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April 25, 2014

U.S Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

VIA REGULATIONS.GOV

RE: Revised EEO Management Directive 110 (Document ID EEOC-2014-0001-0001)

Dear Madam or Sir:

This letter contains the comments of Kalijarvi, Chuzi, Newman & Fitch, P.C., to the proposed revisions to MD-110. Generally, we are pleased that EEOC is taking the initiative to assure the independence and effectiveness of the federal Civil Rights program. The federal Civil Rights program suffers from inadequate funding and regulatory capture. To many federal agencies treat their Civil Rights office as an extension of management's human resources (HR) function. They expect EEO specialists to do what is best for individual managers, rather than advance the cause of Civil Rights. They want docket control more than they want accountability for those who engage in discrimination and retaliation. Since the No-FEAR Act required federal agencies to track taxpayer dollars paid out for Civil Rights violations, over $1 billion has been spent because federal managers failed to follow the Civil Rights laws. This figure accounts only for the managers who were caught and held accountable. From our extensive experience, we believe that amount of unlawful discrimination and retaliation is several times the amount that is established through final adjudications of EEO claims.

For more than 30 years Kalijarvi, Chuzi, Newman & Fitch, P.C., has helped employers and employees solve their employment law matters. We serve clients from the Washington, D.C., area, as well as from across the nation and around the world. We serve all people, including transgender people. Our Washington, D.C., employment law attorneys are highly skilled and respected. A number of our lawyers have received an AV-Preeminent* rating from Martindale-Hubbell, the highest rating available. We represent both employers and employees in both the federal and private sectors. We handle matters such as counseling, litigation, investigations, employee manuals and training sessions, and employee

claims of discrimination, retaliation, whistleblower and hostile work environments. A large portion of our practice revolves around the highly complex and technical issues related to obtaining and maintaining security clearances for federal employees, contractors and military members.

Our experience leads us to offer the following comments that may be helpful to the Commission in drafting the final revisions to MD-110.

A. Chapter 2: Pre-Complaint Processing

On page 2-12, Section V(C), When the Basis(es) is not Covered by the EEO Regulations, the draft revision helpful states, "Under no circumstances should a counselor attempt to dissuade a person from filing a complaint." This statement needs to be moved to a more prominent location and should not be limited to this particular circumstance. Section I(A) or within III would be appropriate. It should be reiterated under VIII(A).

VIII(C) should address what happens if there is no response from the EEO Counselor. A sentence should be added to say that if the Agency does not respond to the complainant's request for EEO counseling, then the complainant has the right to file a formal complaint after 30 days.

B. Chapter 3: ADR

On page 3-3, the draft revision recognizes the importance of enforcing settlement agreements. Unfortunately, EEOC has limited the remedies available to complainants when an agency breaches an agreement. In *Gray v. Department of the Interior*, EEOC Appeal No. 01A54644 (November 2, 2005), the OFO held that a complainant could seek specific enforcement of a settlement agreement, or reinstatement of the original discrimination complaint, but not both. For specific enforcement, EEOC typically will only require the parties to comply with the original terms of the agreement. In fact, complainants often suffer additional damages upon a breach. In particular, complainants suffer emotional distress, anxiety and loss of professional reputation when agencies fail to follow what they promised to do. "Agreements settling litigation are solemn undertakings, invoking a duty upon the involved lawyers, as officers of the court, to make every reasonable effort to see that the agreed terms are fully and timely carried out." *Aro Corp. v. Allied Witan Co*., 531 F.2d 1368, 1372 (6th Cir. 1976). The cause of Civil Rights will benefit from changing this policy to permit complainants to recover all damages resulting from a breach, including additional compensatory damages.

Agencies are already be liable for attorney's fees incurred upon a breach. EEOC has the power to enforce settlement agreements, including provisions involving attorney's fees. See 64 Fed. Reg. 37,644, 37,659-60 (1999) (codified as 29 C.F.R. §§ 1614.401(d) and 1614.504(b)). It is well established that attorney's fees are available for work performed to enforce a judgment or settlement. *Weisenberger v. Huecker*, 593 F.2d 49, 53-54 (6th Cir. 1979); *Jones v. Giles*, 741 F.2d 245, 250 (9th Cir. 1984); *Doden v. Plainfield Fire Protection Dist.*, 108 F.3d 1379 (7th Cir. 1997); *Shaw v. AAA Engineering & Drafting, Inc.*, 213 F.3d 538, 544-45 (10th Cir. 2000). The attorney fee provision of 42 U.S.C. Section 1988 is concerned with the substance of a prevailing party's action, rather than the form in which it is presented. *Americans United For Separation of Church and State v. School District of City of Grand Rapids*, 835 F.2d 627, 631 (6th Cir. 1987).

