

## Equal Opportunity Complaint Investigation Procedure

This procedure shall be used for the investigation of any equal opportunity discrimination complaint against a recipient of USDOL funds, for which a written and signed complaint of discrimination has been received.<sup>1</sup> The procedure is modeled after the USDOL Civil Rights Center's (CRC) procedure, described in the Equal Opportunity Guidebook.

### I. General Principles

#### CRC vs. LWDB complaint handling

Any person alleging discrimination under Section 188 of the Workforce Innovation & Opportunity Act (WIOA) has the option of filing his or her complaint with the Bay Consortium Workforce Development Board (BCWDB) or with the CRC. The BCWDB's EO Officer has the obligation to inform the complainant of the option. Should the complainant elect to file with CRC, the BCWDB's EO Officer should log the complaint and assist the complainant in preparing CRC's Complaint Information Form.

#### Types of complaints

A complaint falls into of three categories, depending on its source:

**Individual** – a complaint that alleges discrimination against the person filing the Complaint

**Third party** – a complaint filed by a group or an individual that alleges discrimination against another group or individual. The BCWDB's EO Officer accepts such complaints if the complainant:

- can provide the name and telephone number (or other means of contact) of the injured party and the injured party is willing to file a complaint, or
- is an organization, such as the National Association for the Advancement of Colored People (NAACP), and can provide names and telephone numbers of the injured parties, or
- is an authorized representative of an injured party.

**Class action** – a complaint filed by one or more individuals that allege discrimination,

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<sup>1</sup> Complaints against private sector employers should be referred to the US Equal Employment Opportunity Commission

not only against themselves, but also against a group of similarly situated individuals. To file such a complaint, the complainant must have standing in the class, that is:

- be a member of the class, and
- be adversely affected by the alleged discrimination.

The purpose of a class action is to secure a remedy that eliminates:

- the discrimination against the person(s) named in the complaint,
- the discrimination against other injured parties, regardless of whether they have been individually named in the complaint, and
- the practice of policy that caused the discrimination.

### **Legal theories of discrimination**

There are three major legal theories of discrimination that can be used to prove illegal discrimination under WIOA and other civil rights laws. These are:

- disparate treatment
- disparate impact
- failure to provide a reasonable accommodation

**Disparate treatment** means treating someone differently because of his or her race, sex, age, or other basis *prohibited by law*. To prove a case of discrimination under this theory, it is necessary to examine *why* the person was treated differently and whether a *prohibited factor* was involved.

**Disparate impact** is based on the premise that discrimination can occur *even if no one is treated differently*. The use of a specific requirement in the decision-making process (for purposes of eligibility, selection, or placement decisions; monetary and nonmonetary determination; disciplinary actions, etc.) can be discriminatory if the requirement has an *adverse effect* **and** if the requirement is *not necessary* to determine the qualifications for the job or training in question. The case will turn on whether the policy or practice in question is a legitimate “business necessity”.

**Failure to provide reasonable accommodation** applies where there is a legal obligation to provide reasonable accommodation, as in the case of a disability or religious belief. Failure to provide a qualified individual with a disability with reasonable accommodation that is legally required- whether by WIOA, the Americans with Disabilities Act (ADA), or Section 504 of the Rehabilitation Act – can be construed as discrimination on the basis of disability, unless providing the accommodation would cause “undue hardship”. In general, “undue hardship” means significant difficulty or expense incurred by a LWDB, One-Stop Center, Service or Training Provider. Factors to be considered in determining whether an accommodation would impose and undue hardship on a LWDB, difficulty or expense incurred by a LWDB, are outlined in 29 CFR 37.4.

## **II. Determining Jurisdiction**

The first step in processing a complaint is to determine if it is within the BCWDB's jurisdiction,<sup>2</sup> that is, if the BCWDB has the legal authority to accept the complaint for investigation. There are three considerations that determine jurisdiction – basis, timeliness, and whether the respondent is a recipient of DOL funds.

**BASIS:** The BCWDB can accept and investigate only those complaints that allege discrimination on the basis of race, color, religion, national origin, gender, political affiliation or belief, age, or disability, or (for beneficiaries only) because of citizenship or participation in WIOA.

**TIMELINESS:** The BCWDB will ordinarily accept and investigate a complaint only if it is filed within 180 days of the alleged violation. This time limit can be waived by the Director of CRC if the complainant: shows that he or she was not notified of the time limit and was not otherwise aware of it, was prevented by circumstances beyond his or her control from filing a complaint, or has some other reason considered sufficient by CRC.

