduct which has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

Harassment based on **sex, race, color, national origin or religion** is a violation of the Civil Rights Act of 1964.

Sex-based harassment is a form of sex discrimination.

Sexual harassment, which is unwelcome conduct of a sexual nature, is one kind of sex-based harassment and it is a form of sex discrimination.

Harassment based on **disability** is a violation of the Rehabilitation Act. **Age** based harassment is a violation of the Age Discrimination in Employment Act. Harassment based upon **sexual orientation** is a violation of a recent Executive Order and a Directive from the Secretary of the Department of Energy (see page 56, below).

II. EEO Based Harassment - What Should I Do?

- What should an employee do if he or she believes that he/she has been sexually harassed (or harassed on any other EEO basis) at work, such as by a co-worker, a supervisor, a member of the public, or anyone else?

An employee should clearly communicate to the harasser and: (1) identify the unwelcomed behavior; (2) state that the conduct is offensive and not welcome; and (3) tell the harasser that he or she wants the person to stop it.

More simply, give the harasser the 1, 2, 3 and tell him or her:

1. **"This is what you are doing."**
2. **"It is offensive and unacceptable to me."**
3. **"Stop it (and if you don't stop it I will raise your behavior with a supervisor)."**

However, an employee does not have to do so. For example, there may be situations where this is too intimidating.

An Albuquerque Operations Office employee can:

1. Immediately tell their immediate supervisor (or any other supervisor or manager that the employee feels comfortable with) about the specific incident or incidents considered to be sexual harassment. **Employees are encouraged to bring any and every instance of harassment on any basis**, such as race, age, gender (which includes sexual harassment), national origin, sexual orientation, disability, religion or color, **to the attention of a supervisor or manager** and should be assured that the allegation will be dealt with quickly and, to the greatest extent possible, confidentially; **and/or**

2. Seek help from the local EEO Office (Yolanda Scarito is the EEO and Diversity Manager, at 505-845-6021. Debbie Allison is the Deputy EEO and Diversity Manager, at 505-845-6021. T. C. Ponce is the EEO/Diversity Specialist, at 505-845-4479. You will get an immediate response.); **and/or**

3. Initiate a complaint through the Equal Employment Opportunity complaint system (by contacting the EEO Office within 45 days of the alleged sexual or other EEO based harassment to initiate an EEO complaint).

When an employee asks for help in informally resolving an EEO harassment problem then every effort will be made to do so and to respect the privacy of everyone involved, to the extent that this is possible.

Individuals will only be informed about the problem to the extent that it is required by any investigation and strictly on a "need to know" basis.

- Employees are expected to support co-workers who have experienced or observed sexual harassment in their efforts to eliminate this behavior.

- The Nevada Operations Office will not tolerate any form of **reprisal** against anyone for initiating an EEO based harassment complaint or for cooperating in the investigation of an EEO based harassment complaint.

If an employee believes that he or she has been subject to such reprisal then the employee should immediately contact:

(1) The EEO Office; or

2. An immediate supervisor or any other manager or supervisor that the employee is comfortable with.

The employee may also seek help or initiate a complaint, as outlined in this section, above.

[Note: If an employee wants to initiate an EEO complaint based upon an allegation of sexual or other EEO based harassment then the employee must contact an EEO Counselor within **45 days** of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within **45 days** of the date of the action.

The time to contact an EEO Counselor will usually not be extended because the matter was brought to the attention of a supervisor or any other management official.]

III. Understanding EEO Based Harassment

A. Evaluating evidence as to whether the conduct occurred

1. **Corroborative evidence** is particularly important. Therefore, an agency that receives a complaint must inquire of other supervisors, managers and employees. At the same time, in fairness to the alleged harasser and complainant, these inquiries should be as confidential as possible and should avoid suggesting that the harassment actually occurred.

2. The **work context** must be considered. Did the alleged harassment occur in an area where you would expect few witnesses or did it occur in a busy open office setting? If the latter, one would expect witnesses and, if there are none, this might weaken any EEO-based harassment claim.

3. The **detail** provided by the complainant about the alleged conduct must be considered. Claims that are general, conclusory and not specific normally should be accorded less weight.

4. The **timing** of the complaint must be considered. The complainant should be asked to explain any delays in filing the complaint.

5. If there are no first hand witnesses to an alleged event, there may be second level witnesses who can provide important information. These include witnesses:

a. Who may be able to establish the alleged victim's demeanor immediately following the incidents.

b. To whom the complainant spoke about the incidents.

c. Who can testify about any changes in the alleged victim's behavior (i.e., before the conduct began compared to after the conduct).

d. Such as other employees, who have had similar problems with the alleged harasser.