On pages 3-3 (¶ 3), 3-4 (¶ C(5)) and 3-20, it may be helpful to remind parties of the new provision on confidentiality clauses enacted as part of the Whistleblower Protection Enhancement Act (WPEA). Section 104 of the WPEA, codified at 5 U.S.C. § 2302(b)(13), requires that every non-disclosure agreement state that:

> These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.

Not only must federal agency agreements include this notice with all non-disclosure agreements, but the contents of the notice must be true. Agencies cannot pressure or discourage employees from making disclosures that are protected by law.

Title VII protects the right of employees to oppose unlawful discrimination, and disclosure itself can constitute such opposition. See, *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 555 U.S. 271, 129 S.Ct. 846, 172 L.Ed.2d 650 (2009).

The public has a right to know about settlements that touch on the public interest. "There is a strong public interest in disclosure." *Cusack v. Bank United of Texas*, 159 F.3d 1040 (7th Cir. 1998). See *Public Courts vesus Private Justice: It's Time to Let Some SunShine in on Alternative Dispute Resolution* by Laurie Kratky Dore (Chicago-Kent Law Review, Vol 81:463 2006).

In settling federal court matters with federal agencies, the Department of Justice has adopted a regulation setting out a general policy against confidentiality clauses. 28 CFR § 50.23. The policy reflects the government's obligation to account to its taxpayers for how their funds are spent. The regulation permits some exceptions, such as in matters involving national security, and in protecting personal information protected by the Privacy Act. However, this policy will not apply in administrative matters involving other federal agencies.

On page 3-6, Section C, it may be helpful to inform agencies that their decision to designate an issue as unavailable to ADR may be used as evidence of the agency's motives. Any issue-based exclusions from ADR should be support by a statute or other legal requirement. Otherwise, it will indicate the agency's lack of commitment to use the available legal authority to settle EEO complaints.

On page 3-7, Section D, the draft revision recognizes that agencies and ADR professionals need to be familiar with "non-EEO issues." This topic often arises when employees are both members of a protected class and whistleblowers. Employers may have policies that protect or even promote the employment of minorities but still have trouble when those minorities act in unexpected ways. Discrimination against a subgroup of a protected minority is just as unlawful as discrimination against the entire class. In *Phillips v. Martin Marietta Corp*., 400 U.S. 542 (1971), Phillips sued for violations of Title VII alleging that she had been denied employment because of her sex. The District Court granted summary judgment for her employer even though the company was not accepting job

applications from women with pre-school-age children (although it employed men with pre-school-age children). The District Court noted that 70-75% of the applicants for the position she sought were women and 75-80% of those hired for the position, assembly trainee, were women. In vacating the judgment, the Supreme Court made clear that unless a condition qualifies as a *bona fide* occupational qualification (BFOQ), such distinctions would qualify as discriminatory. Being nice to most women does not justify discrimination against others.

In the age discrimination case of *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), the plaintiff was terminated at 62 years old and just a few weeks short of the years of service he needed for his pension to vest. The Court made the critical point that employer decisions "based in large part on ***stereotypes unsupported by objective fact***," are "***the essence of what Congress sought to prohibit*** in the ADEA," *id*. at 610-11, (quoting *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983) (emphasis added)). This point applies equally to whistleblowers shunned as "trouble makers," unable to go along with illegality just to get along. In *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505, 1507 (10th Cir. 1985), *cert. denied* 478 U.S. 1011, the nuclear plant could not escape liability when it fired a whistleblower alleging that he could not "get along" with co-workers.

In *Miller-El v. Dretke*, 545 U.S. 231 (2005), Miller-El claimed the prosecution used preemptory strikes to knock out black jurors. Justice Breyer noticed that, "unconscious internalization of racial stereotypes may lead litigants more easily to conclude that a prospective black juror is 'sullen' or 'distant', even though that characterization would not have sprung to mind had the prospective juror been white." *Id*. at 268. "More powerful than those bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination ...." *Id*. at 241.