**RECIPIENT OF DOL FUNDS:** The BCWDB can accept and investigate only those complaints in which the respondent-the program or activity against which the complaint is filed- is a program or activity funded in whole or in part by DOL funds. All programs and activities funded in whole or in part by WIOA are recipients of DOL funds and are, therefore, within the BCWDB's jurisdiction.

## **III. Notifying the Respondent and the Complainant**

Once it is determined that a complaint is within the BCWDB's jurisdiction, the complaint is investigated by the BCWDB's EO Officer. The EO Officer sends the respondent (the administrator or manager of the program/activity receiving funds) notice, which informs him or her that the BCWDB has accepted the complaint and includes:

- the complainant's name,
- a brief description of the allegation,
- a description of the information or documentation needed for the investigation, and time in which it is to be submitted,
- a reminder to the respondent that any form of retaliation or intimidation against the complainant because he or she has filed a discrimination complaint is prohibited, and
- the name and telephone number of the BCWDB's EO Officer assigned to the case.

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<sup>2</sup> A complaint against a One-Stop partner agency that alleges discrimination on the basis that is prohibited by Section 188 and by a civil rights law enforced by the partner agency should be referred to the partner agency pro processing. In such circumstances, the partner agency's regulations will govern the processing of the complaint

A copy of the complaint may be provided to the respondent if it is requested. The EO Officer also sends the complainant a similar notification letter. Both the respondent and the complainant are encouraged to informally resolve the complaint prior to the issuance of a determination.

#### **IV. Data Collection**

A complaint can be investigated in two ways: through analysis of data relevant to the investigation and/or through an on-site investigation. Data needed to determine the merits of the allegations in the complaint should be identified. A written list of questions is forwarded to the respondent, complainant, and other parties such as witnesses. Some questions require a written response, while others request records or while others need documentation. The EO Officer analyzes the data, and if it is sufficient, a determination as to whether or not discrimination occurred may be issued without an on-site investigation.

#### **V. The On-Site Investigation**

The EO Officer conducts the complaint investigation at the site of the alleged violation when:

- the issues are complicated,
- after reviewing the data collected, it is determined that several witnesses must be interviewed or many records reviewed, or
- the BCWDB's EO Officer has received several complaints against the same respondent.

**Before arriving on site**, the EO Officer contacts the respondent to establish a date and time for the on-site investigation, to identify records and other documents to be made available for review, and to identify individuals to be interviewed. This should be regarded as an initial information request. As the investigation proceeds, the EO Officer may identify additional information requirement or interviewees.

The respondent should identify a person responsible for coordinating the on-site investigation. Once on-site, and before meeting with the respondent, the EO Officer meets with the complainant to review the complaint and to obtain any additional information not contained in the complaint or case file.

**The opening conference** is held at the respondent's facility, the EO Officer meets with the respondent an/or respondent's representatives to:

- Describe the complaint being investigated, including the specific allegation(s) and issue(s) under investigation and the BCWDB's authority to investigate them.

- Confirm arrangements made by the respondent to assure the EO Officer privacy, including setting aside a private area for the EO Officer to conduct Interviews and review documents.
- Confirm the interview schedule of individuals named in the complaint, as well as other witnesses.
- Schedule other meetings, such as the orientation meeting for information collection and the exit interview.

Normally, the EO Officer does not discuss the merits of the complaint during the opening conference.

### **Gathering evidence**

In an on-site investigation, the EO Officer gathers evidence by interviewing and by reviewing records. Initially, the EO Officer interviews the official(s) representing the respondent and the person(s) named in the complaint. Information obtained includes:

- the respondent's account of the facts,
- additional persons the respondent wishes interviewed and the matters on which each witness can be expected to provide information, and
- documentation the respondent wishes reviewed.

The EO Officer also interviews witnesses- all individuals named either by the complainant or the respondent as witnesses. As the investigation progresses, the EO Officer may identify additional individuals who should be interviewed.

In addition to conducting interviews, the EO Officer gathers information by reviewing records and other documents, beginning with those initially requested. As the investigation progresses, the EO Officer may require additional records.

When the records required are voluminous or complex, the EO Officer may hold a meeting with the staff responsible for keeping records to:

- acquaint the EO Officer with the respondent's information system,
- acquaint the respondent with the EO Officer's information needs, and
- assign specific document or information request to the appropriate person.

