

United States Bankruptcy Court

Western District of Texas Western Bankruptcy

Employment Dispute Resolution Plan

Effective for Complaints Filed on or after October 1, 2010 (revised 11/2012)

Introduction

This Plan shall be known as the **Equal Employment Opportunity and Employment Dispute Resolution Plan** ("EEO/EDR Plan"). The Judicial Conference of the United States has directed that each court adopt a plan in conformance with the national policy of providing equal employment opportunity to all persons regardless of their race, sex (to include sexual harassment), color, national origin, religion, age (at least 40 years of age at the time of the alleged discrimination), or disability. Each court will promote equal employment opportunity through a program encompassing all facets of human resource management, including recruitment, hiring, promotion, and advancement. This program does not modify or reduce the qualification standards for employment established in the federal court system. This program is not intended to change the "at will" status of court employees, nor does it create property rights for employees.

The Plan supersedes all previous versions of the Employment Dispute Resolution Plan and Discrimination and Complaint Procedures for the U. S. Bankruptcy Court for the Western District of Texas. Claims arising under Chapters in this plan shall be treated in accordance with the procedures set forth in this Plan.

In addition to the EEO Plan, the Judicial Conference has directed that this Plan provide to all court employees the rights and protections comparable to those provided to legislative branch employees under the Congressional Accountability Act of 1995. Each court of the Fifth Circuit shall implement its EEO/EDR plan by either adopting the model Plan or submitting a modified plan for approval by the Judicial Council. This plan has been approved by the Fifth Circuit Judicial Council. A copy of each plan and any subsequent modifications shall be filed with the Circuit Executive and with the Administrative Office and will be posted on our internal and external website. Each court shall submit an annual report on the implementation of its plan to the Administrative Office for inclusion in the Director's Annual Report to the Judicial Conference.

Policies adopted by individual courts pertaining to adverse action or general grievance proceedings not invoking the rights and protections afforded under this EEO/EDR Plan are not affected. Further, local policies relating to rights enumerated under the Plan that are not inconsistent with the rights and procedures established herein are not affected.

The EEO/EDR Plan is not intended to duplicate the protections provided for the resolution of complaints of judicial misconduct or disability under 28 U.S.C. § 351, et seq. but is intended to be the exclusive remedy of employees relating to rights enumerated under the Plan.

This Plan applies to all employees in the Bankruptcy Court for the Western District of Texas, including judges and judges' staffs. The term "employee" includes all individuals currently employed by the Judiciary, as well as applicants for employment and former employees. The

term "employee" does not include interns or externs providing gratuitous service, applicants for bankruptcy judge positions, volunteer counselors or mediators, or other individuals who are not employees of an "employing office."

Clarifications

The term "claim" means the filing of a request for counseling, which may be further pursued by the filing of a request for mediation and a request for hearing.

The term "employing office" is to be interpreted as the clerk's office. The court is the employing office of a judge's chambers staff.

The term "judicial officer" means a judge appointed under Article III of the Constitution, a United States bankruptcy judge, a United States magistrate judge, a judge on the Court of Federal Claims, or a judge of any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States.

The term "court" refers to the unit containing the employing office responsible for redressing, correcting, or abating the violation alleged in the complaint.

The term "chief judge" refers to the Chief Judge of the United States Bankruptcy Court for the Western District of Texas.

Employee Rights and Protections

A. Equal Employment Opportunity and Anti-discrimination rights.

Discrimination against employees based on race, color, religion, sex (to include pregnancy and sexual harassment), national origin, age (at least 40 years of age at the time of the alleged discrimination), and disability is prohibited. Harassment against an employee based upon any of these protected categories or retaliation for engaging in any protected activity is prohibited. All of the above constitute "wrongful conduct."

The term "disability" means a physical or mental impairment that substantially limits one or more of the major life activities of an employee, a record of such an impairment, or being regarded as having such an impairment. See 42 U.S.C. § 12102(2).