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), addresses gender stereotyping. In this case, Ann Hopkins was refused admission to partnership in the accounting firm of Price Waterhouse. Among the reasons cited were: comments to the effect that she was "overly aggressive, unduly harsh, difficult to work with and impatient with staff" but also, "macho," that she "overcompensated for being a woman," needed "a course at charm school" and should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Justice Brennan wrote that, "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." 490 U.S. at 249. Justice Brennan went on to state more broadly that, "[b]y focusing on [the plaintiff's] specific proof, . . . we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision." *Id*. at 251-52.Courts understand that modern employers know the rules and know how to avoid admissions of illegality. Eyewitness testimony concerning an "employer's mental process" seldom exists. Questions facing the triers of fact in discrimination cases are "both sensitive and difficult." *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 120 S.Ct. 2097, 2105 (2000). "Today's employers, even those with only a scintilla of sophistication, will neither admit discriminatory or retaliatory intent, nor leave a well-developed trail demonstrating it. … It is a simple task for employers to concoct plausible reasons for virtually any adverse employment action … ." *Raymond v. U.S.A. Healthcare Center-Fort Dodge, LLC*, 468 F. Supp.2d 1047, 1054 (N.D. Iowa 2006). Similarly, in *Aman v. Cort Furniture Rental Corp*., 85 F.3d 1074 (3d Cir. 1996), the court articulates a fact of life: "It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality

discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial 'smoking gun' behind." *Id*. at 1081-82. That is why, in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003), Justice Thomas said that "[t]he reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" Accordingly, a determination of the central issue of intent must include consideration of all the surrounding circumstances. Indeed, employee protection cases may be based entirely on circumstantial evidence of discriminatory intent. See *Mackowiak v. University Nuclear Systems, Inc*., 735 F.2d 1159, 1162 (9th Cir. 1984) (quoting *Ellis Fischel State Cancer Hospital v. Marshall* , 629 F.2d 563, 566 (8th Cir. 1980)). "Normally, very little evidence of a causal connection is required to establish a prima facie case." *Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 443 (4th Cir. 1998).

On page 3-8, Section I, the draft revision recognizes that agencies have obligations under collective bargaining agreements and the Privacy Act. It is worth noting here that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") also limits an agency's ability to disclose protected health information (PHI). Additionally, just because the EEOC says that, information "cannot be disclosed to the union" does not mean that the Federal Labor Relations Authority would agree. Employer have a separate duty to provide information relevant to bargaining and grievances upon the union's request.

On page 3-10, Section B(2), I suggest that in addition to providing a variety of ways in which information about the ADR program can be disseminated, it would be helpful to have some uniformity in how to find relevant information on the web. For example, it would be helpful if MD-110 required that agency web pages:

1. Have a link to the EEO program on the agency home page.
2. Have the mailing address, fax number, and at least one email address on the web page for the EEO program. (This would be particularly helpful for finding the best way to submit formal complaints.)
3. Provide a link to a text copy of the agency's ADR policy.

In any event, it would be annoying if an agency made it ADR policy available only in video without allowing employees and their advocates to have a printed text of the same policy.

On page 3-15, Section C(3), the revised draft makes the important point that agency representatives must have the authority and responsibility to negotiate in good faith. Agency decisions to designate a representative who does not have adequate authority creates a significant impediment to successful ADR practice.

C. Chapter 4: Mixed Cases

Chapter 4 governs the processing of mixed cases. While this is a complex topic, the new MD-110 adds to the complexity and makes the subject matter difficult to understand, even for seasoned practitioners.

Section II.B.1 and 2 – Section II.B.1 governs Standing, i.e., who is permitted to file an appeal, while II.B.2 governs the actions that may be appealed. Paragraph 1 notes that probationers "generally" do not have the right to appeal, but also notes there are exceptions. Paragraph 1 is flawed to the extent it does not reference probationers who have a statutory right to appeal to the Board if they claim reprisal for whistleblowing. A probationer is entitled to file an EEO complaint alleging discrimination,

and a probationer who has filed a complaint with the Special Counsel alleging whistleblowing reprisal is entitled to file an appeal to the MSPB if the matter has not been resolved by the Special Counsel. 5 U.S.C. § 1221. OFO has previously held that an appeal to the Board from the Special Counsel which includes an allegation of discrimination is not a mixed case. Because an appeal to the MSPB from the Special Counsel which includes an allegation of discrimination satisfies the criteria of 5 U.S.C. § 7702 ("any employee or applicant for employment who has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and alleges that a basis for the action was discrimination"), MD-110 should address whether employees claiming whistleblowing reprisal and discrimination can pursue a mixed case, or whether they are obligated to file two separate actions.[1]

Paragraph 6 (processing mixed case complaints) is redundant and confusing:

> If an employee elects to file a mixed case complaint, the agency must process the complaint in the same manner as it would any other discrimination complaint, except:
>
> a. Within forty-five (45) days following completion of the investigation, the agency must issue a final decision without a hearing before an EEOC Administrative Judge.
>
> * * *
>
> d. Upon completion of the investigation, the agency must notify the complainant that a final decision will be issued within forty-five (45) days without a hearing before an EEOC Administrative Judge.

