

U.S. DISTRICT COURT
N.D. OF N.Y.
FILED
May 28, 2013

LAWRENCE K. BAERMAN, CLERK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

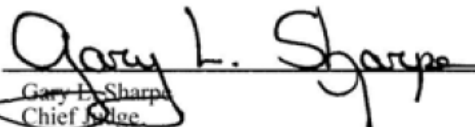
GENERAL ORDER #2

EQUAL EMPLOYMENT OPPORTUNITY (PART A)
And
EMPLOYMENT DISPUTE RESOLUTION PLAN (PART B)



So Ordered:

Date: May 28, 2013



Gary L. Sharpe
Chief Judge
U.S. District Court

Circuit Council Approval on this 25th Day of June , 2013

PART A

EQUAL EMPLOYMENT OPPORTUNITY PLAN

CHAPTER I - PREAMBLE

§ 1 Statement of Policy

In 1987, the Judicial Conference of the United States 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 or disability.

The Judicial Council of the Second Circuit directed each court to adopt its model plan and the accompanying employment dispute resolution plan or to submit an alternative plan for the review and approval by the Judicial Council of the Second Circuit.

The United States District Court for the Northern District of New York has adopted the model Equal Employment Opportunity Plan (EEO Plan) and the accompanying Employment Dispute Resolution Plan (EDR Plan) with certain revisions. The Plans of the United States District Court for the Northern District of New York are set forth in this document.

Each appointing officer and management staff will promote equal opportunity through the EEO Plan encompassing all facets of employment actions and conditions including recruitment, hiring, training, promotion, advancement, and supervision.

Each appointing officer and management staff will promote a court or office environment free of discrimination and discriminatory harassment. Any instances of discriminatory harassment for which a person seeks relief or assistance should be immediately reported. All employing offices shall address promptly all complaints alleging discrimination or discriminatory harassment and shall pursue resolution of each complaint in accordance with the procedures described in Part B - Employment Dispute Resolution Plan.

This program, which will be evaluated periodically, is not intended to modify or reduce the qualification standards for employment in the federal courts, as such standards have been approved by the Judicial Conference of the United States.

§ 2 Definitions

For purposes of the EEO Plan

- A. **Age.** At least 40 years of age at the time of the alleged discrimination except for the age restrictions prescribed by 5 U.S.C. § 8335(b) and 8425 (b) and described in the Judiciary Salary Plan and the Court Personnel System, applying to the appointment and retirement of federal probation and pretrial services officers.
- B. **Disability.** Any physical or mental impairment which substantially limits one or more of a person's major life activities, there is a record of such impairment, or the person is regarded as having such impairment. A qualified disabled person is one who, with or without reasonable accommodation, can perform the essential functions of the position.

- C. **National Origin.** National origin includes ethnicity. Employees of the United States Courts must be citizens of the United States or citizens of countries with treaty relations with the United States, as defined by the United States Department of State, or persons subject to the Chinese Student Protection Act, 8 U.S.C. § 1255.
- D. **Gender.** Discrimination on the basis of marital status or parenthood is also categorized as gender discrimination.
- E. **Discrimination Complaint.** A discrimination complaint is any allegation that a person has been denied employment, promotion or advancement, or has been affected in any other aspect of employment, because of his or her race, color, national origin, gender, religion, age and disability.

A discrimination complaint also includes allegations of restraint, interference, coercion, discrimination or reprisal because a person has raised an allegation of discrimination or has served as a representative, a witness, or an EDR coordinator in connection with a complaint. It does not include complaints relating to other dissatisfactions with a person's condition of employment which are commonly known as grievances.

A discrimination complaint may only be filed pursuant to the procedures set forth in Part B.

- F. **Sexual Harassment.** Sexual harassment is a form of gender discrimination. Sexual harassment is defined as unwelcome sexual advances, such as an overture, an offer, or 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 work environment; and,
 - 4. Such conduct is engaged in either the workplace or outside the workplace, during working hours or after working hours where there is a direct connection with workplace matters.
- G. **Discriminatory Harassment.** Conduct, threats, insinuations, innuendo, slurs, or other offensive statements or conduct based on race, color, national origin, gender, religion, age, and/or disability directed at an individual or a specific class or group is considered discrimination.

- H. Employment Actions and Conditions.** Includes employment and personnel decisions, actions, terms and conditions of a person's employment such as: recruitment, hiring, promotions, advancement, work assignments, compensation and benefits, training, education, disciplinary actions, suspensions without pay, demotions, terminations, and other such categories. Excluded from coverage are matters related to retirement programs, life insurance, bonding, health insurance, and the content of the Court's published regulations, rules, procedures, policies, job descriptions, administrative and general orders.

