



AFGE

PROUD TO MAKE AMERICA WORK

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

THE EEO Advocate

A Newsletter for Litigators

SPRING 2008

Women's and Fair Practices Departments Launch the Disability Rights Campaign

Federal and District of Columbia employees with disabilities challenge the commitment of agencies to treat them fairly, adhere to laws and regulations, and remove barriers to equal employment opportunities. The number of federal employees with targeted disabilities, remains less than two percent of the total federal workforce. During 1997-2006 the number of employees with targeted disabilities decreased by about 14.75 percent, while the federal government grew by 5.48 percent in employment. In FY 2006, the participation rate of people with targeted disabilities fell to 0.94% of the federal government's total work force, the lowest participation rate in over 20 years. This decline is occurring when the number of workers with disabilities and chronic conditions is expected to grow as the workforce ages and our veterans return home.

AFGE members told the Women's and Fair Practices (WFP) Departments that there is something extremely wrong with the treatment of individuals with disabilities in government workplaces. The WFP Departments embrace their concerns and intend to campaign around the hiring, advancement, and treatment of individuals with disabilities, including our U.S. veterans.

As you may recall, on June 29, 2007, the Women's and Fair Practices Departments met with more than 35 AFGE activists in response to concerns regarding the discriminatory and unfair treatment of AFGE members with targeted disabilities working for the federal and District of Columbia governments.

One of the goals to come out of this meeting was that WFP would develop an AFGE-wide campaign for workers with disabilities. We launched our kickoff of this campaign at the AFGE Legislative Conference held in February 2008 in Washington, DC. We have developed a survey titled *AFGE, Women's and Fair Practices Departments Survey for Workers with Disabilities*, to assist with our grassroots efforts. We ask each member to help us distribute this survey to our membership and the government workforce to get

evidence and information about the specific issues and matters disabled employees face.

The survey can be found on the WFP website at http://wfp.afge.org/2008_2_12_wfpdisabilitycampaign.htm. Please feel free to make copies and distribute it. Please send completed surveys by **June 15, 2008** to eeo@afge.org, fax to 202-639-4112, or mail it to AFGE, WFP, 80 F Street, NW, Washington, DC 20001.

Three Primary Campaign Goals:

- **Education** of the current AFGE members and potential members, congressional and political leaders, agencies, and the American people on the rights, treatment, and employment of individuals with disabilities, including our disabled veterans;
- **Enforcement** of the laws, rules, regulations, executive orders, and collective bargaining agreements relating to individuals with disabilities and the government's role as a model employer; and
- **Equality** in the hiring, advancement, access to facilities, and treatment of disabled veterans and individuals with disabilities, including removal of barriers to equal employment opportunities, and the enactment of laws to eliminate loopholes in existing laws and rules to ensure fair treatment with regard to conditions of employment for employees with disabilities.

Get Active:

- **Raise** awareness about the limited rights and unfair treatment of workers with disabilities.
- **Distribute** WFP's survey to AFGE members. Encourage members and potential members to help by completing the survey.
- **Volunteer** or recruit a Coordinator to help with the Disability Campaign.**

**Contact Caniesha Washington – email address: eeo@afge.org

¹Targeted disabilities are identified as blindness, deafness, partial paralysis, complete paralysis, mental illness, mental retardation, convulsive disorders, distortion of limbs and/or spine and missing extremities.

(Continued on page 2)

Supreme Court Rules “Me, Too” Evidence Admissible in Age Discrimination Claims

In *Sprint/United Mgmt. Co. v. Mendelsohn*, 2008 U.S. LEXIS 2195 (2008), decided on February 26, 2008, the U.S. Supreme Court held that evidence of discrimination by other supervisors may be relevant in an individual Age Discrimination in Employment Act (ADEA) case depending on many factors, including how closely related the evidence is to the plaintiff's circumstances and the overall theory of the case. In this case respondent, Ellen Mendelsohn, claimed that she was terminated from her position at Sprint because of her age, and thus, in violation of the ADEA. At trial, Mendelsohn's attorney attempted to include the testimonies of five of her co-workers regarding the discriminatory nature of Sprint. None of these co-workers were from the same department as Mendelsohn, nor did they have the same supervisors as her. These witnesses were there only to show the pattern of Sprint's bias against older workers. Their testimony would have included statements regarding how they and Sprint employees were terminated and mistreated because of their age.