It would also be helpful to note the propriety of complainants pursuing a mixed case through the EEO process and then filing a civil complaint in U.S. District Court raising both the Civil Service Reform Act (CSRA) claim and the discrimination claim. Under 5 U.S.C. § 7702(e)(1), an employee can bring the mixed case to federal court after 120 days of waiting for an agency decision, or after 180 days of waiting for the Commission's decision on a petition from the MSPB. Accord, *Ikossi v. Department of the Navy*, 516 F.3d 1037 (D.C. Cir. 2008); *Bonds v. Leavitt*, 629 F.3d 369 (4th Cir. 2011).

D. Chapter 6: Formal Investigations

Section VI(B) ("Types of Evidence") misses the most important type of evidence: circumstantial evidence. Courts understand that modern employers know the rules and know how to avoid admissions of illegality. Eyewitness testimony concerning an "employer's mental process" seldom exists. Questions facing the triers of fact in discrimination cases are "both sensitive and difficult." *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 120 S.Ct. 2097, 2105 (2000). "Today's employers, even those with only a scintilla of sophistication, will neither admit discriminatory or retaliatory intent, nor leave a well-developed trail demonstrating it. … It is a simple task for employers to concoct plausible reasons for virtually any adverse employment action … ." *Raymond v. U.S.A. Healthcare Center-Fort Dodge, LLC*, 468 F. Supp.2d 1047, 1054 (N.D. Iowa 2006). Similarly, in *Aman v. Cort*

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[1] In *Schlottman v. Sec'y of Labor*, 739 F.3d 21, 25-26 (D.C.Cir. 2014), the D.C. Circuit held that the employee, who had pursued a mixed case to the Board involving a whistleblowing claim, filed his appeal to the MSPB untimely because he exhausted with the Special Counsel. The Court did not address the government's argument that an appeal from the Special Counsel with an allegation of discrimination was not a mixed case under § 7702.

Furniture Rental Corp., 85 F.3d 1074 (3d Cir. 1996), the court articulates a fact of life: "It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial 'smoking gun' behind." *Id*. at 1081-82.

That is why, in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003), Justice Thomas said that "[t]he reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" Accordingly, a determination of the central issue of intent must include consideration of all the surrounding circumstances. Indeed, employee protection cases may be based entirely on circumstantial evidence of discriminatory intent. See *Mackowiak v. University Nuclear Systems, Inc*., 735 F.2d 1159, 1162 (9th Cir. 1984) (quoting *Ellis Fischel State Cancer Hospital v. Marshall* , 629 F.2d 563, 566 (8th Cir. 1980)). "Normally, very little evidence of a causal connection is required to establish a prima facie case." *Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 443 (4th Cir. 1998).

The law calls for consideration of all the surrounding circumstances to understand the disparate treatment at issue in its context. Accord *Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75, 82 (1998). In assessing a dispute about intent, courts must consider the totality of circumstances. *United States v. Arzivu*, 534 U.S. 266 (2002) (Justice Rehnquist admonishes the lower courts for examining the facts surrounding the investigatory stop in isolation. Only by viewing the totality of the circumstances could the court give due weight to the factual inferences drawn by the border patrol agent in deciding to conduct the stop.) The mental process of stereotyping is a "reflexive reaction." *School Board of Nassau County v. Arline*, 480 U.S. 273, 285 (1987). There is no legal requirement that officials be aware of their biases for a complainant to have a valid EEO claim.

On page 6-20, Section E indicates that the ROI can be produced in paper or electronically. In this day and age, it would be appropriate to require agencies to provide the ROI as a PDF unless the complainant specifically asks for a paper copy.

On page 6-25, Section XII invites an Administrative Judge to "exercise his/her discretion to issue sanctions." When an AJ chooses to not enter sanctions, and fails to give any reason for not entering sanctions, the value of the whole investigative program breaks down. An agency can just do no investigation at all and get away with it, if the case is assigned to a judge who will not impose sanctions. I suggest that the Commission indicate here that an Administrative Judge should impose sanctions unless the Administrative Judge has made specific findings explaining why the sanctions are unjust and not in furtherance of the remedial purposes of Title VII.

E. Chapter 7: The Hearing

Section 7.III.E (Summary Judgment), **Paragraph 7.III.E.2** (summary judgment on Administrative Judge's determination) provides as follows:

> If the Administrative Judge determines that some or all of the material facts are not in genuine dispute, s/he may, after giving notice to the parties and providing them an

> opportunity to respond within 15 days of receipt of the notice, issue an order limiting the scope of the hearing or issue a summary judgment decision without conducting a hearing.