"Sexual harassment" includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of

unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Court Practices

The Clerk will assure that all permanent position vacancies are publicly announced to attract an applicant base representing the general ethnicity and gender of the labor market. A position vacancy is defined as a permanent excepted or temporary indefinite appointment that is not staffed by an incumbent employee. If an incumbent employee receives additional responsibilities through job redesign, the position will not be considered vacant and need not be publicly announced. The Clerk need not advertise vacancies if business exigencies dictate that the position be staffed immediately through direct appointment, or via promotion of an incumbent court employee. Temporary positions for a brief duration need not be advertised publicly.

All appointing officers and court management within the District should ensure employment and personnel decisions based on job-related skills. They should make reasonable efforts to see that the skills, abilities, and potential of each employee are identified and developed, and that all employees are given equal opportunities for promotions by being offered, when the work of the court permits and within the limits of available resources, cross-training, reassignments, job restructuring, special assignments, and outside job related training. This does not, however, create a property right for the employee in his or her job.

Each court unit will: (a) seek qualified applicants reflecting the make-up of all such persons in the relevant labor market and publicize vacancies; (b) make hiring decisions strictly upon an evaluation of a person's qualifications and ability to perform satisfactorily the duties of the position; (c) promote employees according to their experience, training, and demonstrated ability to perform duties of a higher level (based on availability of positions); (d) seek, insofar as reasonably practicable, to improve the skills and abilities of its employees through cross-training, job restructuring, assignments, details, and outside training.

B. The Family and Medical Leave Rights

Title II of the Family and Medical Leave Act of 1993, 5 U.S.C. § 6381 provides unpaid family and medical leave to all federal employees covered by the annual and sick leave program. An employee shall be entitled upon request to a total of 12 administrative workweeks of unpaid leave during any 12 month period for certain reasons. Detailed information can be located in Volume 12, Chapter 9, Section 920.20.35 of the Guide to Judiciary Policy.

C. The Worker Adjustment and Retraining Notification Rights

No "employing office closing" or "mass layoff" may occur until the end of a 60-day period after the employing office serves written notice of such prospective closing or layoff to employees who will be affected. This provision shall not apply to an employing office closing or mass layoff which results from the absence of appropriated funds. The term "employing office closing" means the permanent or temporary shutdown of a single site of employment for 50 or more full-time employees during any 30 day period. The term "mass layoff" means a reduction in force which is not the result of an employing office closing. In a "mass layoff" the reduction in force results in an employment loss at the single site of employment during any 30 day period of at least 33% and at least 50 full-time employees or at least 500 full-time employees. See 29 U.S.C. § 2101.

D. The Uniformed Services Employment and Reemployment Rights Act

An employing office shall not discriminate against an eligible employee or deny an eligible employee reemployment rights or benefits under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 et seq.

E. Occupational Safety and Health Protections

Each employing office shall provide to its employees a place of employment which is free from recognized hazards that cause or are likely to cause death or serious physical harm to employees. Claims that seek a remedy that is exclusively within the jurisdiction of the General Services Administration ("GSA") or the United States Postal Service ("USPS") to provide are not cognizable under this Plan; such requests should be filed directly with GSA or the USPS as appropriate. The court shall implement a program to achieve the protections set forth in this chapter.

F. Polygraph Tests

Unless required for access to classified information, or otherwise required by law, no employee may be required to take a polygraph test.

E. Whistleblower Protection

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action shall not, with respect to such authority, take or threaten to take an adverse employment action with respect to an employee (excluding applicants for employment) because of any disclosure of information to –

- A. the appropriate federal law enforcement authority, or
- B. a supervisor or managerial official of the employing office, a judicial officer of the court, or the Administrative Office of the United States Courts,

by the latter employee, which that employee reasonably and in good faith believes evidences a violation of any law, rule, or regulation, or other conduct that constitutes gross mismanagement, a gross waste of funds, or a substantial and specific danger to public health or safety, provided that such disclosure of information –

- 1. is not specifically prohibited by law,
- 2. does not reveal case-sensitive information, sealed material, or the deliberative processes of the federal judiciary (as outlined in the Guide to Judiciary Policy, Vol. 20, Ch. 8), and
- 3. does not reveal information that would endanger the security of any federal judicial officer.