In response to the potential inclusion of the testimony of these five co-workers, Sprint's counsel argued that they should not be allowed to testify because they were not “similarly situated” with Mendelsohn. The District Court agreed with this assertion and stated that Mendelsohn could only “offer evidence of discrimination against Sprint employees who are similarly situated to her” According to the District Court, “similarly situated employees” required proof that (1) Mendelsohn's supervisor was the decision-maker in any adverse employment action, and (2) temporal proximity (i.e., that the incident occurred within a reasonable period of time close to the incident at issue).

The Court of Appeals reversed the District Court's ruling finding that it had abused its discretion by relying on the definition of “similarly situated” provided in *Aramburu v. Boeing Co.*, 112 F.3d 1398 (10th Cir. 1997). The Court of Appeals then remanded the case for a new trial.

From here, the case was appealed to the United States Supreme Court. In an opinion by Justice Clarence Thomas, the Court held that the Court of Appeals erred by remanding the case for a new trial; the case should have been remanded to the District Court for clarification on its order. Regarding the relevancy of the evidence Mendelsohn was attempting to use, the Court stated that there is no blanket rule that

makes the testimony of the five co-workers inadmissible. “Relevancy is not an inherent characteristic of any item of evidence, but exists only as a relation between an item of evidence and a matter properly provable in the case.” See Advisory Committee's Notes on Fed. R. Evid. 401, 28 U.S.C. App., p. 864.

Whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact-based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case. 2008 U.S. Lexis at 15.

WHAT THIS MEANS:

This decision ultimately reversed the previous idea that testimony from co-workers from different offices and with different supervisors should never be allowed in discrimination cases. Because of the ruling here, courts will no longer be able to arbitrarily exclude evidence from plaintiff's co-workers, especially those with different supervisors. The decision will give complainants a better chance of presenting evidence to help them prevail in all types of discrimination cases, and not just those dealing with age.

WHAT YOU SHOULD DO:

When dealing with cases concerning discrimination, do not leave out testimony from your co-workers who have been subjected to or have witnessed discrimination, just because they are not in your department or do not have the same supervisors as you. The testimony from co-workers is extremely important and may make a difference in whether you prevail in your case.

Supreme Court to Decide Whether Federal Employees Are Protected Against Reprisal for Filing Age Discrimination Claims

On February 19, 2008, the Supreme Court heard oral arguments on a postal worker's claim that the Age Discrimination in Employment Act (ADEA) provides a cause of action for retaliation by federal employers. The postal worker appealed from a First Circuit decision finding that the ADEA does not provide such a cause of action. *Gomez-Perez v. Potter, Postmaster General*, 06-1321.

The ADEA does not state that reprisal is a cause of action for federal employees; however, the Civil Rights Act, which prohibits discrimination on the basis of race, color, religion, sex, and national origin, explicitly provides

(Continued on page 3)

reprisal as a cause of action. The Commission enforces both laws, and analyzes them according to the same general framework. Thus, Counsel for Gomez argued that the discrepancy between the Civil Rights Act reprisal provision and the lack of one in the ADEA is an "irrational distinction." The Commission's position in the past has been consistent with the argument made by Gomez. However, if the Supreme Court overturns the First Circuit's decision, the Commission would be obligated to change its position and not recognize ADEA reprisal as a ground for a claim.

WHAT THIS MEANS:

If the Supreme Court overturns the First Circuit's decision, federal employees who file age discrimination complaints in the EEOC process will continue to be able to allege reprisal if subsequent adverse actions are taken against them. Further, federal employees who file equivalent lawsuits in any U.S. District Court will have this right.

If the Supreme Court affirms the First Circuit's decision, federal employees could lose their right to file age-related reprisal complaints at EEOC. A legislative fix could be necessary.

WHAT YOU SHOULD DO:

At this time, the Commission continues to recognize reprisal claims based on age, so continue to file such claims. However, stay tuned for the Supreme Court's decision.

Don't Fall For the Bait and Switch!

If your agency issues you an EEO Report of Investigation (ROI) in disc format only, demand a printed, bound copy!

The Fair Practices Department has received information from several Local officers who regularly litigate EEO complaints for their members that lately their agencies have been issuing ROIs in disc format. Thus the Locals have been assembling the reports themselves, which costs stacks of paper, ink, and the time to bind the report together.

However, agencies are required to assemble its ROIs in a suitable binder, per EEOC's Management Directive 110:

The complaint file will be assembled in a suitable binder, have a title page (see Appendix M of this Management Directive), and contain all documents pertinent to the complaint.

