

[6570-01-P]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1614

Federal Sector Equal Employment Opportunity

AGENCY: Equal Employment Opportunity Commission (EEOC).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Equal Employment Opportunity Commission is proposing revisions to its federal sector complaint processing regulations. These proposals implement recommendations of the Commissioners' Federal Sector Workgroup.

DATES: Comments on the notice of proposed rulemaking must be received on or before [insert date 60 days after date of publication].

ADDRESSES: Written comments should be submitted to Stephen Llewellyn, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 1801 L Street, N.W., Washington, D.C. 20507. As a convenience to commenters, the Executive Secretariat will accept comments transmitted by facsimile ("FAX") machine. The telephone number of the FAX receiver is (202) 663-4114. (This is not a toll free number.) Only comments of six or fewer pages will be accepted via FAX transmittal. This limitation is necessary to assure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663-4070 (voice) or (202) 663-4074 (TDD). (These are not toll free numbers.) Copies of comments submitted by the public will be available for review at the Commission's Library, room 6502, 1801 L Street, N.W., Washington, D.C. between the hours of 9:30 a.m. and 5:00 p.m.

FOR FURTHER INFORMATION CONTACT: Thomas J. Schlageter, Assistant Legal Counsel, or Kathleen Oram, Office of Legal Counsel, 202-663-4640 (voice), 202-663-7026 (TDD). This notice is also available in the following formats: large print, braille, audio tape and electronic file on computer disk. Requests for this notice in an alternative format should be made to EEOC's Publications Center at 1-800-669-3362.

SUPPLEMENTARY INFORMATION: In 2004, former EEOC Chair Cari M. Dominguez asked Commissioner Stuart J. Ishimaru to lead a workgroup to develop consensus recommendations from the Commissioners for improvements to the discrimination complaint process for federal employees. The Federal Sector Workgroup considered testimony and submissions from the November 12, 2002, Commission meeting on federal sector reform, draft staff proposals for federal sector reform, and numerous submissions of internal and external stakeholders with suggestions for improvements to the federal sector process. The Workgroup determined that there was not consensus within the Workgroup for large scale revision of the federal sector EEO process at this time, but that there was agreement on several discrete changes to the existing regulations that would clarify or build on the improvements made by the last major revisions to Part 1614 in 1999. These regulation changes will be accompanied by the issuance of additional guidance in Management Directive 110 and other program changes at EEOC. A description of the proposed regulation changes is set forth below.

Agency Process

The Workgroup considered many recommendations for improvement to the parts of the federal sector EEO process for which the agencies bear responsibility -- counseling, investigations, and final actions. The Workgroup made a number of non-regulatory and

regulatory recommendations to improve the agency process. EEOC proposes the following changes to the agency process in part 1614.

The Commission proposes to add two new paragraphs to § 1614.102. One paragraph requires that agency EEO programs comply with part 1614 and the Management Directives and Bulletins issued by EEOC, and indicates that the Commission will review programs for compliance and the Chair may issue notices to agencies when non-compliance is found. With this provision, the Commission intends to provide a mechanism for reviewing and seeking compliance from agencies that fail to comply, for example, with the requirements of MD-110, MD-715 and Part 1614.

The second proposed new paragraph to § 1614.102 would permit EEOC to grant agencies variances from particular provisions of part 1614 to conduct pilot projects for processing complaints in ways other than those prescribed in part 1614. Such pilots would be subject to EEOC approval by vote of the Commissioners and would usually not be granted for more than 12 months. Pilots could provide helpful data for future recommendations for changes to the federal sector process.

The Commission proposes to add a new paragraph to § 1614.108 Investigation of complaints, that would require agencies that have not completed an investigation within the 180 day time limit for investigations (or up to 360 days if the complaint has been amended) to send a notice to the complainant indicating that the investigation is not complete, when it will be completed, and that the complainant has the right to request a hearing or file a lawsuit. The Commission believes that many complainants may not be aware of their rights to request a hearing or file a lawsuit 180 days after filing the complaint, or may not be aware of when the 180-day period expires. In addition, the Commission believes that requiring such a notice may

shorten delays in agency investigations, by providing an incentive for agencies to timely complete their investigations. The notice would be in writing and would describe the hearing process and include a simple explanation of discovery and burdens of proof.