CHAPTER II - SCOPE OF COVERAGE

§ 1 General

The Plan applies to all Article III judges and other judicial officers in the Northern District of New York as well as to all employees of the U.S. District and Bankruptcy Courts (including chambers staff), and the U.S. Probation and Pretrial Services Office.

CHAPTER III - ORGANIZATION

A. Implementation

The Court shall implement the Equal Employment Opportunity Program. On behalf of the Court, the Chief Judge will submit modifications to the Judicial Council of the Second Circuit.

B. Appointing Officers

The Appointing officers must ensure that all permanent vacancies, are publicly announced to attract candidates who represent the make-up of persons available in the qualified labor market and all hiring decisions are based solely on job-related factors. They should make reasonable efforts to ensure 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.

C. Appointing Officers and Management Staff

All appointing officers and designated court managers must apply equal employment opportunity practices and policies in their respective Court Units. This includes giving each employee a fair and equal opportunity to demonstrate his or her skills and, where those abilities exceed general performance standards, to be recommended for personnel actions and awards recognizing such achievements. As resources permit, it also requires providing training programs which enable employees to develop their job skills fully.

CHAPTER IV - PERSONNEL PRACTICES

A. Discrimination-Free Workplace

All appointing officers will provide a discrimination-free workplace for their employees and applicants. No employing office will tolerate discrimination or discriminatory harassment in hiring or in any employment actions or conditions, on the basis of race, color, national origin, gender, religion, age, disability and/or sexual orientation. Appointing officers should make available to court employees training and education with respect to equal employment opportunity, including, but not limited to, sexual harassment, subject to available funds for such training.

B. Recruitment

All Appointing officials will seek qualified applicants who reflect the make-up of all such persons in the relevant labor market. All permanent vacancies, except for judicial assistant, judicial law clerk and judicial extern/intern positions will be publicly announced.

C. Hiring

Each court unit will make its hiring decisions strictly upon an evaluation of a person's qualifications and ability to perform the duties of the position satisfactorily.

D. Promotions

Each court unit will promote employees according to their experience, training, and demonstrated ability to perform duties of a higher level.

E. Advancement

Each court unit will seek, insofar as reasonable and practicable, to improve the skills and abilities of its employees through cross-training, job restructuring, assignments, details, and outside training.

F. Discrimination Complaints

The court adopts the procedures for resolving discrimination complaints set forth in the Employment Dispute Resolution Plan (EDR Plan). The EDR Plan is attached at Part B of this General Order.

CHAPTER V - EVALUATIONS

§ 1 General

Each Court Unit will prepare a brief report for the EEO Coordinator describing its efforts to provide equal employment opportunities in:

A. Recruitment

Each Court Unit will describe briefly efforts made to bring a fair cross-section of the pool available for the position into its applicant pool, including listing all employment sources used (e.g., state employment offices, schools, organizations, etc). Each Court Unit will also explain the methods it uses to publicize permanent vacancies.

B. Hiring

Each Court Unit will identify where its recruitment efforts resulted in the hiring of a cross-section of the pool available and will, if known, explain those instances where members of the cross-section did not accept employment with the court when it was offered.

C. Promotions

Each Court Unit will briefly describe promotional opportunities which occurred and will provide an analysis of the distribution of promotions, including a description of those persons who were promoted to supervisory positions.

D. Advancement

Each Court Unit will describe what efforts were made to improve the skills and abilities of employees through cross-training, job restructuring, assignments, details, and outside training.

In addition, this evaluation will document factors inhibiting achievement of EEO objectives such as no vacancies, minimal numbers of qualified applicants in the relevant labor market, and all persons in the unit having received all relevant training. This report will also include a breakdown, on forms to be provided by the Administrative Office of the United States Courts, according to the race, sex, color, national origin, religion, age and disability of the court`s personnel involved. The report will cover personnel actions occurring in the year ending September 30 and will be submitted to the Administrative Office of the U.S. Courts annually.

CHAPTER VI - ANNUAL REPORT

§ 1 General

Each Court Unit will prepare a report that includes demographic data and complaints pending or filed in the previous fiscal year. Instructions and deadlines related to the Fair Employment Practices Report will be provided by the Fair Employment Practices Office. Each Court Unit's report will be reviewed and approved by the Chief Judge prior to being submitted to the Fair Employment Practices Office at the Administrative Office.

PART B

EMPLOYMENT DISPUTE RESOLUTION PLAN

CHAPTER I - GENERAL PROVISIONS

§ 1 Preamble

Part B of this document shall be known as the Employment Dispute Resolution Plan (EDR Plan).