This paragraph should require the Administrative Judge to specify in the Notice why he/she believes that the complaint may be ripe for summary judgment, and which issues may not require a hearing. This will allow the parties to focus their efforts on those issues, which will lead to greater efficiency in the briefing.

In addition, Section 7.III.E imposes no burden on the party moving for summary judgment to a) identify the material facts it believes are not in dispute; or b) articulate why, in light of the undisputed facts, it is entitled to judgment as a matter of law (*see* F.R.Civ.P. 56(c)). Section 7.III.E.4 provides that

> For example, when a complainant is unable to set forth facts necessary to establish one essential element of a prima facie case, a dispute over facts necessary to prove another element of the case would not be material to the outcome.

and also

> Moreover, a mere recitation that there is a factual dispute is insufficient. The party opposing summary judgment must identify the disputed facts in the record with specificity or demonstrate that there is a dispute by producing affidavits or records that tend to disprove the facts asserted by the moving party. In addition, the non-moving party must explain how the facts in dispute are material under the legal principles applicable to the case.

It is fundamental that, before the non-moving party bears any burden regarding the availability of summary judgment, the moving party must demonstrate why it is entitled to judgment. More bluntly, before "the party opposing summary judgment must identify the disputed facts" the moving party must first identify the supposedly undisputed facts. As Section 7.III.E currently reads, the Commission has not imposed any burden on the moving party.

Section 7.IV. Discovery. Section 7.IV.C.1.d. provides that a party is limited to 30 Requests for Admission. The reason for that limit is not clear. The purpose of Admissions is to narrow the facts which must be proved at the hearing. It's beyond dispute that the more facts that can be admitted, the less evidence will have to be introduced and the shorter the hearing.

F. Chapter 9: OFO Appeals

Page 9-2, footnote 2 suggests that the Agency has 40 days from receipt plus an additional five days. If true, we would never know what the Agency's deadline would be. Perhaps it is intended to say that OFO presumes that the agency receives the decision 5 days after mailing. Does this mean the parties automatically get an extra five days even if it was received earlier than 5 days? It would be less ambiguous to state that the Agency has 45 days from the date of uncertified mailing. This clarity would also be helpful for complainants now that they have to file an appeal within 30 days of the Agency's deadline for issuing its final decision.

On page 9-9, it would be helpful to provide details about how parties can use the Commission's electronic document submission portal.

In Section IV(G), the Agency should be required to submit the electronic case file to OFO within 15 days of being notified that the complainat has filed an appeal. The agency should also be required to serve a copy on Complainant and the complainant's representative. It would be preferable if the Agency were required to serve the record in an electronic format, unless the complainant requested a paper copy. This would enable the Complainant to cite directly to the record and know that it is within OFO's possession. We have seen enough cases where OFO does not have a complete record that some practitioners now attach every document to our appeal briefs. This would not be necessary if we knew what the Agency was providing it to OFO.

G. Chapter 11: Remedies

We join with the comments of MELA and urge the Commission to provide more specific guidance that bumping a selectee is appropriate as a remedy for an unlawful selection. In particular, in cases where a discriminatory decision adversely affected more than one applicant, the guidance should be clear that all victims must be made whole. This may require the agency to create two or more positions as necessary to provide full relief.

In *Willison v. Shannon*, 857 F. Supp. 34, 35 (S.D. Tex. 1994), *aff'd in part*, 77 F.3d 473 (5th Cir. 1995) (unpublished), a jury found that the defendant discriminated against two female employees based on their gender in successively denying them access to a real estate appraiser's position. The defendant moved for a new trial, arguing that only one real estate appraiser position had been available for either Plaintiff to fill, and that only one of the Plaintiffs could have obtained the position even in the absence of discrimination . . . only one Plaintiff should be able to recover damages. The court rejected this argument as "repugnant," insisting that the defendant's reasoning would "allow it to discriminate with respect to any given position with impunity for near perpetuity, once it has become liable for discriminating once."

In the federal sector, agencies have a duty to assure that employment decisions "shall be made free from any discrimination …." 42 USC § 2000e–16. Complainants do not have to show that unlawful discrimination was a "but for" cause of any adverse action. *Ford v. Mabus*, 629 F.3d 198 (DC Cir. 2010). See also, *Lander v. Lujan*, 888 F.2d 153, 156 (D.C. Cir. 1989)("District courts must strive to grant '*the most complete relief possible*' in cases of Title VII violations.")(emphasis added)(*quoting Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976)).

