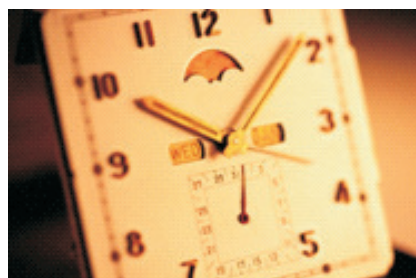


Can an agency employee acting as a representative file an EEO complaint based on retaliation if he or she is denied official time to work on a case?



Unfortunately, the answer is no.

Employees who act as EEO representatives are entitled to a reasonable amount of official time to work on the EEO complaints of the employees they are representing. However, since the right to such time flows from the original complainant, only that individual can challenge the denial of official time for the representative. See *Szluzer v. USPS*, EEOC Appeal No. 0120064782 (2007).

In layman's terms the complainant would have to file a complaint for the agency's denial of official time.

What is a reasonable amount of official time?

- a) Two hours a week
- b) Ten hours a week
- c) 40 hours
- d) Depends

If you chose **D** give yourself a gold star.

"The amount of official time to be afforded to an employee for representational activities will vary with the circumstances." EEOC Management Directive 110, Chapter 06.

"The Commission considers it reasonable for agencies to expect their employees to spend most of their time doing the work for which they are employed. Therefore, an agency may restrict the overall hours of official time afforded to a representative, for both preparation purposes and for attendance at meetings and hearings, to a certain percentage of that representative's duty hours in any given month, quarter, or year." EEOC Management Directive 110, Chapter 06.

What Does This Mean?

"[A] complainant's right to official time [for pursuing EEO complaints] is not an unqualified right. It is restrained by legitimate management considerations, like business necessity.... Thus, what constitutes a reasonable amount of official time must be determined by weighing two factors: the amount of time necessary to process the complaint given the complexity of the complaint; and, the complainant's job responsibilities and the agency's need to utilize the complainant in his job functions." See *Hall v. Department of the Army*, EEOC No. 01842335 (1985).

What Should You Do?

If you or your representative are requesting official time, we recommend that you do so in writing. Your request should include the number of hours you are requesting, when you propose to use those hours and what you will be working on.

Family Friendly Laws and Regulations Governing Federal and D.C. Leave Entitlements

Remember, several types of leave exist for federal and D.C. government employees to care for themselves and their families. Some of them include:

- Sick Leave (General)
- Sick Leave for Personal Medical Needs
- Sick Leave for Family Care and Bereavement (SLFCB)
- Sick Leave to Care for a Family Member with a Serious Health Condition
- Sick Leave for Adoption
- Family and Medical Leave
- Military Family Leave
- Annual Leave
- Donated Leave under the Voluntary Leave Transfer and Leave Bank Programs

The interplay between and among the various laws and regulations can be as helpful as they are complex. Refer to your collective bargaining agreements to assist you and ask your union representative for advice PRIOR to submitting your leave requests.

What Does FMLA Allow?

The Federal Medical Leave Act became effective on August 5, 1993, and has been amended several times. The Act entitles most federal employees to take 12 weeks of job-protected, unpaid leave in any 12-month period for one or more of the following reasons:

- (1) for the birth and care of the newborn child of the employee;
- (2) for placement with the employee of a son or daughter for adoption or foster care;
- (3) to care for an immediate **family member** (spouse, child, or parent) with a serious health condition; **or**
- (4) To take medical leave when the employee is unable to work because of a serious health condition. The **serious health condition** makes the employee unable to perform any one of the **essential functions** of his or her position.

Each of the highlighted terms is defined by the law and OPM regulations.

If you have one or more of the above reasons to take leave AND are an eligible employee, employers are required to grant you unpaid leave.

- You do not have to take 12 consecutive weeks off;
- You may request intermittent leave.

The 2008 amendments to FMLA (the National Defense Authorization Act for FY 2008 (NDAA)) also authorizes Military Caregiver Leave: 26 workweeks of leave during a 12-month period for family members to care for a covered services member who suffers a serious injury or illness on active duty. Qualified family members include the spouse, child, parent, or next of kin of the service member. Note that this leave may only be taken once during a single 12-month period, and that the 26 weeks of leave are a maximum entitlement, so employees couldn't use the 26 weeks and then another 12 weeks in any given year.

District of Columbia FMLA is more comprehensive than the Federal Medical Leave Act and the definition for family member includes "care for in-laws". See http://dchr.dc.gov/dcop/frames.asp?doc=/dcop/lib/dcop/dpm_12_42.pdf

Neither Agency policies nor collective bargaining agreements can take away any of these rights, but they can add to these statutory rights. However, it should be noted, the FMLA states that the provision permitting return to work certifications does not supersede "a valid State or local law or collective bargaining agreement that governs the return to work of employees." 29 U.S.C. § 1614. (See "Returning to Work" rules on page 19).

The WFP's Revised FMLA Manual about your rights under the medical leave and sick and bereavement regulations is available for MEMBERS. Contact the Women's and Fair Practices Department, 202-639-4006 if you have questions.