The Commission proposes two clarifying changes in the agency process section of the regulations. Section 1614.103(b)(6) would be amended to comport with the coverage provisions of the Rehabilitation Act and state that part 1614 applies to discrimination complaints against the Government Printing Office, except for complaints under the Rehabilitation Act. It is also proposed to revise the dismissals section to clarify that complaints alleging discrimination in proposals to take personnel actions or other preliminary steps to taking personnel actions should be dismissed unless the complaint alleges that a proposal or preliminary step is retaliatory. This change would conform the dismissals section of part 1614 to private sector Commission policy guidance on retaliation claims.

EEOC Process:

The Workgroup recommended a number of changes to improve the hearings and appeals processes. The hearings changes are primarily non-regulatory. With respect to appeals, the Commission proposes to require that agencies submit appeals records and complaint files to the Commission electronically. Complainants would be encouraged, but not required, to submit appeals and other documentation electronically. The Commission also proposes to revise § 1614.402(f) to require that briefs in opposition to appeals be submitted to the Commission and served on the opposing party within 35 days of service of the statement or brief supporting the appeal (as opposed to the existing requirement that they be filed within 30 days of receipt of the statement or brief supporting the appeal.) The Commission proposes to revise § 1614.405(b) (redesignated as § 1614.405(c)) to provide that decisions under the section are final for purposes

of filing a civil action in federal court, unless a timely request for reconsideration is filed by a party to the case. The Commission proposes to revise § 1614.504(c) to distinguish between appeals alleging breach of settlement agreements from those alleging breach of final decisions. The section would state that the Commission may order compliance with a decision or a settlement agreement, or, in the case of a settlement agreement, it may order that the complaint be reinstated for further processing from the point processing ceased. In addition, the Commission proposes editorial changes to §§ 1614.402, 1614.405(a) and 1614.409 to correct errors and omissions.

Class complaints:

The Workgroup carefully considered the class complaint process and made a number of recommendations to improve its effectiveness. As a result of those recommendations, the Commission proposes to revise the class complaint regulations to make an administrative judge's decision on the merits of a class complaint a final decision, which the agency can fully implement or appeal in its final action. Currently, the administrative judge issues recommended findings and conclusions, which the agency may accept, reject or modify in its final decision. In individual complaints, the Commission changed the administrative judge's recommended decision to a final decision that is fully implemented or appealed by the agency in its final order in the 1999 regulation changes. This proposed change would bring the class complaint procedures into full conformity with the individual complaint procedures.

The Commission also proposes to provide for expedited processing of appeals of decisions to accept or dismiss class complaints (certification decisions) to shorten the class certification process. Specifically, the Commission proposes to amend § 1614.405, to provide

that decisions on appeals of decisions to accept or dismiss class complaints will be issued within 90 days of receipt of the appeal.

Finally, the Commission proposes an editorial change to § 1614.204(f)(1) to correct the omission of the word “shall.”

ADEA Notice of Intent to Sue Statute of Limitations:

Federal employees have two alternative routes for pursuing claims of age discrimination under the Age Discrimination in Employment Act (ADEA). An individual may file an administrative complaint with his or her agency under Part 1614 and then proceed to court after exhausting those remedies, or may bypass the administrative complaint process and proceed to court after filing a notice of intent to sue with EEOC. The ADEA does not contain a statute of limitations for lawsuits by federal employees and applicants. The Commission has taken the position in Part 1614 that an individual who files an administrative complaint under the ADEA must file a court action within the same time limits as an individual who files a Title VII administrative complaint, i.e., within 90 days of final action by the agency or final appellate decision by EEOC or, if no final action or appellate decision have been issued, after 180 days have passed since filing the complaint or appeal. Title VII, however, does not have a notice alternative permitting bypass of the administrative process like the ADEA and Part 1614 is silent as to the limitations period that should apply to suits brought under the ADEA after an individual files a notice of intent to sue with EEOC. The absence of an express limitations period in a statute does not mean that there is no time limitation for filing suits under that statute.

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 158 (1983). When a statute is silent, courts borrow a limitations period from a closely analogous statute. *Stevens v.*

Department of the Treasury, 500 U.S. 1, 7 (1991); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975).

The two federal courts of appeals that have considered the question of a limitations period for suits brought after the filing of a notice of intent to sue disagree regarding the appropriate borrowed time limit. The Eleventh Circuit, in *Edwards v. Shalala*, 64 F.3d 601 (1995), concluded that Title VII is the most analogous statute, and borrowed the then-applicable 30 day statute of limitations from Title VII for filing suit after filing an administrative complaint. It held that a federal employee who gives EEOC notice of intent to sue instead of filing an administrative complaint must file a lawsuit within 30 days of the expiration of the 30-day notice period to EEOC. The court relied on the decisions of circuit courts and the EEOC regulation (§ 1614.407), which applied the Title VII statute of limitations to ADEA cases that have gone through the administrative process, but do not apply to instances where an individual files a notice of intent to sue with EEOC.

