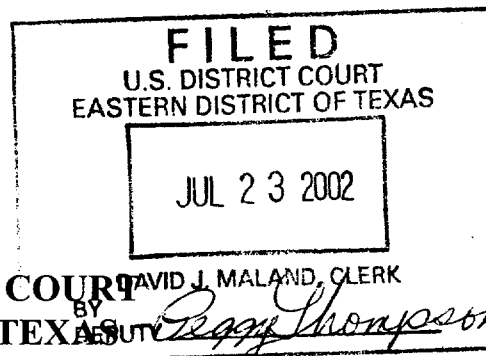


GENERAL ORDER NO. 02-6



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

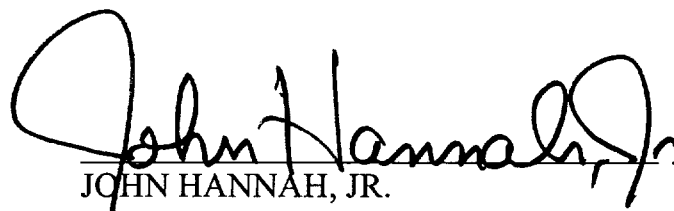
GENERAL ORDER ADOPTING REVISED FIFTH CIRCUIT MODEL EEO/EDR PLAN

The attached revised Fifth Circuit Model Equal Employment Opportunity and Employment Dispute Resolution Plan is hereby ADOPTED for implementation in this district. The effective date of the revised Plan is January 1, 2003. This order supercedes General Order 97-19, which adopted the original Fifth Circuit Model EEO/EDR Plan.

Signed this 22nd day of July, 2002.

FOR THE COURT:

By:


JOHN HANNAH, JR.
Chief Judge

FIFTH CIRCUIT MODEL EQUAL EMPLOYMENT OPPORTUNITY AND EMPLOYMENT DISPUTE RESOLUTION PLAN

CHAPTER I - GENERAL PROVISIONS

§ 1 Preamble

This Plan shall be known as the Fifth Circuit Model Equal Employment Opportunity and Employment Dispute Resolution Plan (the “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, color, national origin, religion, age (at least 40 years of age at the time of the alleged discrimination), or disability. This program does not modify or reduce the qualification standards for employment established in the federal court system.

The Judicial Conference has also 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 this model Plan or submitting a modified plan for approval by the Judicial Council. A copy of each plan and any subsequent modifications shall be filed with the Circuit Executive and with the Administrative Office.

Policies adopted by individual courts pertaining to adverse action or general grievance proceedings not invoking the rights and protections afforded under this 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 Plan is not intended to duplicate the protections provided for the resolution of complaints of judicial misconduct or disability under 28 U.S.C. § 372(c) but is intended to be the exclusive remedy of employees relating to rights enumerated under the Plan.

§ 2 Scope of coverage - This Plan applies to all circuit, district, bankruptcy, and magistrate judges of the United States courts in the Fifth Judicial Circuit, as well as to all employees of the said courts.

§ 3 Definitions - For purposes of this Plan--

- A. The term “employee” includes all individuals listed in Section 2 of this Chapter, as well as applicants for employment and former employees, except as provided below. The term “employee” does not include externs, applicants for bankruptcy judge or magistrate judge positions, private attorneys who apply to represent indigent defendants under the Criminal Justice Act, criminal defense investigators not employed by federal public defenders, volunteer counselors or mediators, or other individuals who are not employees of an “employing office” as that term is defined below.
- B. The term “employing office” includes all offices of the United States courts of appeals, district courts, and bankruptcy courts, including the offices of the circuit executive, federal public defenders, clerks of court, chief probation officers, chief pretrial services officers, staff attorneys, chief settlement conference attorneys, circuit librarians, and any such offices that might be created in the future. The court is the employing office of a judge’s chambers staff.
- C. The term “court” refers to the unit containing the employing office responsible for redressing, correcting, or abating the violation alleged in the complaint. In the case of disputes involving federal public defenders, the term refers to the court of appeals.
- D. The term “chief judge” refers to the chief judge of the court that adopted the Plan under which the complaint arises.

§ 4 EEO/EDR Implementation - Judges and court unit heads must apply the practices and policies described herein by, on an equal opportunity basis: (a) seeking qualified applicants reflecting the make-up of the relevant labor market and publicizing all vacancies; (b) making hiring decisions upon an evaluation of a person’s qualifications and ability to perform satisfactorily the duties of the position; (c) promoting employees according to their experience, training, and demonstrated ability to perform duties at a higher level; (d) seeking, insofar as reasonably practicable, to improve the skills and abilities of their employees through training, job restructuring, assignments, and details.

§ 5 Annual report - Each court unit will prepare and submit the annual employment practices report required by the Administrative Office of the United States, describing its efforts to provide equal employment opportunity and its activity in responding to EEO/EDR complaints.