EEOC has clarified that each victim of discrimination is entitled to make whole relief. 29 CFR §1614.501(a) ("the agency shall provide full relief"). That relief includes:

> (3) An unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by that person, or a substantially equivalent position;

Accordingly, it is entirely appropriate for each victim of discrimination to receive full relief.

On page 11-2, the draft revision states reinstatement also reinstates seniority, "except for meeting

service requirements for completion of a required probationary or trial period." It is hard to see how this exception furthers the remedial purposes of the Civil Rights Act. It is contrary to the requirement that victims be "made whole." If there is a legal requirement for actual service to complete a probationary or trial period, it would be helpful to have a citation to that requirement.

In the last sentence of page 11-2, Section III(A) states, "Under Title VII, GINA and the Rehabilitation Act, back pay is limited to two years prior to the date the discrimination complaint was filed." This statement is outdated in light of the Lilly Ledbetter Fair Pay Act of 2009. See page 2-9 of the draft revision for a description of this law.

On page 11-13, Section F, it would be helpful if MD-110 made clear that travel time is fully included in the lodestar. The origin of the EEOC's thinking on this issue begins with its decision in *Hooper v. DLA*, EEOC Appeal No. 01873384 (May 6, 1988). In *Hooper*, the Agency issued a final decision finding that the employee had been the victim of discrimination when he was not promoted. The employee applied for attorney fees, and the Agency reduced the time spent in travel by 50%. The employee appealed, and this is how the EEOC decided the issue:

> Travel - The Commission has in the past held that attorneys are not entitled to fees for time spent in travel. *See William S. Avery v. Tennessee Valley Authority*, EEOC Appeal No. 01831755 (October 18, 1985). However, federal case law supports reimbursement for travel time at the full hourly rate, *Henry v. Webermeier*, 738 F.2d 188 (7th Cir. 1984), or (more commonly) at a reduced rate. *See United States v. Marengo County Commission*, 667 F. Supp. 786 (S.D. Ala. 1987), *McPherson v. School District #186*, 465 F. Supp. 749 (S.D. Ill. 1978). In light of the case law and because we find the agency's 50 percent reduction in the hourly rate to be reasonable, the Commission affirms the agency's award of $47.50 per hour for travel.

Since *Hooper*, which was decided almost 30 years ago, the EEOC has adhered to its "50% rule" without any further analysis. *See Santiago v. DHS*, EEOC Appeal No. 0720100038, p. *13 (March 2, 2011) ("the Commission has taken the position that the rate for an attorney's travel time should be reduced by 50 percent"); *Brown v. Justice*, EEOC Appeal No. 0120072877, footnote 6 (February 25, 2009) ("[t]he Commission has long held that the attorney's hourly rate should be reduced by fifty percent (50%) for travel time").

What the EEOC has never done, in *Hooper* or thereafter, is explain *why* "the rate for an attorney's travel time should be reduced by 50%". The Supreme Court has articulated some principles underlying the calculation of attorney fees in civil rights cases in which the plaintiff has prevailed through decision or settlement. First, the purpose of awarding attorney fees to plaintiffs who prevail is to ensure "effective access to the judicial process for persons with civil rights grievances". *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). This has been uniformly interpreted to mean that because many discrimination plaintiffs lack the finances to pay qualified attorneys to take their case, competent attorneys are not likely to take these kinds of cases if they cannot be assured of being receiving an award if they prevail.

The second principle is that because an award of attorney fees is paid by the employer, the successful attorney is supposed to ensure that all of the hours claimed were reasonably expended, and were not duplicative, redundant, or unnecessary. As the Court put it,

> Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. " . . . Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority."
>
> *Hensley*, 461 U.S. at 434.

Considered in this context, the EEOC's decision to reduce an attorney's travel time is difficult to understand. An attorney who travels from one place to another, regardless where the other place is and how much time it takes to get there and back, would be working on matters for which she can bill (and be paid) if she remained in the office. That is the underlying reason why attorneys bill their clients for their travel time: not because they are working while they are traveling, but because they would be working for this or another client if they were not traveling.

Surprisingly, this precise point was made in the very cases, *McPherson* and *Henry*, which the EEOC cited in its 1988 decision approving the reduction. In *McPherson*, the district judge believed that a 50% reduction was appropriate notwithstanding his observation that an attorney was surrendering the opportunity to earn fees during any travel time:

> The fee statute clearly intends for an attorney to be compensated for all time reasonably spent on the case. This follows from the fact that a lawyer's time is his stock in trade. Mr. Julian states in his affidavit that he was working on the case while commuting. Even if he were not, an argument can be made that an attorney should be compensated for travel time since he must be away from the office and cannot utilize the time for other billable matters.