B. When is conduct related to an EEO basis (such as sex)?

1. A "**reasonable person**" standard is applied, not that of an overly sensitive person.

C. Evaluating evidence as to whether the conduct was unwelcome

1. Again, it is important to look at the **timing** of the complaint. Did the employee timely file a complaint and if not why not?

2. It is also important to determine whether the alleged victim had an **opportunity to leave** the unit and get away from the alleged harasser. Was transfer a prospect? In one case the employee's claim failed because she had several concrete opportunities for a transfer which were passed up.

3. While it is important not to blame the victim, it is sometimes relevant to consider, if raised, **whether the alleged victim welcomed the conduct.**

- Evidence that the victim actively participated in the conduct that she later challenged would probably block an EEO-based harassment claim because, by actively participating, the "victim" communicated that the conduct was welcome.

D. Evaluating evidence as to whether a work environment is hostile

In order to prove hostile environment harassment, an employee has to show that the harassment is sufficient "to alter the conditions of the... employment and create an abusive environment." The conduct does not have to cause a tangible psychological injury. An abusive environment can "detract from the victims job performance, discourage employees from remaining on the job or keep them from advancing in their careers."

Even without such tangible effects, an environment can be hostile and in the end, each case depends on unique circumstances, including the frequency of the conduct, its severity, whether it is physically threatening or humiliating or a merely offensive utterance and whether it unreasonably interferes with the work performance. *Harris v. Forklift Systems, Inc.,* 114 Sup. Ct. 367 (1993).

1. The **factors** that should be considered include:

   a. Whether the conduct was verbal or physical or both.

   b. How frequently it was repeated.

   c. Was the alleged harasser a co-worker or a supervisor. (Supervisors are held to a higher standard)

   d. Was more than one individual involved in the harassment.

   e. Was the harassment directed at more than one individual.

2. The viewpoint must be one of a **reasonable person**, that is, would the conduct substantially affect the work environment of a reasonable person.

3. Unless it is quite severe, a single incident will not suffice. The circumstances in which a single incident has been sufficient are few.

4. Nothing tangible about the individual's job need be affected.

A victim of hostile environment EEO harassment does not have to show that he or she was fired, threatened, given a bad evaluation, or otherwise penalized as a result of the harassment. The focus here is on the intangible work atmosphere, and if that atmosphere is made intimidating, hostile or offensive -- so that a reasonable employee wouldn't want to come to work because of the harassment -- then unlawful hostile environment will be found.

E. Liability of an Employer for EEO Based Harassment

On June 26, 1998, the Supreme Court issued two decisions that clarified employer liability for sexual harassment by a supervisor. On June 18, 1999, the EEOC issued important guidance on employer liability issues addressed in the two Supreme Court cases. Guidance from the two cases (*Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*) and the EEOC's interpretation of the state of the law is incorporated into this section.

Important Note: - Although this section addresses sexual harassment, the Supreme Court's vicarious liability rules also apply to harassment by supervisors on other EEO bases, such as race, color, religion, sex (*i.e.*, gender), protected activity (*i.e.*, retaliation), age or disability.

1. For Sexual Harassment by Co-Workers

An employer is liable for hostile environment sexual harassment if it knew or should have known of the harassment, unless it can show that it took immediate and appropriate corrective action.

2. For Sexual Harassment by Supervisors

An individual qualifies as an employee's "supervisor" if:

- The individual has authority to undertake or recommend tangible employment decisions affecting the employee; *or*

- The individual has authority to direct the employee's daily work activities.

An employer still may have vicarious liability for harassment by a supervisor who does not have actual authority over the employee if the “employee reasonably believed that the harasser had such power".

a. In **“quid pro quo”** type sexual harassment, an employer will be held responsible for a supervisor's sexually harassing actions if a supervisor takes a "tangible employment action" against an employee based upon the employee's refusal to submit to the supervisor's sexual demands.

A "tangible employment action" constitutes a significant change in employment status, such as hiring, firing, failure to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

Note that no affirmative defense is available when the supervisor's harassment culminates in a tangible employment action.

b. In **hostile environment** cases, an employer will sometimes be held responsible for a supervisor's sexually harassing actions. The Supreme Court provided a possible affirmative defense to employers.

This is the standard set forth by the Supreme Court.

"An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.

When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.

The defense comprises two necessary elements:

(1) That the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and

(2) That the (complaining) employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

The Exercise of Reasonable Care by an Employer

Generally, to prove the "exercise of reasonable care" an employer must prove that it:

(i) Established, disseminated, and enforced an anti-harassment policy and complaint procedure; and

(ii) Took other reasonable steps to prevent and correct harassment.