CHAPTER II - EQUAL EMPLOYMENT OPPORTUNITY
AND ANTI-DISCRIMINATION RIGHTS

- § 1 **General** - Discrimination against employees based on race, color, religion, sex, national origin, age (at least 40 years of age at the time of the alleged discrimination), and disability is prohibited.
- § 2 **Definition** - The term “disability” means –
- A. a physical or mental impairment that substantially limits one or more of the major life activities of an employee,
 - B. a record of such an impairment, or
 - C. being regarded as having such an impairment. *See* 42 U.S.C. § 12102(2).
- § 3 **Special provision for probation and pretrial services officers** - The age discrimination provision of Section 1 of this Chapter shall not apply to the initial hiring of probation and pretrial services officers. *See* Report of the Proceedings of the Judicial Conference of the United States (March 1991), pp. 16-17.

CHAPTER III - SEXUAL HARASSMENT

- § 1 **General** - Sexual harassment of any employee is prohibited.
- § 2 **Definition** - Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical contact 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.
- § 3 **Complaints against court employees** - A complaint of sexual harassment against any court employee shall be processed in accordance with Chapter IX of this Plan.
- § 4 **Complaints against judges** - A complaint of sexual harassment against any judge may be filed as a complaint of judicial misconduct pursuant to 28 U.S.C. § 372(c), or

under the internal procedure presented below.

Internal Procedure - The complaint must be in writing, must allege all relevant facts constituting the basis for such complaint, and must specify the relief requested. The complaint must be filed within six months of a particular act or occurrence unless good cause is presented and accepted by the chief judge receiving the complaint. If the subject of the complaint is a district, bankruptcy, or magistrate judge, the complaint shall be filed with the chief district judge. If the subject of the complaint is a circuit judge, the complaint shall be filed with the chief circuit judge. Upon receipt of the complaint, the chief judge will:

- A. make any investigation into the matter deemed necessary;
- B. consult with involved parties and seek an informal resolution of the problem;
and
- C. prepare a report to the parties identifying the issues, describing the chief judge's findings and recommendation, and explaining what resolutions, if any, will be undertaken.

CHAPTER IV - FAMILY AND MEDICAL LEAVE RIGHTS

- § 1 General** - Title II of the Family and Medical Leave Act of 1993, 29 U.S.C. § 2611, applies to court employees in the manner prescribed in Volume I-C, Chapter X, Subchapter 1630. 1, Section R, of the Guide to Judiciary Policies and Procedures.

CHAPTER V - WORKER ADJUSTMENT AND RETRAINING NOTIFICATION RIGHTS

- § 1 General** - No "employing office closing" or "mass layoff" (as defined in Section 2 of this Chapter) 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 caused by non-appropriation of funds.

§ 2 Definitions

- A. 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.

- B. The term “mass layoff” means a reduction in force which--
1. is not the result of an employing office closing; and
 2. results in an employment loss at the single site of employment during any 30-day period for
 - a. (1) at least 33 percent of the full-time employees; and
(2) at least 50 full-time employees; or
 - b. at least 500 full-time employees. *See 29 U.S.C. § 2101.*

CHAPTER VI - EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES

- § 1 **General** - 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.*

CHAPTER VII - OCCUPATIONAL SAFETY AND HEALTH PROTECTIONS

- § 1 **General** - 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. Judges and court unit heads shall insure that such recognized hazards in court space are brought to the attention of the respective landlord (General Services Administration, U.S. Postal Service, or private lessor) for correction.

CHAPTER VIII - POLYGRAPH TESTS

- § 1 **General** - No employee may be required to take a polygraph test.

CHAPTER IX - DISPUTE RESOLUTION PROCEDURES

§ 1 General procedure for consideration of alleged violations - An employee who claims a denial of the rights granted under Chapters II through VIII of this Plan may seek resolution of such claims through the procedures of this Chapter. Before invoking these procedures, however, an employee is expected to address his or her concerns within the existing management structure. The procedures under this Plan do not relieve the employee or the employing office of their respective obligations to maintain a productive, ongoing dialogue about the work, the working environment, and workplace behavior.

The procedural process consists of:

- A. counseling, complaint, investigation, and optional mediation;
- B. review by and/or 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.

§ 2 General provisions and protections

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

- D. Extensions of time - The chief judge of the court, or designee, may extend any of the deadlines set forth in this Chapter for good cause.
- E. 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.

§ 3 Designation and duties of 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 include the following:

- A. to provide information to the court and employees regarding the rights and protections afforded under this Plan;
- B. 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;
- C. to coordinate the counseling of individuals in the initial stages of the complaint process, in accordance with Section 5 of this Chapter;
- D. to identify and designate an appropriate and competent investigator upon the filing of a complaint, in accordance with Section 7 of this Chapter; and
- E. to collect, analyze, and consolidate statistical data and other information pertaining to the court's EDR process.