MD-110, Chapter 6, Part IX, Subpart A. Also note that the ROI must have the following features:

- (1) Case index to documents and exhibits.
 - (2) Tabbed sections for documents, exhibits, and explanatory material.
 - (3) A typed summary of the investigation signed and dated by the investigator and containing a discussion and analysis of the evidence.
- MD-110, Chapter 6, Part IX, Subpart B.

WHAT THIS MEANS:

Agencies are not supposed to merely give you a digital copy of your EEO Report of Investigation.

WHAT YOU SHOULD DO:

If the agency sends you only a disc ROI, accept the disc but ask your agency's Office of Civil Rights – in writing – for a bound copy. However, the 30-day window to file a request for an EEOC hearing is already ticking, so do not delay filing your hearing request! If the agency's delay is significant, and you have to print the ROI before the agency issues you a bound, tabbed copy, you may be able to recover the costs associated with printing the ROI at a later stage in the hearing process.

Tax Consequences of 'Make Whole' Remedy

In a recent decision from the EEOC Office of Federal Operations, the Commission restated its position on the remedies available to employees who win discrimination claims involving back pay awards. *Drennon-Gala v. Department of Justice*, EEOC Petition No. 0420060025 (Dec. 4, 2006).

In *Drennon-Gala v. Department of Justice*, the complainant filed a discrimination claim against the agency alleging that he was removed from his Case Manager position in reprisal for prior EEO activity. At the hearing, the EEOC Administrative Judge (AJ) agreed with the complainant that his termination was motivated by the agency's retaliatory animus.

When employees prevail in discrimination complaints, they are entitled to "make whole" relief. In other words, the agency must put the employee in the position he would have been in, absent the discrimination. In ruling that the agency unlawfully terminated the complainant for discriminatory reasons, the AJ awarded the complainant:

- (1) Reinstatement to the Case Manager position,
- (2) A clean record,
- (3) Back pay with interest, and
- (4) Commensurate salary increases from the date of termination to date of reinstatement. *

(Continued on page 4)

* When reimbursing the complainant for back pay, the agency granted him a “lump sum” monetary amount for all the years he did not receive a salary following his termination.

The agency issued the complainant the full amount of back pay, but because the award was a lump sum, the one-time increase in his income resulted in negative tax consequences. In his petition for enforcement, the complainant alleged that the agency had not granted him “make whole” relief because he incurred a greater tax liability. The complainant alleged that if the agency had not discriminated against him, he would have paid taxes on his yearly salary, which would have been at a lower tax rate compared to the “lump sum” amount that required him to pay a higher tax rate.

In its decision, the Commission agreed with the complainant that due to the tax liability incurred as result of the “lump sum” payment, the agency did not grant him “make whole” relief. In order to put the complainant in the position he would have been in absent the discrimination, the Commission ruled that the agency must be responsible for the increased income tax liability. However, the Commission stated that the complainant bore the burden of proving that he experienced negative tax consequences as result of the “lump sum” award.

WHAT THIS MEANS:

The Commission’s decision in *Drennon-Gala* highlights the many issues concerning remedies that an employee must consider even after winning an EEOC hearing. It shows the full impact of the “make whole” provision of federal anti-discrimination laws.

WHAT YOU SHOULD DO:

Even though tax laws are unrelated to a discrimination complaint, you must be mindful of the negative tax consequences of a legal award and be prepared to assert your right to “make whole” relief by gathering evidence to prove additional liabilities that resulted from an agency’s discriminatory conduct.

When Does the Time to File an EEO Complaint Expire? When Does the Clock Start Ticking?

The answer depends on when you reasonably suspected that you were discriminated against. Generally speaking, the Equal Employment Opportunity Commission (“Commission”) regulations provide that

federal government employees who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must initiate contact with a 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 effective date of the action. 29 CFR 1614.105(a) (1)

The agency or the Commission shall extend the time limits when the individual shows: (1) he was not notified of the time limits and was not otherwise aware of them, (2) he did not know and reasonably should not have known, (3) the discriminatory matter or personnel action occurred, or (4) despite due diligence he was prevented by circumstances beyond his control from contacting the EEO Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission. 29 CFR 1614.105(a) (2)

In layman’s terms the clock does not begin ticking until the complainant suspects discrimination. For example, John Doe applies for a promotion on January 1, 2007. He is notified on February 1, 2007 that he did not get the position. On March 1, 2007, he discovers that Jane Smith received the promotion he applied for. Later on April 1, 2007 he hears that Jane Smith has less experience for the promotion and less education than he does. On May 1, 2007, the union, via a Freedom of Information Act (FOIA) request, obtains Jane’s resume and gives it to John. Based on this scenario, by what date must John have initiated contact with an EEO Counselor?