Most recently, the First Circuit reluctantly refused to follow *Edwards*, and held that the Fair Labor Standards Act's two and three year statutes of limitations should be borrowed for ADEA lawsuits where the plaintiff bypasses the administrative process and files a notice of intent to sue. *Rossiter v. Potter*, 357 F.3d 26 (2004). The court concluded that the Title VII limitations period does not fit instances where an individual elects to bypass the administrative process, because the Title VII limitations period follows from and is dictated by the administrative process. In addition, it found that the Supreme Court's decision in *Stevens v. Department of Treasury*, 500 U.S. 1 (1991), forecloses borrowing the Title VII limitations period because, without deciding which limitations period applied, the Court held that Stevens' claim filed one year and six days after the alleged discriminatory event was "well within whatever

statute of limitations might apply to the action.” *Id.* at 8. Stevens’ claim would have been time barred had Title VII’s time limits been applied. Finally, the court concluded that the FLSA offers the closest analogy to ADEA actions based on a notice of intent to sue, reasoning that the FLSA creates private rights of actions that do not depend on the administrative process, and that the Act that extended protection against age discrimination to federal employees was an amendment to the FLSA.

The Commission is persuaded by the reasoning of the First Circuit, and proposes to add a sentence to § 1614.201(a) indicating that an individual who chooses to bypass the administrative complaint process by filing a notice of intent to sue with the EEOC under the ADEA must file a suit no later than two years after the occurrence of the alleged unlawful practice, or if the alleged unlawful practice was willful, within three years of the occurrence of the alleged unlawful practice.

Other clarifying changes:

The Commission proposes to substitute the word “disability” for the word “handicap” throughout Part 1614 to update the regulations and make them consistent with the language currently in the Rehabilitation Act and the Americans with Disabilities Act.

The Commission proposes to amend § 1614.109(g) to rename the section “Summary Judgment” instead of “Decision without a hearing.” This change is intended to convey more clearly the Commission’s policy that the standards of Rule 56 of the Federal Rules of Civil Procedure governing summary judgments apply in the EEOC hearings process. This change is not intended, however, to alter existing Commission policy or practice; Commission decisions on the summary judgment process will continue to apply.

The Commission proposes to amend § 1614.302(c)(2) to correct an erroneous cross reference. The section should refer to § 1614.107(a)(4).

Finally, the Commission proposes to revise § 1614.502(c) to change the time frame in which agencies must provide the relief ordered from 60 days to 120 days. The regulation currently requires an agency to pay an administrative complainant who prevails before the EEOC within 60 days of EEOC's final decision. Since 1991, however, complainants have had up to 90 days to file suit in United States district court if they are dissatisfied with EEOC's decision. Once a civil action is filed, the EEOC decision is no longer final and the agency does not have to provide the relief awarded. Amending the regulation to require agency payment within 120 days will ensure that the EEOC award is final before the agency provides the relief.

Regulatory Procedures

Executive Order 12866

In promulgating this notice of proposed rulemaking, the Commission has adhered to the regulatory philosophy and applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. We have conferred with the Office of Management and Budget, and concluded that this regulation is not a significant regulation within the meaning of the Executive Order.

Regulatory Flexibility Act

The Commission certifies under 5 U.S.C. Sec. 605(b), enacted by the Regulatory Flexibility Act (Pub. L. 96-354), that this rule will not have a significant economic impact on a substantial number of small entities, because it applies exclusively to employees and agencies of the federal government. For this reason, a regulatory flexibility analysis is not required.

Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Paperwork Reduction Act

This regulation contains no information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 29 CFR Part 1614

Administrative practice and procedure, Age discrimination, Equal employment opportunity, Government employees, Individuals with disabilities, Race discrimination, Religious discrimination, Sex discrimination.

For the Commission,

Dated

Naomi C. Earp
Chair

Accordingly, for the reasons set forth in the preamble, the Equal Employment Opportunity Commission proposes to amend chapter XIV of title 29 of the Code of Federal Regulations as follows:

PART 1614—[AMENDED]

1. The authority citation for 29 CFR Part 1614 continues to read as follows:

Authority: 29 U.S.C. 206(d), 633a, 791 and 794a; 42 U.S.C. 2000e-16; E.O. 10577, 3 CFR, 1954-1958 Comp., p. 218; E.O. 11222, 3 CFR, 1964-1965 Comp., p. 306; E.O. 11478, 3

CFR, 1969 Comp., p. 133; E.O. 12106, 3 CFR, 1978 Comp., p. 263; Reorg. Plan No. 1 of 1978, 3 CFR, 1978 Comp., p. 321.