For purposes of this Chapter, an “adverse employment action” means a termination, demotion, transfer, or reassignment; loss of pay, benefits, or awards; or any other employment action that is materially adverse to the employee’s job status, compensation, terms, or responsibilities, or the employee’s working conditions.

Reports of Wrongful Conduct

A report of wrongful conduct is not the same as initiating or filing a claim under this Plan; thus, employees who wish to file an EDR claim relating to any alleged wrongful conduct must follow the procedures set forth in Dispute Resolution Procedures of this Plan.

Judges and employees are encouraged to report wrongful conduct to the court's EDR Coordinator, the chief judge, unit executive, human resources manager, or their supervisor as soon as possible, before it becomes severe or pervasive. Retaliation against any employee making a report of wrongful conduct is prohibited. The person receiving such a report has the responsibility to notify the EDR Coordinator as soon as possible.

The EDR Coordinator shall promptly inform the chief judge and unit executive of any report. The chief judge and/or unit executive shall ensure that the allegations in the report are appropriately investigated, either by the human resources manager or other person.

All individuals involved in the investigation shall protect the confidentiality of the allegations of wrongful conduct to the extent possible. Information and records about the allegations shall be shared on a need-to-know basis. Employees found by the chief judge and/or unit executive to have engaged in wrongful conduct, as defined in this Plan, may be subject to disciplinary action.

Employment Dispute Resolution (EDR) Procedures

General Overview

An employee who claims a denial of the rights granted under this Plan shall seek resolution of such claims through the Employee Dispute Resolution Plan (EDR). The process consists of:

- A. counseling and mediation;
- B. hearing before the chief judge of the court (or a designated judge) in which the alleged violation arises; and
- C. review of the hearing decision under procedures established by the Judicial Council of this circuit.

Alleged Violation by Employee - Before invoking a request for counseling an employee (to the extent feasible) is encouraged to bring his or her concerns to his or her supervisor or unit executive, unless the supervisor or unit executive is the alleged violator. In such a situation, the court or employing office should specify alternative neutral points of contact for the initial inquiry. An employee alleging that any of the rights granted under this Plan have been violated, and who seeks relief under this Plan, must file a request for counseling with their court's EDR Coordinator in accordance with information found in this Chapter.

Alleged Violation by Judge - Any employee alleging that a judge violated any rights granted under this Plan may file an EDR claim in accordance with this Plan. In such an instance, however, all the claims procedures of this Chapter shall be performed by the circuit council, either by members of the council directly or by persons designated to act on its behalf, which may include the chief judge of the circuit. If a judge becomes the subject of both an EDR claim and a judicial misconduct complaint under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364, the circuit judicial council or its designee, which may include the chief judge of the circuit, will craft a procedure for determining any common issues of fact and processing both complaints, subject to all requirements of the Act, the Rules for Judicial-Conduct and Judicial-

Disability Proceedings, and, as practicable, the EDR Plan. In so doing, the council or its designee, who may include the chief judge of the circuit, may determine that all or part of the EDR claim must be abated until action is taken on the judicial misconduct complaint.

Confidentiality - The court or employing office shall protect the confidentiality of allegations filed under this Plan to the extent possible. However, information about allegations filed under this Plan shall be shared on a need-to-know basis. Records relating to violations under this Plan shall be kept confidential on the same basis.

Prohibition against retaliation - Complainants under this Plan have the right to be free from retaliation, because of filing a complaint pursuant to this Plan. Likewise, any person who participates in the filing or processing of a claim such as an employment dispute resolution coordinator, mediator, witness, representative, or co-worker, also is entitled to freedom from retaliation.