465 F.Supp. at 758. Despite this unassailable logic, the judge agreed to a 50% reduction for no apparent reason.

An additional difficulty with the Commission's reliance upon *McPherson* is *Henry*, which the Commission cited as expressing the view that travel time should be reimbursed at the "full hourly rate". In *Henry*, the Seventh Circuit (Judge Posner) held that:

> When a lawyer travels for one client he incurs an opportunity cost that is equal to the fee he would have charged that or another client if he had not been traveling. That is why lawyers invariably charge their clients for travel time, and usually at the same rate they charge for other time, except when they are able to bill another client for part of the travel time (a lawyer might do work for client A while flying on an airplane to a meeting with client B). And if they charge their paying clients for travel time they are entitled to charge the defendants for that time in a case such as this where the plaintiffs have shown a statutory right to reasonable attorneys' fees. . . .
>
> The presumption, which the defendants have not attempted to rebut, should be that a reasonable attorney's fee includes reasonable travel time billed at the same hourly rate as the lawyer's normal working time.

738 F.2d at 194. The Seventh Circuit includes Illinois; *McPherson* was decided in the Southern

District of Illinois, six years before the Seventh Circuit's decision in Henry. The Commission's casual analysis that *Henry* and *McPherson* cancel each other out is preposterous: after *Henry*, *McPherson* was no longer valid law.

There is no question that some courts have awarded only partial fees for travel time by successful attorneys. But that's not the issue. With respect to federal employees, it is the job of the EEOC to ensure that the federal government does not discriminate against its employees. When a federal employee is able to prove to the EEOC's satisfaction that she was the victim of discrimination or reprisal, it makes no sense for the very agency that is supposed to vindicate her rights to penalize her attorney by artificially reducing the fee award.

The Supreme Court has held that the touchstone of fee awards is what is necessary to attract capable counsel. *Perdue v. Kenny A. ex rel. Wynn*, 599 U.S. 542, 130 S. Ct. 1662, 1672 (2010), stated: "First, a 'reasonable' fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case." (Citations omitted.) The First Circuit has clarified that "the rules surrounding fee-shifting in civil rights cases are designed to encourage attorneys to take these types of cases and are based on full compensation for the work performed." *Diaz v. Jiten Hotel Management, Inc*., 704 F.3d 150 (1st Cir. 2012).

The draft revision's treatment of enhancements to attorney fee awards at pp. 11-15 and 11-16 is outdated in light of *Perdue v. Kenny A. ex rel. Wynn,* 599 U.S. 542*,* 130 S. Ct. at 1675 (2010). In *Perdue*, the Supreme Court noted the similarity of all fee-shifting statutes, and laid out the "important rules" for calculating a "reasonable" fee under them. *Id.* at 1671 n.3, 1672-73. Specifically:

- A "reasonable fee" must be sufficient to "induce a capable attorney to undertake the representation of a meritorious" case. *Id.* at 1672; *accord Brown v. City of Pittsburgh*, No. 06-393, 2010 U.S. Dist. LEXIS 52927, at *11 (W.D. Pa. May 27, 2010).[2]
- The "lodestar" method for determining a fee is "presumptively sufficient to achieve this objective," as a properly calculated lodestar includes "most, if not all, of the relevant factors constituting a 'reasonable attorneys fee.'" *Purdue*, 130 S. Ct. at 1673.
- The relevant factors for calculating the lodestar include, but are not limited to: the novelty and complexity of the litigation, the skill and experience of the attorney, the overall quality of the representation, and the understanding that payment of fees will generally not come until the end of the case, if at all. *Id*. at 1673, 1675
- A lodestar-based fee can be "enhanced" in "rare" or "exceptional" circumstances that the lodestar "did not adequately take into account." *Id.* at 1669, 1673.

The *Perdue* Court made it clear that these rules applied generally to "federal fee shifting statutes" that are "based on the 'lodestar,' *i.e.*, the number of hours worked multiplied by the prevailing hourly rates…." *Perdue*, 130 S.Ct. at 1669, 1671 n.3 (noting that many federal fee-shifting statutes use "virtually identical language").[3] As such, *Perdue* and the cases it cites unquestionably constitute the

[2] *Brown* is the first district court case to utilize *Perdue* in analyzing a fee petition.

[3] The Supreme Court has held that there is a presumption that statutes sharing the common purpose of promoting citizen enforcement of important federal policies should be interpreted similarly. *Bd. of Trustees of the Hotel & Restaurant Employees Local 25 v. JPR, Inc.*, 136 F.3d 794, 802 (D.C. Cir. 1998) (citing *Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 558-60 (1986)).

controlling law for calculating statutory fee awards.