The Exercise of Reasonable Care by an Employee

A complaint by the employee does not automatically demonstrate reasonable care. Thus, if a complaint provided inadequate or untruthful information or if the employee failed to cooperate in an investigation, the employer might still establish the affirmative defense.

Summary - What the Albuquerque Operations Office Must Do

It is important that the Albuquerque Operations Office:

1. Have in place a strong, explicit, widely disseminated, and consistently enforced employer policy against sexual harassment (in the absence of an explicit Sexual Harassment Policy employee can reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management);

2. Have in place an effective complaint procedure with a reasonably available avenue by which victims of sexual harassment could complain to someone with authority to investigate and remedy the problem;

3. Clearly and consistently communicate the policy and procedure concerning sexual harassment to all employees;

4. Promptly act by investigating sexual harassment complaints (with the extent and manner of the investigation consistent with the seriousness of the complaint and the level within the employer's workforce of the alleged harasser) and, if the investigation substantiates the allegation of sexual harassment, then taking prompt and effective remedial action (which is discussed in section F., below).

F. Did the employer take prompt and effective remedial action after learning of the harassment?

In a hostile environment case, an employer can defend successfully by showing that it took prompt and effective remedial action.

Generally, "prompt and effective remedial action" involves:

1. **Promptly investigate any complaint;**
2. **Discipline the offender;**
3. **Make the victim “whole;”**
4. **Take measures to prevent the conduct from recurring;**
5. **Remind employees that EEO based harassment will not be tolerated;**
6. **Monitor the continued interactions within the workforce; and**
7. **In appropriate circumstances, separate the harasser and the person being harassed.**

G. Harassment by non-employees

An employer is responsible for providing a work atmosphere that is free of sexual harassment. For non-employees (such as contractors, contract employees, tourists, customers, or employees of other federal or state entities) an employer must take immediate action and correct the situation to the extent that the employer has control of the harassing party.

For example, a visitor to the Albuquerque Operations Office who sexually harasses an employee can be expelled or, in a case of sexual assault, subject to being arrested. If a Contractor (such as a plumber or electrician) sexually harasses an employee:

(1) The employee should immediately inform the harasser that his or her conduct is unacceptable;

(2) The employee should immediately inform an Albuquerque Operations Office supervisor, the EEO or the Human Resources Office; and then

(3) The Contractor's supervisor should be immediately contacted by an appropriate contracting officer or manager.

Case Example

A company had hired an outside consultant to conduct a mandatory safety meeting. At the meeting, the instructor used foul language and made a series of sexually offensive references, including a description of the sexual experiences of linemen at a Nevada brothel. Ms. Trent was the only woman present at the lecture. After unsuccessfully complaining to her boss (when she said that she was "not one of the boys" her supervisor said that she was "for some purposes"), the company fired Ms. Trent. She then filed a lawsuit claiming that the company had retaliated against her for opposing a practice made unlawful by federal law. The company had argued that she was complaining about the practice of an outside consultant, not her employer, and she therefore was not protesting an "an unlawful employment practice" under federal law. The Court disagreed, finding that the contractor was not a "private individual" since the employer had hired the contractor to train its employees, a function often carried out by company supervisors. The Court found that "protected activity" under federal law includes an employee's protest to her employer of an outside consultant's conduct. *Trent v. Valley Electric Association Inc.,* 41 F. 3d 524 (9th Cir. 1994).

Part 6: Remedies for Discrimination

What Can an Employee Get Who Wins an EEO Complaint?

A Make Whole Remedy, Including:

- Back pay
- Reinstatement, promotion, etc. if appropriate
- Attorney fees and costs
- "Injunctive relief" (e.g., an end to the practice, training for employees, posting, etc.)
- "Compensatory damages" for intentional Title VII (sex, race, color, religion and national origin) and Rehabilitation Act (disability) discrimination [compensatory damages can not be awarded in age discrimination or equal pay cases].

Part 7: Alternative Dispute Resolution

The Albuquerque Operations Office has an active alternative Dispute Resolution Program.

At the Albuquerque Operations Office you can contact:

Yolanda Scarito, the EEO and Diversity Manager, at 505-845-6021;

Debbie Allison, the Deputy EEO and Diversity Manager, at 505-845-6021; or

T. C. Ponce, the EEO/Diversity Specialist, at 505-845-4479.

What follows is an explanation of the different forms of Alternative Dispute Resolution, including mediation.