Right to representation - Every individual invoking the dispute resolution procedures of this Plan may be represented by a person of his or her choice if such person is available and consents to be a representative. A court employee may accept the responsibilities of representation if it will not unduly interfere with assigned duties or constitute a conflict of interest, as determined by the representative's appointing officer. Similarly, every respondent to a complaint is entitled to representation in the same manner as complainants.

Case preparation - To the extent feasible, every individual invoking the dispute resolution procedures of this Plan may use a reasonable amount of official time to prepare the case, so long as it does not unduly interfere with the performance of official duties.

Extensions of time - The chief judge of the court, or other presiding judicial officer may extend any of the deadlines set forth in this Chapter for good cause. Extensions of time must be submitted in writing to the chief judge with a copy to the EDR coordinator. The written request must detail reasons for the request.

Dismissal of claim - On his or her own initiative or at the request of any party, the chief judge or presiding judicial officer may at any time in the proceedings, dismiss a claim on the grounds that it does not invoke violations of the rights or protections granted under the Plan or is untimely, is unduly repetitive of a previous claim, adverse action, or grievance, is frivolous, or fails to state a claim upon which relief may be granted.

Records - At the conclusion of formal and informal proceedings under this Plan, all papers, files, and reports will be filed with the court's Employment Dispute Resolution Coordinator ("EDR Coordinator"). No papers, files or reports relating to a dispute will be filed in any employee's personnel folder, except as necessary to implement an official personnel action. Records related to proceedings under this Plan shall be kept for 5 years, after which they may be destroyed.

Employment Dispute Resolution Coordinator

Each court shall designate a person to serve as the EDR Coordinator. Courts may designate more than one EDR Coordinator. The duties of such person shall be to provide information to the court and employees regarding the rights and protections afforded under this Plan; to coordinate and organize the procedures and establish and maintain official files of the court pertaining to complaints and other matters initiated and processed under the court's EDR plan; to coordinate the counseling of individuals in the initial stages of the claims process, and to collect, analyze, and consolidate statistical data and other information pertaining to the court's EDR process.

General disqualification provision- A party may seek the disqualification of a judge, employee, or other person involved in a dispute under this Chapter by filing a request with the EDR Coordinator accompanied by a sworn statement describing why that person's impartiality might reasonably be questioned. If designation of an alternate is necessary for the integrity of the process or for the appearance of impartiality – regardless of whether disqualification has been requested – the individual shall disqualify him- or herself, and the chief judge shall name an alternate to function in his or her place. In the case of recusal or disqualification of a chief judge, a replacement judge will be named by the chief judge of the circuit. Requests for disqualification shall be made at a reasonable time early in the process.

Counseling

An employee who believes that his or her rights under this Plan have been violated must first request counseling. Requests for counseling are to be submitted to the court's EDR Coordinator in writing and must contain all the violations asserted by the claimant within 30 days of the alleged violation or within 30 days of the time the employee becomes aware of the alleged violation. The counseling shall be conducted by the court's EDR Coordinator, unless the EDR Coordinator is disqualified from serving as counselor, or is otherwise unavailable. In such instances, the chief judge of the court shall designate another qualified individual to perform the counseling function. The EDR Coordinator shall promptly provide a copy of the request for counseling to the unit executive and the chief judge of the court.

The purposes of the counseling shall be to discuss the employee's concerns and for the EDR Coordinator to elicit information from the employee, regarding the matter which the employee believes constitutes a violation; to discuss which right was violated and why the employee believes there was a violation; to advise the employee of his or her rights and responsibilities and the procedures of the court applicable to the employment dispute resolution process; to evaluate the matter; and to assist the employee in achieving an early resolution of the matter, if possible.

Unless waived in writing by the employee, the court or employing office shall protect the confidentiality of allegations filed under this Plan to the extent possible. However, information

about allegations filed under this Plan shall be shared on a need-to-know basis. Records relating to violations under this Plan shall be kept confidential on the same basis.

The EDR Coordinator shall reduce to writing any agreement achieved during the counseling process and secure the signatures of the employee, his or her representative, if any, and the member of the employing office who is authorized to enter into settlement on the employing office's behalf.