2. Amend part 1614 to remove the word “handicap” wherever it appears and add, in its place, the word “disability”.

3. Amend part 1614 to remove the word “handicaps” wherever it appears and add, in its place, the word “disabilities”.

4. In §1614.102 add new paragraphs (e) and (f) to read as follows:

§ 1614.102 Agency program

* * * * *

(e) Agency programs shall comply with this Part and the Management Directives and Bulletins that the Commission issues. The Commission will review agency programs from time to time to ascertain whether they are in compliance. **If an agency program is found not to be in compliance, efforts shall be undertaken to obtain compliance. The Chair may issue a notice to the head of any federal agency whose programs are not in compliance and identify each non-compliant agency in the Office of Federal Operations’ annual report on the Federal workforce.**

(f) Unless prohibited by law or executive order, the Commission, in its discretion and for good cause shown, may grant agencies prospective variances from the complaint processing procedures prescribed in this Part. Variances will permit agencies to conduct pilot projects of proposed changes to the complaint processing requirements of this Part that may later be made permanent through regulatory change. Agencies requesting variances must identify the specific section(s) of this Part from which they wish to deviate and exactly what they propose to do instead, explain the expected benefit and expected effect on the process of the proposed pilot project, indicate the proposed duration of the pilot project, and discuss the method by which they

intend to evaluate the success of the pilot project. **Variations** will not be granted for individual cases and will **usually not be granted for more than 12 months**. Requests for variations should be addressed to the Director, Office of Federal Operations.

5. Revise 1614.103(b)(6) to read as follows:

§ 1614.103 Complaints of discrimination covered by this part.

* * * * *

(b) * * *

(6) The Government Printing Office except for complaints under the Rehabilitation Act; and

* * * * *

6. Revise 1614.107(a)(5) to read as follows:

§ 1614.107 Dismissals of complaints

(a) * * *

(5) That is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory, **unless the complaint alleges that the proposal or preliminary step is retaliatory;**

* * * * *

7. Amend 1614.108 by redesignating paragraph (g) as paragraph (h), and adding a new paragraph (g) to read as follows:

§ 1614.108 Investigation of complaints.

* * * * *

(g) If the agency does not send the notice required in paragraph (f) of this section within the applicable time limits, it shall, within those same time limits, issue a written notice to

the complainant informing the complainant that it has been unable to complete its investigation within the time limits required by § 1614.108(f) and estimating a date by which the investigation will be completed. Further, the notice must explain that if the complainant does not want to wait until the agency completes the investigation, he or she may request a hearing in accordance with paragraph (h) of this section, or file a civil action in an appropriate United States District Court in accordance with section 1614.407(b). Such notice shall contain information about the hearing procedures.

§ 1614.109 [Amended]

8. Revise the introductory text of 1614.109(g) to remove the words “Decisions without a hearing” and add in their place the words “Summary Judgment.”

9. In §1614.201(a) add a new last sentence to read as follows:

§ 1614.201 Age Discrimination in Employment Act

(a) * * * Such a civil action should be filed in a United States district court within two years of the occurrence of the alleged unlawful practice, or within three years of the occurrence of the alleged unlawful practice if that practice was willful.

10. Amend 1614.204 to:

a. in paragraph (f)(1) remove the words “administrative judge notify” from the first sentence and add in their place the words “administrative judge shall notify.”

b. revise paragraphs (i), (j) and (k) to read as follows:

§ 1614.204 Class complaints.

* * * * *

(i) *Decisions:* The administrative judge shall transmit to the agency and class agent a decision on the complaint, including findings, systemic relief for the class and any individual

relief, where appropriate, with regard to the personnel action or matter that gave rise to the complaint. If the administrative judge finds no class relief appropriate, he or she shall determine if a finding of individual discrimination is warranted and, if so, shall order appropriate relief.

(j) *Agency final action.* (1) Within 60 days of receipt of the administrative judge's decision on the complaint, the agency shall take final action by issuing a final order. The final order shall notify the class agent whether or not the agency will fully implement the decision of the administrative judge and shall contain notice of the class agent's right to appeal to the Equal Employment Opportunity Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit, and the applicable time limits for appeals and lawsuits. If the final order does not fully implement the decision of the administrative judge, then the agency shall simultaneously file an appeal in accordance with § 1614.403 and append a copy of the appeal to the final order. A copy of EEOC Form 673 shall be attached to the final order.