- (1) February 15, 2007
- (2) March 18, 2007
- (3) April 15, 2007
- (4) May 16, 2007
- (5) June 15, 2007

If you chose 4, give yourself a gold star.

Any federal employee who reasonably suspects that he/she is a victim of illegal discrimination should contact an EEO Counselor within 45 days. The clock does not begin to start until a complainant should reasonably suspect discrimination, but before all the facts that would support a claim of discrimination have become apparent. Answer 5 is not correct because you do not wait until you have the proof to file a complaint; that evidence will be revealed throughout the investigation of the complaint. However, you must file when you have a reasonable suspicion of discrimination. In the scenario above, a reason to suspect discrimination arose when John learned that his qualifications may have been superior to Jane’s qualifications.

EEO Complaint Expiration *cont.*)

WHAT THIS MEANS:

If you have any suspicion that you are being illegally discriminated against, immediately contact the EEO counselor. Information on how to contact an EEO counselor should be available on your Agency's website, in your Agency's Office of Civil Rights or its Office of Human Resources.

or selection criteria that on its face appears to be neutral, but disproportionately excludes or impacts a group of persons because of their race, color, sex, religion, national origin, disability or age and there is either no justified business necessity for such a test or criteria, or there is an alternative that can be used. Although an employer is permitted to administer tests and set certain selection criteria in the hiring and promoting of individuals, the test and/or criteria can not be designed, intended, or used to discriminate.

What's the Difference Between Disparate Treatment and Disparate Impact?

Title VII of the Civil Rights Act prohibits employment discrimination based on race, color, religion, sex and national origin. The Age Discrimination and Employment Act (ADEA) prohibits employment discrimination based on age. The Americans with Disabilities and Rehabilitation Act prohibits employment discrimination based on disability. These laws prohibit both disparate treatment and disparate impact because of membership in one or more of the listed protected groups.

Disparate Treatment is where an employer intentionally discriminates against an individual. Simply stated, it is illegal for an employer to treat an individual differently because of his/her membership in one or more of the protected groups.

Disparate Impact is where an employer uses tests

WHAT DOES THIS MEAN?

It is important to scrutinize and analyze what is taking place when you challenge action you believe is discriminatory.

WHAT SHOULD YOU DO?

Representatives should start by looking for comparables – those who are similarly situated as the complainant, but are treated differently than the complainant because they are OUTSIDE the complainant's protected class – for disparate treatment cases.

Representatives should analyze disparate impact cases by determining

- (1) whether the test or criteria is job related and consistent with a business necessity, and
- (2) if the test or criteria is job related and consistent with a business necessity, is there an equally effective alternative test or criteria available that doesn't disproportionately exclude or impact the protected group?

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What, Where, How, & When?



OVERVIEW CHART OF FEDERAL EMPLOYEE/UNION HEARING RIGHTS

WHAT	WHERE	How	WHEN
Discrimination (A Lost opportunity) based on: <ul style="list-style-type: none"> • Race • Color • Sex, includes: <ul style="list-style-type: none"> * sexual harassment * pregnancy discrimination. • National Origin • Religion • Age • Disability • EEO Reprisal 	Agency EEO Complaint Process /EEOC	EEO Complaint	Contact an agency EEO Counselor within 45 days of the alleged event (45 days from date of lost opportunity until first meeting with Agency's EEO counselor)
Contract violation: <ul style="list-style-type: none"> • EEO violation • any other CBA violation 	Arbitration	Negotiated Grievance Duty of Fair Representation	See Union's Collective Bargaining Agreement
Adverse Action including <ul style="list-style-type: none"> • Removals • Suspension of more than 14 days • Reduction in grade or pay • Furlough without pay of less than or equal to 30 days 	MSPB	MSPB Appeal	30 days to file an appeal
Whistleblowing	MSPB	Individual Right of Action pursuant to statute	65 days from Office of Special Counsel (OSC) investigation closure or 120 days after notice of OSC
Unfair Labor Practice – Management Violations of Unions Right to: Bargain, Represent, and Operate as a Local Union	FLRA	Local Union's Right of Action pursuant to statute	6 months after alleged event

**AFGE MEMBERS
CONTACT YOUR LOCAL AFGE UNION REPRESENTATIVE!**