It was adopted by the United States District Court for the Northern District of New York in accordance with the Federal Judiciary Employment Dispute Resolution Model Plan (Model EDR Plan) adopted by the Judicial Conference of the United States on March 16, 2010 in order to provide rights and protections to employees of the United States District Court for the Northern District of New York that are comparable to those provided to legislative branch employees under the Congressional Accountability Act of 1995.

This EDR Plan supersedes all of its previous versions and Chapter VI (Annual Report) of the Equal Employment Opportunity Plan (EEO Plan) imposing requirements on the United States District Court and the United States Bankruptcy Court. Claims arising under Chapters II through IX of the EDR Plan, or under Chapters I through VI of the EEO Plan, shall be treated in accordance with the procedures set forth in Chapter X of the EDR Plan. The duties of the Court's EEO coordinator will be assumed by the EDR coordinator (established Chapter IX Section VI of the EDR Plan), except that the dispute resolution duties assigned to the EEO coordinator under the EEO Plan will be replaced by the dispute resolution procedures set forth in Chapter X of the EDR Plan.

The EDR Plan is to be implemented in the same manner as the EEO Plan. This court has adopted and implemented the EDR Plan based upon the Model EDR Plan adopted by the Judicial Conference of the United States. Modifications from the Model EDR Plan have been approved by the Judicial Council of the Second Circuit. A copy of the EDR Plan shall be posted on this Court's internal and external websites. A copy of the EDR Plan and any subsequent modifications shall be filed with the Office of the Circuit Executive and the Administrative Office of the United States Courts. This court shall annually submit a report on the implementation of the EDR Plan to the Administrative Office of the United States Courts for inclusion in the Director's Annual Report to the Judicial Conference.

Policies adopted by offices within this court pertaining to adverse action or general grievance proceedings that do not invoke the rights and protections afforded under the EDR Plan are not affected by the EDR Plan. Further, other local policies relating to rights enumerated under the EDR Plan that are not inconsistent with the rights and procedures established herein will not be affected by the EDR Plan.

The EDR Plan is not intended to duplicate the protections provided for the resolution of complaints of judicial officer misconduct or disability under 28 U.S.C. §§ 351 364, and

otherwise is intended to be the exclusive remedy of the employee relating to rights enumerated under the EDR Plan.

§ 2 Scope of Coverage

The EDR Plan applies to all judicial officers of this Court including chambers staff, as well as all employees of District Court, Bankruptcy Court and Probation and Pretrial Services.

§ 3 Definitions

For purposes of this Plan:

- A. The term “claim” means the filing of a request for counseling as set forth in Chapter IX, which may be further pursued by the filing of a request for mediation and a request for hearing.
- B. 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, applicants for judicial law clerk positions, private attorneys who apply to represent indigent defendants under the Criminal Justice Act, criminal defense investigators, volunteer counselors or mediators, or other individuals who are not employees of an "employing office" as that term is defined below.
- C. The term "employing office" includes all offices of the United States District Court, United States Bankruptcy Court, Probation and Pretrial Services, and any such offices that might be created in the future. The Court is the employing office of a judicial officer's chambers staff.
- D. The term "judicial officer" means a judge appointed under Article III of the Constitution, a United States Bankruptcy Judge, and a United States Magistrate Judge.
- E. The term "court" refers to the District Court or Bankruptcy Court in which the employing office is responsible for redressing, correcting or abating the violation alleged in the complaint.
- F. The term "days" in all filing and other time periods specified in this Plan shall mean calendar days, except that if the deadline date falls on a weekend or holiday, the deadline shall be extended to the following court business day.

CHAPTER II - EQUAL EMPLOYMENT OPPORTUNITY AND ANTI-DISCRIMINATION RIGHTS

§ 1 General

Discrimination against employees based on race, color, religion, sex (including 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 rights and protections of Chapters I through V of the Judiciary’s Equal Employment Opportunity Plan (Part A) shall also apply to employees.

§ 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).

Special provision for probation and pretrial services officers and officer assistants - The age discrimination provision of Section I 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.* Additionally, probation and pretrial services officers must meet all fitness for duty standards, and compliance with such standards does not, in and of itself, constitute discrimination on the basis of disability.

CHAPTER III - FAMILY AND MEDICAL LEAVE RIGHTS

§ 1 General

Title II of the Family and Medical Leave Act of 1993, 5 U.S.C. §§ 6381 et. seq., applies to court employees in the manner prescribed in Volume 12, Chapter 9, Section 920.20.35 of the *Guide to Judiciary Policies and Procedures*.