### **Types of evidence**

In general, evidence falls into four categories:

**Direct evidence** is evidence of the actual, subjective intent of the person(s) charged with discrimination. It may take the form of an admission of discriminatory purpose, although this will rarely occur. You will most often find such an admission during an interview, when a person is explaining or justifying his or her actions. Direct evidence encompasses more than admissions, it also includes any facts tending to establish the subjective motives of persons involved in the alleged discrimination.

**Circumstantial evidence** includes facts from which one may infer intent or discriminatory motive. Circumstantial evidence proves intent by using objectively observable data. It does not, however, prove anything directly about actual subjective intent. For example, historical information on how members of the protected group at issues have been treated by the respondent, and similar complaints.

**Comparative evidence** is that which identifies difference(s) in treatment of similarly situated individuals based on their race, sex, or other protected basis. For example, this might involve comparing the quality and quantity of services provided a group of the same race with services provided to a group of a different race. If there is no adequate non-racial explanation for the differences, it is reasonable to infer that race may be a factor.

**Statistical evidence** is most often used to demonstrate the adverse effect of a procedure, policy, rule, or selection criteria. The evidence will have to show that a substantial disparate impact exists, and that it is not due to chance. Such evidence may include EO data reports and monitoring reports.

#### **The exit conference**

When the on-site investigation has been completed, the EO Officer may hold an exit conference with the respondent to clarify the information obtained during the on-site investigation or to request additional information. The EO Officer expresses no opinion about the information collected during the on-site investigation and makes no analysis or conclusions about the issues.

## **VI. Administrative Closures**

**Pre-investigative administrative closures** occur prior to the initiation of the investigation. A **pre-determination administrative closure** is one which occurs between the initiation of an investigation and before an investigative report is drafted. Investigations may not be administratively closed if they imply or involve class issues, which have not been corrected for all members of the class. Investigations that are not class involved may be administratively closed if one or more of the following conditions exists:

- the complainant refused to cooperate in the investigation;
- the complainant cannot be located;
- the complainant is deceased;
- the complainant withdraws the complaint in writing; or
- the complaint was fully resolved through mediation or conciliation.

If the complainant can be located, he or she must be notified in writing that the complaint is being administratively closed and explain the reason for the decision. The closure letter should also advise the complainant of the right to file a complaint with the CRC within 30 days of receipt of the letter of closure.

## VII. Analysis of Evidence

### **Disparate treatment**

To determine if it is reasonable to believe that discrimination based on disparate treatment occurred; a three-phase analytical process will be used. This process is as follows:

#### **Phase 1: Prima facie**

This phase is a determination as to whether there is sufficient evidence **to raise an inference** of discrimination. An inference **does not prove** discrimination, rather, it allows you to go on to the next analytical set(s) – determining whether the inference is correct. An inference of discrimination based on disparate treatment can be established when an eligible/qualified **individual** shows that he or she was treated differently because of a prohibited factor. In the case of **systemic** or pattern-or-practice discrimination, an inference of discrimination may be established by showing that individuals or groups are treated differently based on race, sex, or some other prohibited factor. The Supreme Court created a template for establishing a case by inference based on disparate treatment. The elements of a prima facie case may vary depending on the facts of the complaint, but such elements often include the following:

1. the aggrieved person was a member of a protected class;
2. this person applied for, and was eligible for federally assisted program or applied and was qualified for employment;
3. was denied services or employment despite being eligible/qualified; and
4. after this denial, the respondent selected applicants for services or provided employment to persons not in the complainant's group with similar eligibility or qualifications.

#### **Phase 2: Rebuttal**

The second phase is the respondent's opportunity to defend itself. If there is sufficient evidence to establish a prima facie case, the investigator must determine if the respondent can articulate a "legitimate, nondiscriminatory reason" for the challenged action. For example, in a case of individual discrimination, the respondent might explain that the complainant was not as qualified as the applicant selected for employment, or that the complainant applied for training at a time when there were no vacancies. In the case of systemic discrimination based on disparate treatment, the respondent might explain the low placement of women in auto mechanics by showing that the women who applied were not as qualified as the male applicants.

#### **Phase 3: Pretext**

Once the respondent has articulated a reason for the disparate treatment, the investigator must examine the respondent's reasons and evidence relevant to the complaint. Where facts are in dispute, the investigator should attempt to corroborate the facts independently. If the respondent's defense is not based on a legitimate requirement, the investigator may show that the rebuttal evidence presented by the respondent was a "pretext" for discrimination. Types of evidence that may be helpful in proving pretext

are:

- the respondent failed to follow its own rules, policies, and procedures;
- the respondent acted inconsistently with its own stated legitimate nondiscriminatory reason;
- evidence obtained in the investigation contradicts the nondiscriminatory reasons; or
- the reason offered now was not offered to support the challenged decision at the time it occurred, suggesting the reason was offered as an afterthought.