§ 4 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 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.

§ 5 Counseling

- A. Request for counseling - An employee who believes that his or her rights under Chapters II through VIII of this Plan have been violated is expected, but not required, to request counseling.
- B. Form and manner of requests - Requests for counseling are to be directed to the court's EDR Coordinator at any time within 30 days of the alleged violation or within 30 days of the time the employee becomes aware of the alleged violation. A request for counseling does not extend the time for filing a formal complaint. See Section 6.A. below.
- C. Procedures
 - 1. Who may serve as counselor - The counseling shall be conducted by the court's EDR Coordinator, unless the EDR Coordinator is disqualified from serving as counselor under Section 4 of this Chapter, or is otherwise unavailable. In such instances, the chief judge of the court shall designate another qualified individual to perform the counseling function. If the dispute involves an alleged violation of this Plan by a judge, the person who conducts the counseling shall be a judge designated by the chief judge.
 - 2. Purposes of counseling - The purposes of the counseling shall be to discuss the employee's concerns and elicit information regarding the matter which the employee believes constitutes 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.
 - 3. Confidentiality - All counseling shall be kept confidential unless the employee agrees in writing to waive confidentiality of the counseling process for the purpose of allowing the designated counselor to contact the employing office or to attempt a resolution of the disputed matter.

§ 6 Filing a Complaint

- A. An employee who believes that his or her rights under Chapters II through VIII of this Plan have been violated may file a formal complaint with the EDR Coordinator within 30 days of the alleged violation or within 30 days of the time the employee becomes aware of the alleged violation, regardless of whether the employee has requested or received counseling. 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. 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.
- B. The employee must file an original and two copies of the complaint. The EDR Coordinator will provide a copy of the complaint to the respondent.

§ 7 Investigation and Report

A. Procedures

1. Designation of investigator - Upon receipt of a written complaint, the EDR Coordinator shall promptly designate an investigator to conduct an investigation of the allegations of the complaint. If the complaint is against a judge, the EDR Coordinator shall defer the designation of an investigator to the chief judge (See subsection 2.a below).
2. Who may serve as investigator - The investigator must be someone capable of doing a thorough and even-handed investigation and preparing a competent report and recommendation. Possible investigators may include, but are not limited to, district or magistrate judges, co-located court unit heads, chief deputies, staff attorneys, or other qualified personnel.
 - a. If the complaint alleges that a judge has violated the rights protected by this Plan, the investigator shall be a judge designated by the chief judge, who shall act promptly making such designation.
 - b. The EDR Coordinator may designate him- or herself as investigator, as long as he or she meets the other requirements of Section 7.A.2 of this Chapter.
3. Purpose of investigation - The investigator shall investigate the facts alleged in the complaint, apply the standards articulated in this Plan to the

facts, and prepare a report summarizing his or her factual findings, conclusions of law, and recommended remedies. The investigation should include contact with witnesses identified by the complainant and may include questioning the complainant.

4. Confidentiality - Any person or party involved in the investigation shall not disclose, in whole or in part, any information or records obtained through or prepared specifically for the investigation, except as necessary to perform the investigation and prepare the report as provided in this Section. The investigator shall advise everyone he or she contacts in the course of the investigation of this confidentiality requirement.
- B. Duration of investigation - Within 30 days of receipt of the complaint, the investigator shall submit his or her report and recommendations to the EDR Coordinator, who shall provide copies of it promptly to all affected parties. An investigator may petition the chief judge for a reasonable extension of time for good cause shown.
- C. The investigator shall recommend dismissal of the complaint, specifying the reasons therefor in his or her report, if the investigator determines:
1. the allegations are not supported by sufficient evidence;
 2. the facts do not state a claim upon which relief can be granted;
 3. the complaint is untimely; or
 4. the complaint is repetitive, frivolous, or vexatious.
- D. If the investigator finds merit in the complaint, his or her report shall set forth the nature of the violation, the evidence on which the finding is based, and recommendations for an appropriate remedy consistent with Section 11 below.
- E. The investigator's report and proposed resolution become final 7 days after receipt unless a party files a timely request for mediation or hearing. Once the report becomes final, all parties shall cooperate in the prompt implementation of any remedy specified in that report.

§ 8 Optional Mediation

- A. Initiation - Within 7 days after receiving the investigator's report, any party aggrieved by its findings or recommendations may, rather than seek immediate review by the chief judge as provided in Section 9, file with the EDR Coordinator a request for mediation. The request must be in writing, stating the claim(s) presented and identifying the exceptions taken to the investigator's report. If either party makes a timely request for mediation, the review and hearing procedures contained in Section 9 of this Plan are deferred until after mediation is concluded. The EDR Coordinator will provide copies of the request for mediation to all affected parties.