The period for counseling shall be 30 days (or a shorter period if counseling is concluded at an earlier date), beginning on the date that the request for counseling is received by the EDR Coordinator.

The EDR Coordinator shall notify the employee in writing of the end of the counseling period, if the issue has not been resolved before then. As part of the notice, the EDR Coordinator shall inform the employee of the right and obligation, should the employee choose to pursue a claim, to file with the EDR Coordinator a request for mediation.

Mediation

Within 15 days after receiving the notice concluding the counseling period, the employee may file a request for mediation with the EDR Coordinator. The request must be in writing, stating the claim(s) presented. The EDR Coordinator shall promptly provide a copy of the request for mediation to the unit executive and the chief judge of the court. Failure to pursue mediation within 15 days will preclude further processing of the employee's claim under any other provisions of this Chapter. As soon as possible after receiving the request for mediation, the chief judge or EDR Coordinator shall designate a mediator and provide written notice of such designation.

Any person with the skills to assist in resolving disputes, except the court's EDR Coordinator, may serve as a mediator under this Plan. If the complaint alleges that a judge has violated the rights protected by this Plan, the mediator shall be a judge designated by the chief judge.

The mediator shall meet separately and/or jointly with the employee and his or her representative, if any, and the employing office to discuss alternatives for resolving a dispute, including any and all possibilities of reaching a voluntary, mutually satisfactory resolution.

Any party involved in the mediation process shall not disclose, in whole or in part, any information or records obtained through, or prepared specifically for, the mediation process, except as necessary to consult with the parties or their representatives, and then only with notice to all parties. A written record of all such contacts must be kept and made available for review by the affected person(s). In addition, in the event the employee files a complaint, the hearing officer shall have access to the record of any claims raised in mediation.

The mediator shall put into writing any settlement achieved during the mediation process and secure the signature of the employee, his or her representative, if any, and the member of the employing office authorized to enter into settlement on the employing office's behalf.

The mediation period shall be 30 days (or a shorter period if mediation is concluded at an earlier date), beginning on the date the request for mediation is received. The employee is required to attend at least one mediation session. Thereafter, he or she may proceed to file a complaint.

If, at the end of the mediation period, the parties have not resolved the matter that forms the basis of the request for mediation, the EDR Coordinator shall provide the employee, the employee's representative, if any, and the employing office with written notice that the mediation period has concluded. The notice also shall inform the employee of the right to file a complaint.

To File A Complaint

Not later than 15 days after receiving the notice concluding the mediation period, an employee may file a complaint under procedures established by the court. The complaint shall be in writing, shall identify the complainant and all involved parties and individuals, and shall set forth a short and plain statement of the complainant's claim and the relief or remedy being sought. Failure to pursue a complaint within 15 days will preclude further processing of the employee's claim. Claims that were not previously presented during the mediation process may not be pursued. The respondent shall be the employing office responsible for redressing, correcting, or abating the violations alleged in the complaint. No individual shall be named as a respondent in the complaint.

The Hearing

If the chief judge or presiding judicial officer does not dismiss the complaint the chief judge or presiding judicial officer shall hold a hearing on the merits of the complaint unless he or she determines that no material factual dispute exists.

The presiding judicial officer may provide for necessary discovery and investigation. In general, the presiding judicial officer shall determine the time, place, and manner of conducting the hearing. However, the following specific provisions shall apply to hearings conducted under this Section:

- The hearing shall commence no later than 60 days after the filing of the complaint.
- The complainant and the head of the office against which the complaint has been filed must receive written notice of the hearing. Such notice also shall be provided to the individual alleged to have violated rights protected by this Plan.