Alternative Dispute Resolution ("ADR"): ADR refers to a whole range of dispute resolution approaches, other than court or EEOC adjudication, which can assist disputing parties in resolving disagreements. These approaches, which can help avoid costly litigation, include mediation, mini-trials, settlement judges, fact-finding, negotiated rule making and arbitration. The federal government believes that ADR is an important area where an agency can be innovative, responsive and demonstrate leadership in reducing cost and speeding resolution and agencies therefore are developing procedures to utilize ADR in a variety of situations.

A. The Advantages of Using ADR

Traditional approaches to resolving conflicts, such as agency adjudication and courtroom litigation, can be protracted and expensive. In addition, adjudication and litigation often do not succeed in settling the real issues underlying a dispute. Further, in the face of overwhelming demands on the American administrative and judicial systems, the reasoned use of ADR in appropriate matters offers valuable opportunities to resolve disputes quickly and satisfactorily.

B. The Various Techniques

Mediation: Mediation is a process by which a neutral third party assists the disputants to reach a voluntary negotiated settlement of their differences. The parties select the mediator and control the outcome of the mediation. The mediator has no power to impose a settlement, but serves as a facilitator to help the parties come to agreement. The mediator meets with the parties, often both together and separately, to help them reach agreement. Mediation is usually informal, non-adversarial and binding only when the parties reduce the resolution to writing. It is unstructured in that there are no formal rules or procedures.

Med - Arb: A neutral third party attempts to mediate a dispute and if the mediation is unsuccessful, the mediator switches to the role of an arbitrator, conducts a formal arbitration and issues a binding decision.

Early Neutral Evaluation: A Neutral evaluator assesses relative strengths and weaknesses of parties' positions, facilitates settlement (or streamlines case ultimately heard) by clarifying truly disputed areas and identifying collateral or non-essential issues. This process may involve written submissions identifying items requested by the evaluator, i.e., lists supplied by each party of the “top ten critical documents," etc. The Evaluator may also take each party aside and request candid assessments of, for example, costs of litigation through trial or hearing, or amount of damages.

Fact-Finding Conference: An investigation conducted by someone not directly involved in the dispute to determine the facts. The fact-finding conference is primarily an investigative forum intended to further define the issues, determine which elements are undisputed, clarify disputed issues and evidence, and determine what other evidence may be necessary. The Fact-Finder may also assist the parties to achieve a settlement.

Peer Review: As one variation, a Peer Review Panel investigates the EEO complaint and then prepares and submits a report of investigation and a recommended resolution which the Agency and the Complainant then must accept

or reject, providing a written justification if either party does not accept the Peer Review Panel's recommended resolution. If there is no resolution the EEO (or other) complaint continues to be processed.

Dispute Resolution Panels: A multi-member Dispute Resolution Panel or Committee agreed to by the parties. It can be a standing committee or one that is selected for individual cases. Normally, each side makes a short presentation to the committee. This is followed by a discussion among committee members with either a recommendation, if they are able to reach consensus, or an explanation if they are not. The recommendation or explanation is then submitted to the parties. If they accept the recommendation (or agree to otherwise resolve the dispute) that is the end of the matter. If they disagree the EEO (or other) complaint continues to be processed.

Part 8: Affirmative Action

Each Agency must maintain a continuing affirmative program to promot equal opportunity and to identify and eliminate discriminatory practices and policies. This includes Special Emphasis Programs, upward mobility and efforts to expand the pool of applicants through affirmative outreach and recruitment.

Agencies are required to have an Affirmative Action Plan (AAP) in whic the Agency analyzes its workforce and determines whether there is a significan underutilization of minorities and/or women from their expected participation i the workforce. If there is a significant underutilization then an agency must identify and eliminate any barriers that exclude minorities and/or women and affirmatively seek to expand their numbers in the workforce.

An AAP allows an employer to use race or sex as one factor in an employment decision, such as when selecting among relatively equally qualified candidates.

The plan must:

1. Be designed to eliminate a manifest racial imbalance in traditionally segregated job categories and open up opportunities;

2. Be a temporary measure in the sense that it is designed to attain, not maintain, a balance among affected classes; and

3. Not create an absolute bar to the advancement of male or non-minority employees or otherwise trammel their interests.

In analyzing jobs that require no special expertise a comparison of the percentage of minorities or women in the employer's workforce with the percentage in the area labor market or general population is appropriate in determining whether an imbalance exists that would justify taking sex or race i account.

Where a job requires special training, however, the comparison should b with those in the labor force who possess the relevant qualifications.

These criteria were set forth by the U. S. Supreme Court in *Johnson v. Santa Clara,* 480 U.S. 616 (1987).