### **Disparate Impact**

The model for proving discrimination based on disparate impact is different from the disparate treatment model because the underlying theory is different. Rather than seeking to prove that the service or training provider had a discriminatory motive, you are seeking to prove that a policy, requirement, or practice has a *disproportionate effect* on a particular group or groups. Indications of disparate impact are most likely to arise in the context of a compliance review.

#### **Phase 1: Determining Adverse Impact**

The investigator will need to develop evidence that can be tested for adverse impact by making a comparison of the effects of the policy, requirement or practice in question on members of the complainant's protected class with persons not in the protected class. The evidence in an investigation of a case involving disparate impact will likely include both *statistical* and *comparative* evidence (see Types of Evidence). The first step is determining whether there is disproportionate representation of protected class members participating in the program in question (for example, four percent of participants in a training program are female, while fifty percent of the applicants are female). In this case, the investigator will want to look at the application process and other aspects of program administration to determine if there is evidence that a policy or practice is causing the disparity. If there is a statistically significant disparity between the representation of protected class members remaining after application of the challenged policy or requirement when compared with the representation of persons not in the protected class, a prima facie case has been established.

#### **Phase 2: Identifying the Cause of the Adverse Impact**

After determining that the numbers show significant differences, the next step is to determine what caused the disparities. The investigator must identify which policy, requirement or practice accounts for the adverse impact. That requires focus on the points in the decision making process where some applicants become participants and others do not (for example, identifying which requirements or practices have the result of screening out more women applicants than you would expect to be screened out, given the number of women applicants).

#### **Phase 3: Business Necessity**

Identifying the requirements or practices that have the adverse impact *does not prove* disparate impact discrimination. A determination must be made as to whether the

requirement that has the adverse impact is *job related and necessary* (for example, a requirement that a firefighter trainee weight at least 150 pounds could disproportionately screen out women as a group [even if some women can meet the requirement and some men cannot]).

In this scenario the service or training provider would have to provide evidence that the weight requirement is necessary for a job related reason (for example, evidence that the weight test is an accurate predictor of a person's ability to handle firefighting equipment).

#### **Phase 4: Identifying alternative practice**

Even if the weight test accurately predicts success in firefighting, if it has an adverse impact, the service or training provider must first try to devise a standard that *does not have adverse impact* to determine whether an applicant can handle the equipment.

### **VIII. Post Investigation**

#### Investigative Report

An investigative report is a written document that sets out in a detailed and logical fashion a) **all** facts pertinent to the case, b) analyzes those facts in light of the complainant's allegations, and c) recommends a determination as to the validity of the allegations based on that analysis. The following is a suggested format:

- Introduction
- Allegations
- Analysis
- Conclusions
- Recommendations

The investigative report should be a document separate from the formal letter of findings. Generally, the investigative report is not released to the complainant or the service or training provider except in the case of a Freedom of Information Act request or Privacy Act request.

Ideally, an investigative report should be prepared whenever a full investigation is completed. If an investigative report is not done in every case, it should be prepared for complex cases that involve extensive analysis. An investigative report should also be prepared for all cases resulting in a violation.

If the case is straightforward, raises only limited issues, does not involve significant rebuttal by either party, and results in a no violation finding, an investigative report may not be necessary.

#### Letter of Findings

The purpose of the letter of findings is to notify the parties in writing of the determination made on each issue. Letters of findings must be prepared for all

investigations, regardless of whether a violation is found. A written notice of final action must be sent within 90 days after the filing date of the complaint. Complainants must be notified of their right to file a complaint with CRC if he or she believes the determination is unsatisfactory.

Each letter of findings must:

- State the jurisdictional authority including the basis for the investigation;
- Address all issues covered in the investigation, and for each issue reach conclusions which are supported by an explanation or analysis; and
- State the determination for each issue investigated

*“The Bay Consortium Workforce Development Board is an Equal Opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. TDD: VA Relay Center: 711 or 800.828.1120. This workforce product was 100% supported with U.S. Department of Labor Employment and Training Administration Workforce Innovation and Opportunity Act Title I funds awarded to the Bay Consortium Workforce Development Board. This does not necessarily reflect the official position of the VCCS or DOLETA.”*