- At the hearing, the complainant will have the right to representation, to present evidence on his or her behalf, and to cross-examine adverse witnesses. The employing office will also have the right to representation, to present evidence on its behalf, and to cross-examine adverse witnesses.
- A verbatim record of the hearing must be kept and shall be the sole official record of the proceeding.
- In reaching a decision, the chief judge or presiding judicial officer shall be guided by judicial and administrative decisions under the laws related the Chapters of this Plan and by decisions of the Judicial Council of the Fifth Circuit.
- Remedies may be provided in accordance with this Chapter where the hearing officer finds that the complainant has established by a preponderance of the evidence that a substantive right protected by this Plan has been violated.
- The final decision of the chief judge or presiding judicial officer must be issued in writing not later than 30 days after the conclusion of the hearing.
- All parties, or any aggrieved individual, shall have the right to written notice of any action taken as a result of a hearing.

Review of Decision

A party or individual aggrieved by a final decision of the chief judge or presiding judicial officer, or by a summary dismissal of the complaint, may petition for review of that decision under procedures established by the Judicial Council of the Circuit. Failure to pursue a review of decision within 30 days will preclude further action. Any review will be conducted by a judge or judges, based on the record created by the hearing officer, and shall be affirmed if supported by substantial evidence.

Listed below are the procedures for the processing of EEO/EDR petitions for review by the Fifth Circuit Judicial Council:

- A person aggrieved by the disposition of a chief judge or designee, on an EEO/EDR complaint filed in any court of the Fifth Circuit, may petition the Judicial Council for review thereof.
- The petition for review must be filed in writing with the circuit executive within 30 days of receipt of the challenged ruling. Upon receipt of notice of the filing of petition for review, the EDR coordinator for the involved court shall promptly transmit to the circuit executive the complete record of complaint.

- After the record is received by the circuit executive, the chief judge of the circuit shall appoint a panel composed of three members of the Judicial Council to review the complaint and its disposition. The panel shall be empowered to act for and on behalf of the Judicial Council.
- The panel shall consider the record of the complaint and such other data or evidence as it deems appropriate, and shall rule thereon within 30 days, if possible. Panel action shall be by majority vote and the panel shall be guided by the substantial evidence standard of review.
- Decisions by the panel shall be in writing and shall be final and conclusive and not subject to further review by the Judicial Council, judicial appeals, or otherwise.
- Dispositions by the chief judge or designee and rulings by review panels shall be deemed confidential and made public only upon concurrence of the complainant, respondent, and subject chief judge and, if reviewed, by the review panel. Sanitized memoranda explaining the essence of the complaint, disposition, and review shall be made public by placing same in a file maintained by the EDR coordinator of the involved court. Sanitized versions of rulings by review panels shall be made public by placing same in a file maintained by the Circuit Executive, United States Court of Appeals for the Fifth Circuit, 600 Camp Street, New Orleans, Louisiana 70130. When any memorandum is deemed of precedential value, the chief judge of the affected court or chief judge of the circuit may cause a sanitized version thereof to be published.

Remedies

Where judges acting pursuant to this Plan find that a substantive right protected by this Plan has been violated, they may order a necessary and appropriate remedy. A remedy may be directed at correcting a past violation, prospectively insuring compliance with the rights protected by this Plan, or both. A remedy shall be tailored as closely as possible to the specific violation involved.

Remedies provided to successful complainants under this Plan may include, but are not limited to:

- placement of an employee in a position previously denied;
- placement in a comparable alternative position;
- reinstatement to a position from which previously removed;
- prospective promotion to a position;
- priority consideration for a future promotion or position;

- back pay and associated benefits, including attorneys' fees, where the statutory criteria of the Back Pay Act, 5 U.S.C. § 5596, are satisfied;
- records modification and/or expungement;
- "equitable" relief, such as temporary stays of adverse actions;
- granting of family and medical leave; and
- accommodation of disabilities through the purchase of specialized equipment or the restructuring of duties and work hours.

Remedies not legally available include:

- payment of attorney's fees (except as authorized under the Back Pay Act);
- compensatory damages; and
- punitive damages.

Final decisions under this Plan shall be made available to the public in accordance with procedures established by the Judicial Council of the circuit.