• Federal agencies are required to conduct a continuing program for the **recruitment** of members of minorities for positions within the agency in a manner designed to eliminate under representation of minorities, with special efforts directed at recruiting in minority communities, in educational institutions and other sources. Recruitment of minority candidates includes the total process by which Federal Agencies locate, identify and assist in the employment of qualified applicants from underrepresented groups for job openings in categories in which under representation has been determined. It is intended to cover processes designed to prepare applicants who have the potential but do not presently meet the valid qualification requirements for job openings through programs of training, work experience or both. Applicable OPM regulations are at 5 C.F.R. Part 720.

• **Special Emphasis Programs** - The federal government and individual agencies have instituted Special Emphasis Programs (SEP's) to enhance opportunities for and participation by minorities, women and people with disabilities in all employment areas. SEP's include: the Federal Women's Program; the Hispanic Emphasis Program; the African-American Emphasis Program; the Asian/Pacific American Emphasis Program; the Individuals With Disabilities Emphasis Program; and the Native American Emphasis Program.

The **mission** of the Special Emphasis Programs include: increasing the representation of the specific group (if it has been determined that the group is underrepresented in the agency's workforce) within the agency; identifying any

discriminatory practices within the agency that effect the specific group and then monitoring the removal of those barriers; assisting the agency to better utilize the skills of individuals within the specific group; and providing a channel of communication for the members of the specific group to express their unique concerns.

Affirmative Action in the Courts

• **A Supreme Court decision** continues to have a significant impact on the area of affirmative action in employment, *Adarand Constructors, Inc. v. Pena,* 115 S. Ct. 2097 (June 12, 1995).

The Department of Justice issued an important **Memorandum** interpreting the *Adarand* decision on February 29, 1996. The memorandum states that:

" What *Adarand* requires is that in order for race or ethnicity to be used as a basis for decision making, an agency must have a demonstrable factual predicate for its actions. That predicate could be the agency's interest in remedying the effects of its past discriminatory practices or the effects of employment practices that unintentionally have excluded minorities, or it could be based on the agency's operational needs. Once this predicate is identified, the agency should consider all reasonable means of increasing minority participation in its workforce without specific reliance on racial criteria. However, if such methods are inadequate to meet the agency's legitimate objectives, consideration can be given to racial and ethnic factors. Under *Adarand* such measures must be flexible and fair -- race can be used as one of a number of factors in evaluating an applicant's credentials, but it cannot be the sole factor, or so outweigh all other considerations that it effectively defines who will receive consideration. The use of race conscious measures also must be limited in duration, lasting no longer than necessary to accomplish the agency's objective. If the use of the classification is intended to be remedial it can be targeted only at those groups against whom discrimination has been shown. Finally, consideration must be given to the kind of employment decision that is at issue and the impact the use of the criteria will have on non minorities to assure that the burden will not fall too heavily on innocent parties."

The Justice Department has conducted a review of federal government programs that provide preferences to minorities and women (one study by the Congressional Research Service identified 160 federal government programs that provide race and gender preferences). This has resulted in the elimination or alteration of 17 federal affirmative action programs.

Part 9: EEO Counseling - An Overview

EEO Counselors Must Perform 6 Duties

1. Inform all involved about the EEO complaint process.

2. Determine the Issue(s) and Basis(es) of the potential complaint.

3. Conduct a Limited Inquiry to:

a. Help in settlement effort; and

b. Determine jurisdictional questions.

4. Settlement Effort.

5. Write up the Agreement or Advise of right to file formal complaint.

6. Write a Report - Required counseling done, Jurisdiction established.

I. Contacting an EEO Counselor

A. A Complainant has **45 days** to contact a Counselor. The exceptions to the 45-day time limit are when an individual shows that he or she:

1. Was not notified of the time limits and was not otherwise aware of them.

2. Did not know and reasonably should not have known that the discriminatory matter or personnel action occurred.

3. Despite due diligence was prevented by circumstances beyond his or her control from timely contacting an EEO Counselor.

or **4.** Other sufficient reasons.

B. Representation and Official Time

1. The complainant and the complainant's representative are entitled to a reasonable amount of official time not just to prepare the complaint but also "to respond to agency and EEOC requests for information."

2. If an employee is represented (and unless otherwise provided by the complainant) all agency official correspondence is with the representative, with copies to the complainant.

3. The complainant must serve all official correspondence on the designated agency representative.

4. The primary responsibility for proceeding with the complaint lies with the complainant, even if represented (e.g., mistakes by the representative are attributed to the complainant).

II. EEO COUNSELING

An EEO Counselor is required to advise complainants, in writing, of their rights and responsibilities. The EEO Counselor has 30 days to complete counseling, with a possible agreed upon extension of up to 60 additional days. The Counselor must not attempt in any way to restrain the aggrieved individual from filing a formal EEO complaint. The heart of the counseling effort is the attempt by the EEO Counselor to help the parties to resolve the dispute.