Nationally, a total of 235,641 civil non-prisoner cases were filed in the district courts during FY 2011. Of these, only 25,795, or 11%. were *pro se*. The rate of *pro se* filings in the federal EEO program is substantially higher and indicates a need for more reliable and remunerative fee awards. *Pro se* filings consume disproportionately large amounts of judicial resources, and are growing. JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT, CIVIL LITIGATION MANAGEMENT MANUAL (2d ed. 2010), Chapter 7, Part D (Pro Se Cases), states at 136:

> Cases involving a *pro se* litigant present special challenges for several reasons, not the least of which is your obligation to ensure equal justice for litigants who may have little understanding of legal procedure or the law. At each stage in the case, you may need to take actions not required in cases in which all parties are represented by counsel.

It would also be helpful for the final MD-110 to recognize the role of *Laffey* rates. After years of wrangling over the matter of attorney fee hourly rates, the District Court in DC ruled that hourly rates for attorneys practicing civil law in the Washington, DC metropolitan area could be categorized by years in practice and adjusted yearly for inflation. *Laffey v. Northwest Airlines, Inc*., 572 F.Supp. 354, 371 (D.D.C. 1983). The Department of Justice (DOJ) crafted its own rules for, and maintains, its version of the Laffey Matrix.[4] After scrutinizing the DOJ's methodology of setting and adjusting hourly rates for the Matrix, the District Court has used an Updated version. *See Ricks v. Barnes*, No. 05-1756 HHK/DAR, 2007 U.S. Dist. LEXIS 22410, at *16 (D.D.C. Mar. 28, 2007) (finding Updated Matrix rates reasonable); *Smith v. District of Columbia*, 466 F. Supp. 2d 151, 156 (D.D.C. 2006) (concluding that use of the Updated Matrix is reasonable and noting that the Updated Matrix is more accurate than the DOJ's Laffey Matrix because the Updated Matrix is "based on increases/decreases in legal services rather than increase[s]/decreases in the entire CPI which includes price changes for many different goods and services"); *Salazar v. District of Columbia*, 123 F. Supp. 2d 8, 13 (D.D.C. 2000). The Updated Laffey Matrix is available at http://www.laffeymatrix.com/see.html.

The Commission has adopted the *Laffey* matrix as the appropriate basis for determining reasonable attorneys fees for attorney's practicing in this metropolitan area. *Knott v. Donahoe*, EEOC Appeal No. 0720100049, 2011 EEOPUB LEXIS 2062 (2011) (awarding Laffey Matrix rates in a case in Baltimore). See also *Donaldson v. Napolitano*, EEOC Appeal No. 0720090032 (2009) (awarding Laffey rates to a DC attorney for a case in Las Vegas). See also, *Jimenez v. HHS*, EEOC Appeal No. 0120083765 (June 12, 2012). The MSPB determines attorney fees based on the market in which the attorney ordinarily practices. Accord, 5 C.F.R. § 1201.203(a)(3) (governing fee petitions to the MSPB). As a predominate number of federal sector practitioners have offices in the metropolitan Washingting, DC, area, use of the updated *Laffey* Matrix will simplify the determination of fee petitions and encourage practitioners to accept meritorious federal sector cases.

On page 11-20, Section B(1) should reflect the aspiration that compensatory damage awards be comparable to those issued in jury trials. The purpose of the administrative program is not to short-change victims of discrimination, but rather to provide a more efficient and cost-effective route to the same remedies they could obtain in court. If the record supports a finding of emotional distress damage, these damages should be awarded even if an employee did not seek professional counseling. *Blackburn v. Martin*, 982 F.2d 125, 132-33 (4th Cir. 1992); see also, *DeFord v. Secretary of Labor*, 700 F.2d 281, 288 (6th Cir. 1983). In many cases, the employee will know that it is the discrimination that is causing

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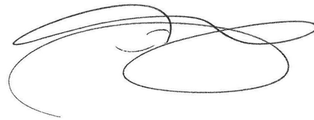
[4] http://www.justice.gov/usao/dc/divisions/Laffey_Matrix_2003-2013.pdf

the distress and pursuing the EEO claim is more productive than medical care. The Commission should strive for compensatory damage awards that are comparable to those that are made in comparable cases.

When federal officials are held to account for the full measure of damage they have caused, perhaps then we will see the ebb of discrimination and a culture of compliance instead of intimidation.

Thank you for your attention to our comments.

Very Truly Yours,



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