CHAPTER IV - WORKER ADJUSTMENT 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 which results from the absence of

appropriated funds.

§ 2 Definitions

- A.** The term "employing office closing" means the permanent or temporary shutdown of a single site of employment if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees.
- B.** "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.** at least 33 percent of the employees (excluding any part-time employees);and
 - b.** at least 50 employees (excluding any part-time employees); or
 - c.** at least 500 employees (excluding any part-time employees).

See 29 U.S.C. § 2101.

CHAPTER V - 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 VI - 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. Claims that seek a remedy that is exclusively within the jurisdiction of the General Services Administration ("GSA") or the United States Postal Service ("USPS") are not cognizable under this Plan; such requests should be filed directly with GSA or the USPS as appropriate.

§ 2 Court Program Requirements

The Court shall implement a program to achieve the protections set forth in Section 1 of this Chapter.

CHAPTER VII - POLYGRAPH TESTS

§ 1 General

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

CHAPTER VIII – WHISTLEBLOWER PROTECTION

§ 1 General

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.

§ 2 Definition

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.

CHAPTER IX – 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 Chapter X of this Plan.

Judges and employees are encouraged to report wrongful conduct to the Court's EDR Coordinator, the Chief Judge, Court 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 Court Unit Executive of any report. The Chief Judge and/or Court Unit Executive shall ensure that the allegations in the report are appropriately investigated, either by the Human Resources Manager or other designated individual.

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, including termination.

CHAPTER X - 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 shall seek resolution of such claims through the procedures of this Chapter. Generally, the process consists of:

- A. counseling and mediation;
- B. a hearing before the Chief Judge of the Court (or a designated judicial officer) in which the alleged violation arises; and
- C. a review of the hearing decision under procedures established by the Judicial Council of the Second Circuit.

§ 2 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 Court 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 the EEO Plan or this EDR Plan have been

violated, and who seeks relief under this Plan, must file a request for counseling with the Court's EDR Coordinator in accordance with Section 8 of this Chapter.

§ 3 **Alleged Violation by Judge**

Any employee alleging that a judge violated any rights granted under the EEO Plan or this EDR 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. §§ 351364, 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.

§ 4 **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.

§ 5 **General provisions and protections**

- A. Prohibition against retaliation.** Claimants under this Plan have the right to be free from retaliation because of filing a claim 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, is also entitled to freedom from retaliation.
- B. Right to representation.** Every individual invoking the dispute resolution procedures of this Plan has the right to 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 his or her court duties or constitute a conflict of interest, as determined by the representative's appointing officer.
- 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 his or her case, so long as it does not unduly interfere with the performance of his or her court duties.
- D. 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.

- E. Choice of Forum.** If an employee covered under the scope of this Plan believes that s/he is entitled to redress under either the adverse action or general grievance proceedings or the EDR proceedings, the employee must elect to file a claim and/or complaint under one or the other but may not proceed with a cause of action under both, either simultaneously or consecutively.
- F. 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 EEO Plan or this EDR Plan. A claim may also be dismissed if it is: untimely; unduly repetitive of a previous claim, adverse action or grievance; frivolous; or fails to state a claim upon which relief may be granted.
- G. 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.
- H. Determining Time Periods.** The word days in all filing and other time periods specified in this Plan shall mean calendar days. If the deadline date falls on a Saturday, Sunday or holiday, the deadline shall be extended to the following Court business day.

§ 6 Designation and duties of Employment Dispute Resolution (EDR) Coordinator

The Court shall designate a person to serve as the EDR Coordinator. The Court may designate more than one EDR Coordinator. The duties of the EDR Coordinator 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 claims and other matters initiated and processed under the court's employment dispute resolution plan;
- C.** to coordinate the counseling of individuals in the initial stages of the claims process, in accordance with Section 8 of this Chapter; and
- D.** to collect, analyze, and consolidate statistical data and other information pertaining to the court's employment dispute resolution process.

§ 7 General disqualification provision

Any person seeking disqualification or recusal of an EDR coordinator, counselor, mediator, or reviewing official shall submit a written statement to the Chief Judge explaining the reasons for the requested disqualification or recusal. If disqualification or recusal is warranted, the Chief Judge shall designate another individual to act as the EDR coordinator,

counselor, mediator, or reviewing official. In the event, the Chief Judge is unavailable to serve under this subsection or has disqualified or recused himself or herself pursuant to this provision, the Chief Judge will designate another judicial officer to serve as the reviewing official. Disqualification or recusal of the EDR coordinator, counselor, mediator, or reviewing official of a Court shall not be warranted merely because the Court is named as a responding party. However, to avoid possible conflict of interests if the Court Unit Executive is the alleged violator of the EDR Plan's provisions, the Chief Judge may designate another party to represent the employing office in mediation and/or at the formal hearing.