Part 10: The Functions of Other Agencies and Processes

I. Employees should understand the functions and roles of other agencies and processes besides the EEOC such as the MSPB, OSC, OPM, FLRA and Grievance Arbitration.

II. THE MERIT SYSTEMS PROTECTION BOARD (MSPB)

The MSPB adjudicates appeals of federal employees on such serious adverse actions as a removal, demotion, suspension for 15 or more days, and denial of an application for disability retirement. Some federal employees cannot appeal to the MSPB, including probationary employees, non-appropriated fund activity employees and employees serving under a temporary appointment limited to one year or less. An employee who alleges discrimination on a matter appealable to the MSPB must have the discrimination issue decided by the MSPB (though there is a right to appeal the MSPB decision on the discrimination allegation to the EEOC).

III. FEDERAL LABOR RELATIONS AUTHORITY (FLRA)

The Civil Service Reform Act, (CSRA), which created the FLRA, gave it jurisdiction over labor-management relations and vested in it the authority to supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit; to conduct hearings and resolve complaints of unfair labor practices; and to resolve exceptions to certain arbitration awards.

IV. GRIEVANCE-ARBITRATION

Under the CSRA, if an employee is covered by a collective bargaining agreement which allows the employee to raise allegations of discriminations, the aggrieved employee, at his option, may raise the matter either under the EEO procedures (or the Board in a mixed case) or under the negotiated grievance procedure as an arbitrable matter. (Just as with some other CSRA sections, this election procedure does not apply to Postal Service employees). The employee must elect which course of action he or she wishes to pursue. This is done by timely filing an EEO complaint (or the appeal in a mixed case) or timely filing a grievance in writing under the negotiated grievance procedure. If the employee attempts to do both, he or she is bound by whichever was filed first. See 5 U.S.C. § 7121.

V. OFFICE OF PERSONNEL MANAGEMENT (OPM)

Under the CSRA, the OPM is assigned the lead in the personnel administration area. As such, it issues regulations that flesh out actions such as performance (e.g., 5 C.F.R., Part 432) or discipline (Part 752).

VI. OFFICE OF SPECIAL COUNSEL (OSC)

The Reform Act (and the Whistleblower Protection Act of 1989) authorized OSC to investigate claims of prohibited personnel practices (e.g., whistleblower reprisal) as well as perform other functions not directly related to the topic at hand (e.g., safe channel for whistle blowers, Hatch Act investigations, etc.). Consistent with its prohibited personnel practice (PPP) responsibility, OSC will sometimes intervene in MSPB proceedings, seek disciplinary action against employees who have allegedly committed PPP's, seek stays to protect employees from PPP's, and serve as a first step for employees who want a hearing before the MSPB on certain claims of whistleblower reprisal (i.e., Independent Right of Action or IRA appeals). These authorities and responsibilities will be discussed briefly below.

The OSC's right to intervene in Board proceedings can only be exercised with the appellant's consent. 5 C.F.R. Section 1201.34(b). Disciplinary action against employees who allegedly commit PPP's is sought by OSC by filing a complaint to the full Board, which, under current practice, refers the complaint for hearing to the Board's Administrative Law Judge, who makes a recommended decision to the Board. Since the WPA of 1989, OSC has more frequently used its authority to seek stays of actions pending an investigation. These stay requests are presented to and granted liberally by the full Board or individual members under a generous statutory standard.

The WPA of 1989 also allows an individual to first file a whistleblower reprisal complaint with OSC on a matter not "otherwise appealable". (This is termed an "Independent Right of Action" or "IRA" appeal). Following an OSC decision on the complaint, or absent a decision after 120 days have gone by, the complainant may appeal to the MSPB's regional office, and even request a stay of the agency action as well as a hearing on the appeal. This IRA appeal procedure has vastly expanded the Board's jurisdiction and changed the nature of what is a mixed case.

Part 11: Religion in the Workplace

I. What are the Rules?

A. The Civil Rights Act of 1964, as amended is the key national discrimination law, which created the Equal Employment Opportunity Commission (EEOC) and banned discrimination in many areas, such as employment, education, and public accommodations. Title VII of the Civil Rights Act of 1964 prohibits **employment discrimination** based upon religion, **race, color, sex** (to include sexual harassment and pregnancy), or **national origin.**

The discrimination may occur in hiring, promotion, discharge, compensation, terms, conditions and privileges of employment, or in classifying, limiting or segregating employees or job applicants. The Act also prohibits retaliation against those who: (1) oppose discrimination; or (2) participate in the EEO process. The Act applies to individual and class complaints of discrimination.