(2) If an agency does not issue a final order within 60 days of receipt of the administrative judge's decision, then the decision of the administrative judge shall become the final action of the agency.

(3) A final order on a class complaint shall, subject to subpart D of this part, be binding on all members of the class and the agency.

(k) *Notification of final action:* The agency shall notify class members of the final action and relief awarded, if any, through the same media employed to give notice of the existence of the class complaint. The notice, where appropriate, shall include information concerning the rights of class members to seek individual relief, and of the procedures to be followed. Notice shall be given by the agency within 10 days of the transmittal of the final action to the agent.

* * * * *

c. in paragraph (1)(2) remove the words “final decision” and add in their place the words “final order.”

d. in paragraph (1)(3) remove the words “final decision” wherever they appear in the first and last sentences and add in their place the words “final order” and revise the third sentence to read as follows: “The claim must include a specific detailed showing that the claimant is a class member who was affected by the discriminatory policy or practice, and that this discriminatory action took place within the period of time for which class-wide discrimination was found in the final order.”

§ 1614.302 [Amended]

11. Remove the words “§ 1614.107(d)” wherever they appear in § 1614.302(c)(2) and add in their place the words “§ 1614.107(a)(4).”

§ 1614.401 [Amended]

12. In § 1614.401(c), remove the words “a class agent may appeal a final decision on a class complaint” and add in their place the words “a class agent may appeal an agency’s final action or an agency may appeal an administrative judge’s decision on a class complaint.”

13. Add a new sentence to § 1614.402(a) before the last sentence to read as follows:

§ 1614.402 Time for appeals to the Commission.

(a) * * * Appeals described in § 1614.401(d) must be filed within 30 days of receipt of the final decision of the agency, the arbitrator or the Federal Labor Relations Authority.

* * * * *

13. In § 1614.403, revise the first sentence of paragraph (a), revise the first sentence of paragraph (f) and add a new paragraph (g) to read as follows:

§ 1614.403 How to appeal.

(a) The complainant, agency, agent, grievant or individual class claimant (hereinafter appellant) must file an appeal with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, at P.O. Box 19848, Washington, DC 20036, or electronically, or by personal delivery or facsimile. * * *

* * * * *

(f) Any statement or brief in opposition to an appeal must be submitted to the Commission and served on the opposing party within 35 days of service of the statement or brief supporting the appeal, or, if no statement or brief supporting the appeal is filed, within 60 days of receipt of the appeal. * * *

(g) Agencies are required to submit all appeals, complaint files, and other appellate filings to EEOC electronically, except in exigent circumstances. Appellants are encouraged, but not required, to submit appeals and supporting documentation electronically.

13. Amend § 1614.405 to revise the second sentence of paragraph (a), redesignate paragraph (b) as paragraph (c), add a new paragraph (b) and revise the first sentence of redesignated paragraph (c) to read as follows:

§ 1614.405 Decisions on appeals.

(a) * * * The Commission shall dismiss appeals in accordance with §§ 1614.107, 1614.403(c) and 1614.409. * * *

(b) The Office of Federal Operations, on behalf of the Commission, shall issue decisions on appeals of decisions to accept or dismiss a class complaint issued pursuant to § 1614.204(d)(7) within 90 days of receipt of the appeal.

(c) A decision issued under paragraph (a) of this section is final within the meaning of § 1614.407 unless a timely request for reconsideration is filed by a party to the case. * * *

14. Revise the first sentence of § 1614.409 to read as follows:

§ 1614.409 Effect of filing civil action.

Filing a civil action under §§ 1614.407 or 1614.408 shall terminate Commission processing of the appeal. * * *

§ 1614.502 [Amended]

15. Revise the last sentence of § 1614.502(c) to remove the words "60 days" and in their place add the words "120 days."

16. Revise the second sentence of § 1614.504(c) to read as follows:

§ 1614.504 Compliance with settlement agreements and final action.

* * * * *

(c) * * * If the Commission determines that the agency is not in compliance with a decision or settlement agreement, and the noncompliance is not attributable to acts or conduct of the complainant, it may order such compliance with the decision or settlement agreement, or, alternatively, for a settlement agreement, it may order that the complaint be reinstated for further processing from the point processing ceased. * * *