- B. Procedures –
 - 1. Designation of mediator - As soon as possible after receiving the request for mediation, the EDR Coordinator shall designate a mediator and provide written notice of such designation.

 - 2. Who may serve as mediator - 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.

 - 3. Purpose of mediation - 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.

 - 4. Confidentiality - Any person or 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.

- C. Duration of mediation period - 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 parties are required to attend at least one mediation session. Thereafter, any party may proceed to request review and hearing, terminating the mediation period.

- D. Conclusion of mediation period and notice - 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 parties of the right to request review and hearing under Section 9 of this Chapter.
- E. The investigator's report and proposed resolution become final 7 days after receipt of the notice concluding the mediation period by the EDR Coordinator unless a party files a timely request for review and hearing as provided in Section 9. Once the report becomes final, all parties shall cooperate in the prompt implementation of any remedy specified in that report.

§ 9 Review and Hearing

- A. Within 7 days after receiving the investigator's report, or, if mediation has been requested, not later than 7 days after receiving the notice concluding the mediation period, any party aggrieved by the findings or recommendations in the investigator's report may file with the EDR Coordinator an original and two copies of a request for review and hearing. The request must be in writing, stating the claim(s) presented and identifying the exception(s) taken to the investigator's report. The EDR Coordinator will provide copies of the request for review and hearing to all affected parties. Absent a timely request for review and hearing, the matter shall be concluded on the terms set forth in the investigator's report.
- B. Review of pleadings
 - 1. Reviewing official - The complaint and any other documents shall be reviewed by the chief judge of the court, or by another judge designated by the chief judge. In the event the chief judge is disqualified under Section 4 of this Chapter, or is unavailable to serve under this subsection, the reviewing official shall be designated as specified in Section 4. In the case of a complaint alleging that an Article III judge has violated rights protected by the Plan, that judge may elect to have a hearing conducted by a judge of another court, as designated by the Judicial Council. Any designation of a judge from another court to hear and decide the case shall be arranged by agreement of the chief judges of the affected courts.
 - 2. Review procedures - After notice to the complainant and an opportunity to respond, the chief judge or designee may dismiss in writing any complaint

that is found to be frivolous, unduly repetitive of a previous complaint, or that fails to state a claim upon which relief may be granted. If the chief judge or designee finds that the investigator's report is well-founded, he or she also may adopt summarily those findings and recommendations.

C. Hearing procedures

1. Hearing officer - If the chief judge or designee does not dismiss the complaint under the preceding subsection or adopt the findings and recommendations of the investigator's report, the chief judge or designee, acting as the hearing officer, shall hold a hearing on the merits of the complaint unless he or she determines that no material factual dispute exists.
2. Specific provisions - The presiding judge may provide for necessary discovery and/or additional investigation. In general, the presiding judge shall determine the time, place, and manner of conducting the hearing. However, the following specific provisions shall apply to hearings conducted under this Section:
 - a. the hearing shall be commenced no later than 60 days after the filing of the complaint;
 - b. 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;
 - c. at the hearing, the complainant will have the rights to representation, to present evidence on his or her behalf, and to cross-examine adverse witnesses; the employing office will have the rights to representation, to present evidence on its behalf, and to cross-examine adverse witnesses;
 - d. a verbatim record of the hearing must be kept and shall be the sole official record of the proceeding;
 - e. in reaching a decision, the chief judge or designee shall be guided by judicial and administrative decisions under the laws related to Chapters II through VIII of this Plan and by decisions of the Judicial

Council under Section 10 of this Chapter;

- f. remedies may be provided in accordance with Section 11 of 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;
- g. the final decision of the chief judge or designee must be issued in writing not later than 30 days after the conclusion of the hearing; and
- h. all parties, or any aggrieved individual, shall have the right to written notice of any action taken as a result of a hearing.

§ 10 Review of decision - A party or individual aggrieved by a final decision of the chief judge or designee may petition for review of that decision under procedures established by the Judicial Council of the circuit. Any review will be conducted by a judge or judges, based on the record created by the investigator and the hearing officer, and shall be affirmed if supported by substantial evidence.

§ 11 Remedies

- A. Where a substantive right protected by this Plan has been violated, the investigator may recommend (see Section 7) and the judge(s) may order (see Sections 9 & 10) 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.
- B. Remedies provided to successful complainants under this Plan may include, but are not limited to:
 - 1. placement of an employee in a position previously denied;
 - 2. placement in a comparable alternative position;
 - 3. reinstatement to a position from which previously removed;
 - 4. prospective promotion to a position;
 - 5. priority consideration for a future promotion or position;

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

C. Remedies not legally available include:

1. payment of attorneys' fees (except as authorized under the Back Pay Act);
2. compensatory damages; and
3. punitive damages.

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