1. Federal agencies are required to accommodate all aspects of the religious beliefs, practices and observances of employees and prospective employees unless the agency can prove that to do so would create an undue hardship on the conduct of the agency's business.

Some of the more frequent cases have involved religious practices and work schedules, religious practices and union membership, and religious practices and personal appearance (e.g., wearing uniform, wearing a beard, etc.,).

The duty to accommodate is an affirmative obligation.

Examples of reasonable accommodation include: voluntary schedule swaps or substitutions with other employees, flexible scheduling or changes in job assignments.

Note that the duty to accommodate an employee in the area of religion is not as strong as the accommodation obligation in the area of disability.

2. In most cases whether or not a practice or belief is religious is not at issue.

However, in those cases in which the issue does exist, the Supreme Court has defined religious practice to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.

The Supreme Court has stated that a sincere and meaningful belief that occupies in the life of its possessor a place parallel to that filled by the God of more traditional religions is a protected religious belief.

The test of a covered religious belief is: (1) Is the belief sought to be protected religious in the individual's own scheme of things; and (2) Is the belief sincerely held.

Note that atheist and other unconventional religious beliefs are protected if they are sincerely held.

Individuals who are not members of any recognized religious group, but who sincerely hold meaningful religious beliefs, are covered. Furthermore, the fact that the religious group to which an individual professes to belong may not accept the individual's belief will not determine whether the belief is a religious belief of an employee or prospective employee.

3. Initially, a plaintiff must raise an inference of discrimination (establish a *prima facie* case). A common way to do so in the context of religious accommodation is for the complainant to prove that: (i) she has a bona fide religious belief that conflicts with an employment requirement; (ii) she informed the employer of this belief; and (iii) she was disciplined or treated adversely for failure to comply with the conflicting employment requirement.

The burden of proof then shifts to the employer to prove that it made a good faith effort to accommodate the employee's or applicant's religious beliefs and, if such efforts were unsuccessful, to demonstrate that it was unable reasonably to accommodate the beliefs "without undue hardship."

4. An important issue is the scope of the duty to accommodate and the degree of "undue hardship" required. In *TWA v. Hardison,* 432 U.S. 63 (1977), which involved a job assignment system governed by a union contract, the Supreme Court found: (1) that neither an employer nor a union is obliged to take steps inconsistent with an otherwise valid collective bargaining agreement; (2) that an employer has no obligation to impose an undesirable shift on non religious employees; and (3) that an employer has no obligation to agree to substitute or replacement workers if such an accommodation would require "more than a de minimis (minimal) cost" (in *Hardison* the cost of the regular payment of premium wages to substitutes was held to be an undue hardship). Thus, *Hardison* gave almost complete deference to the seniority provisions in a collective bargaining agreement and established a fairly low cost standard (no more than minimal cost) for an employer to meet to establish "undue hardship."

Nonetheless, the EEOC will determine what constitutes more than a minimal cost with reference to the identifiable cost in relation to the size and operating cost of the employer and the number of individuals who will, in fact, need a particular accommodation.

The EEOC also presumes that the payment of administrative costs necessary for providing an accommodation will not constitute more than a minimal cost. Administrative costs could include those costs involved in the rearranging of schedules and recording substitutions for payroll purposes.

The EEOC, in its regulations at 29 C.F.R. §1605.2(d), has provided guidance on possible accommodations.

(i) Voluntary Substitutions and "Swaps"

Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers and labor organizations

facilitate the securing of a voluntary substitute with substantially similar qualifications.

Examples of methods to facilitate voluntary swaps include:

(1) Publicizing policies regarding accommodation and voluntary substitution;

(2) Promoting an atmosphere in which such substitutions are favorably regarded; and

(3) Providing a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

(ii) Flexible Scheduling

Flexibility could be allowed by providing for: flexible arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting an employee to make up time lost due to the observance of religious practices. [Note that there is a federal law requiring federal agencies to allow their employees "Compensatory Time Off for Religious Observances." 5 U.S.C. §5550a.]

(iii) Lateral Transfer

When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations should consider whether or not it is possible to change the job or to give the employee a lateral transfer.

(iv) Dues for Labor Organizations

Some collective bargaining agreements contain a provision that requires all employees to join the union or to pay the union a sum equivalent to dues. If this conflicts with an individual's religious beliefs or practices then the employee should be accommodated by allowing the employee to donate a sum equivalent o the mandatory dues payment to a charitable organization.

Part 12: Sexual Orientation Discrimination

"Sexual orientation" means homosexuality, bisexuality or heterosexuality, whether the orientation is real or perceived.