Negotiations: "An Opportunity, not a Just a Process"

We negotiate for new contractual provisions, we negotiate negative employment actions, and we negotiate settlements for problematic issues. We all know that the EEOC process can be lengthy, and that sometimes it takes months or years before a result can occur through the Administrative Judge. At any time in the EEOC process, the parties can negotiate a settlement.

Sometimes, however, negotiation with the Agency can seem daunting. Here is this monolithic management monstrosity, who has denied you equality, and you're supposed to negotiate with them? In one word, "Yes!"

Of course, there are limits to negotiating. No matter how good of a negotiator you or your union representative is, you are unlikely to receive the statutory maximum in a settlement. The reason for this is the idea of 'incentive.' If you ask for everything you could possibly receive in a hearing, what possible incentive does the Agency have to settle for that amount? They would be far better off at taking their chances at a hearing.

The Agency attorneys no more want to go to a hearing than you, and that goes double for management. The Agency will lose man-hours for both the attorneys and witnesses preparing

for the hearing, not to mention the travel expenses for all of the employee witnesses which are charged to the Agency. While you may see the hearing as a cathartic process that allows you to tell your side of the story, the Agency (and its witnesses) likely see it as an expensive opportunity for the Agency's dirty laundry to be aired in public.

Take all this together, and you have an opportunity! If you put together a reasonable settlement package, the Agency will take a good long look, and likely accept it. Settlement can be cheaper and more rewarding to all parties.

For instance, say that you are sick and tired of working at your current position, but you currently lack certain training to apply for that dream job you want; make that training a potential settlement point. The Agency has an interest in having well-trained employees, and you have an interest in obtaining the training. Creativity may be the difference between a satisfying quick result, or a potentially unsatisfying delayed one.

What Does This Mean?

For a valid settlement agreement, the following should be included:

- Identification of the parties
- "Voluntary clause" stating the parties knowingly AND voluntarily agreed to it
- "Consideration" or something of value or detriment to either or both of the parties

- Statement that the agreement shall be binding on BOTH parties
- Age discrimination claims have special provisions that must comply with the Older Workers Benefits Protection Act
- Breach procedures
- Effective date
- Signatures

What Should You Do?

When drafting an agreement, keep the following in mind:

- Avoid legalese, use plain and unambiguous language, and use the active voice.
- Ensure that the intent of the parties is reflected within the four corners of the document.
- Compensation is taxable, including back pay, compensatory damages, emotional distress/pain and suffering.

Withholding of taxes in the settlement agreement is NOT always required, but you will be responsible to pay the appropriate taxes.

"A complainant may receive back pay as a part of a settlement agreement, even without an agency admission of discrimination." See *Barrington v. Department of Transportation (FAA)*, EEOC Appeal No. 01990183 (May 21, 2002); see also EEO MD-110, Chapter 12 "Settlement Authority."



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AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

THE EEO Advocate

A Newsletter for Litigators

Winter 2010

U.S. Supreme Court Docket of Employment Cases

Kasten v.

Saint-Gobain Performance Plastics Corp
(09-834)

Cert. granted: March 8, 2010.

Issue: Whether the Fair Labor Standards Act's anti-retaliation provision protects an oral complaint. (29 U.S.C. § 215(a) (3))

Case Below: (7th Cir 07/29/2009); rehearing en banc denied [with dissenting opinion] (7th Cir 11/15/2009)

Staub v. Proctor Hospital

(09-400)

Cert. granted: April 19, 2010.

Issue: When will an employer be held liable based on the unlawful intent of officials who caused or influenced the decision, but did not make the ultimate employment decision.

Case Below: (7th Cir 03/25/2009)

Thompson v.

North American Stainless, LP
(09-291)

Issue: Does Title VII, Section 704(a) create a cause of action for third-party retaliation (such as a spouse, family member or fiancé closely associated with the employee) for persons who did not themselves engage in protected activity, and if the third party victim can seek enforcement?

Case Below: (6th Cir en banc 06/05/2009)

Borough of Duryea v. Guarnieri

(09-1476)

Cert. granted: June 29, 2010.

Issue: Whether the First Amendment's Petition Clause protects government employees from retaliation for petitioning on matters of purely private concern.

Case Below: (3rd Cir 02/04/2010)

Wal-Mart Stores v.

Dukes

(10-277)

Cert. granted: December 6, 2010

Issue: Whether a nationwide class action (largest employment class action in history) was properly certified under Federal Rule of Civil Procedure Rule 23(b)(2) and whether claims for monetary relief can be certified under Rule 23(b)(2).

Case Below: (9th Cir 04/26/2010)

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, members and complainants who regularly litigate EEO complaints for their members that lately their agencies have been issuing ROIs in disc format. Thus, the Fair Practices Department, members and complainants 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" See also: MD-110, Chapter 6, Part IX, Subpart A and B. Agencies are not supposed to merely give you a digital copy of your EEO Report of Investigation.

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.