§ 8 Counseling

- A. Initiating a proceeding; formal request for counseling.** An employee who believes that his or her rights under Chapters II through VIII of this Plan have been violated must first request counseling.
- B. Form and manner of requests.** Requests for counseling:
1. are to be submitted to the court's EDR Coordinator;
 2. must be made in writing and contain all the violations asserted by the claimant; and
 3. must be made within 30 calendar days of the alleged violation or within 30 calendar days of the time the employee becomes aware of the alleged violation.
- 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 7 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. The EDR Coordinator shall promptly provide a copy of the request for counseling to the Court Unit Executive and the Chief Judge of the Court.
 2. **Purposes of counseling.** The purpose 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.** 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.

4. Form of settlement. The EDR Coordinator shall reduce to writing any settlement 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.

D. Duration of counseling period. The period for counseling shall be 30 calendar 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.

E. Conclusion of the counseling period and notice. The EDR Coordinator shall notify the employee in writing of the end of the counseling period. As part of the notice, the EDR Coordinator shall inform the employee of the right and obligation, should the employee choose to pursue his or her claim, to file with the EDR Coordinator a request for mediation in accordance with Section 9 of this Chapter.

§ 9 Mediation

A. Initiation. Within 15 calendar days after receipt by the employee of the notice of the conclusion of the counseling period, the employee may file with the EDR Coordinator a request for mediation. The request must be made in writing and must state 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 will preclude further processing of the employee's claim under any other provisions of this Chapter.

B. Procedures

1. Designation of mediator. 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.

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.

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.

5. **Form of settlement.** The mediator shall reduce to 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 who is authorized to enter into settlement on the employing office's behalf.
- C. **Duration of mediation period.** The mediation period shall be 30 calendar 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 request for hearing.
- 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 shall also inform the employee of his or her right to file a complaint under Section 10 of this Chapter.

§ 10 Complaint and hearing

- A. **Complaint.** Not later than 15 calendar days after receiving notice of the end of 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. Claims that were not presented in Section 9(A) may not be pursued. The respondent shall be the employing office which would be responsible for redressing, correcting or abating the violation(s) alleged in the complaint. No individual shall be named as a respondent in the complaint.
- B. **Hearing procedures**
 1. **Presiding Judicial Officer.** 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.
 2. **Specific provisions.** The presiding Judicial Officer may provide for such discovery and investigation as is necessary. 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:
 - a. the hearing shall be commenced no later than 60 calendar 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 shall also be provided to the individual alleged to have violated rights protected by this Plan;
- c. 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 have the right 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 his or her decision, the Chief Judge or presiding Judicial Officer shall be guided by judicial and administrative decisions under the laws related to Chapters II through IX of this Plan and by decisions of the Judicial Council of the Second Circuit under Section 12 of this Chapter;
- f. remedies may be provided in accordance with Section 13 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 presiding Judicial Officer must be issued in writing not later than 30 calendar 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.

§ 11 Record of hearing. The record of the hearing is considered confidential. The complainant must submit a written request to the Chief Judge in order to request a copy of the record.

§ 12 Record of Decision by the Chief Judge or designated Judicial Officer. A copy of the record will remain with the Chief Judge or Court Unit Executive of the employing office and will be made available to the public upon written request.

§ 13 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 file a petition for review of that decision under procedures established by the judicial council of the circuit. Any review will be conducted by a Judicial Officer(s), based on the record created by the hearing officer, and shall be affirmed if supported by substantial evidence. The petition to review the District's decision must be made to the Judicial Council of the Second Circuit in writing. The petition must be filed within 30 calendar days after the individual receives the Chief Judge's or presiding judicial officer's final decision or the

summary dismissal of the complaint. The petition must be completed on the Second Circuit's *Petition for Review form*, which will be provided by the EDR Coordinator.

§ 14 Remedies

- A.** Where Judicial Officers acting pursuant to Section 10 or 12 of 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 ensuring 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 which may be provided to successful complainants under this Plan 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 the employee was previously removed;
 4. prospective promotion to a position;
 5. priority consideration for a future promotion or position;
 6. back pay and associated benefits, including attorney's 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, or other appropriate means.
- C.** Remedies which are *not* legally available include:
1. payment of attorney's fees (except as authorized under the Back Pay Act);
 2. compensatory damages; and
 3. punitive damages.

§ 15 Record of final decisions. Final decisions rendered under this Plan shall be made available to the public in accordance with procedures established by the Judicial Council of the Second Circuit.