The federal EEO laws do not prohibit discrimination because of sexual orientation and the EEOC and the courts will not accept a formal EEO complaint of sexual orientation discrimination.

However, the Secretary of the Department of Energy has issued a directive that proscribes discrimination based upon sexual orientation in the Department of Energy.

This protection against sexual orientation discrimination in employment was recently expanded to all federal agencies when, on May 28, 1998, President Clinton signed an Executive Order that prohibits discrimination based on sexual orientation in the entire federal civilian workforce, by adding sexual orientation to the list of categories for which discrimination is prohibited under Executive Order 11478 (race, color, religion, sex, national, origin, disability and age).

A Department of Energy applicant or employee cannot process a complaint of discrimination or harassment based upon sexual orientation through the existing federal sector EEO process, as Congress has not changed the applicable law.

Department of Energy employees may process sexual orientation discrimination allegations by first contacting an EEO Counselor and then receiving EEO Counseling, the right to file a formal complaint, an investigation and a final decision by the Department of Energy.

However: (1) there is no EEOC administrative hearing on a complaint of sexual orientation discrimination; (2) the decision of the Department of Energy on the sexual orientation complaint is final and there is no further administrative or court review of the complaint; (3) if there is a finding of sexual orientation discrimination the complaining party will not be awarded compensatory damages; and (4) the complaining party is not entitled to receive attorney's fees as part of a make whole remedy.

Part 13: Exercises

1. Dan Wong, Arthur Shakishvily and Pete Carillo are scientists working at the Albuquerque Operations Office on a sensitive project that required all of them to have a high security clearance.

They were having lunch with a co-worker, Steven Sanders, and discussing the sensitive project they were all working on when Steven said, in a joking manner, "Hey, you know, given your backgrounds I better watch what I tell you because I just may be broadcasting to China or Russia or Fidel or all three."

Dan angrily called Steven a "horse's ass" and things went down hill from there, with both employees using abrasive language, until Arthur had to physically intercede to prevent a fight.

You supervise all four employees. Steven demands that you discipline Dan. Dan demands an apology. What will you do?

Later, both Dan and Arthur come into your office and ask you to do something about the "racial profiling" that they believe they are subjected to by their co-workers, higher level managers and security. What will you do?

2. Michelle Sutton was a regional pilot for a small airline. Her uncorrected vision was 20/200 in one eye and 20/400 in the other. With glasses or contact lenses her vision was 20/20 in both eyes. Michelle met the Federal Aviation Administration's (FAA's) standards for vision for pilots and was highly regarded as a pilot by the small airline that employed her. Michelle applied for a job with United Airlines as a global airline pilot. United has higher standards than the FAA and required its global airline pilots to have uncorrected vision of 20/100. Accordingly, United rejected Michelle's application. She filed a law suit alleging discrimination based upon her disability. You are the Jury. Does she have a disability? What is your verdict?

3. a. Lisa was a new supervisor at the Albuquerque Operations Office. She had just begun to supervise a group of employees in a work unit that was having serious morale and production problems. Lisa is White. The employees are African-American, Hispanic, Asian and White. At a meeting of her employees Lisa stated that, the previous evening, she had gone through the desks of the employees and that they were "a shambles" and "no wonder there are so many problems getting work out, your desks are a mess, and the work that you people do reflects that mess. I also removed Ramona's poster of Jesus Christ which was in the reception area, clearly visible to the public." Ramona (the receptionist), a Hispanic employee, immediately filed an EEO lawsuit alleging national origin and religious discrimination.

You are the attorney for the Albuquerque Operations Office. You assert that Lisa's statements, though insensitive, were unusual and inconsistent with the climate of equal employment opportunity for all here at the Albuquerque Operations Office.

You want to introduce evidence to support this, to prove that the Albuquerque Operations Office is a place where the general climate is and has been one in which all individuals are treated with respect in all aspects of employment, including not being harassed and being given equal opportunities at work in such areas as promotions and job assignments. What, if any evidence (witnesses or documents) will you seek to introduce to prove this (in other words, is it true?).

b. Now switch roles. The judge in the case has asked you, as the jury, to use your experience as employees at the Albuquerque Operations Office to answer the following questions and to use your answers as a factor in your verdict:

1. Does the Albuquerque Operations Office exercise reasonable care to prevent and correct promptly any EEO based harassing behavior in the workplace?
2. Has the Albuquerque Operations Office established, widely disseminated, and fairly and consistently enforced an anti-harassment policy?
3. Does the Albuquerque Operations Office have in place an effective complaint procedure with a reasonably available avenue by which victims of EEO based harassment can complain to someone which will result in a thorough, impartial and confidential investigation and then a remedy to the problem?

What is your verdict?