The Leadership Conference
on Civil and Human Rights

1620 L Street, NW
Suite 1100
Washington, DC
20036

202.466.3311 voice
202.466.3435 fax
www.civilrights.org

STATEMENT OF TAMARA E. CHRISLER, MANAGING DIRECTOR OF POLICY
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS

U.S. COMMISSION ON CIVIL RIGHTS
BRIEFING: "FEDERAL ME TOO: EXAMINING SEXUAL HARASSMENT IN GOVERNMENT WORKPLACES"

MAY 9, 2019

Chairwoman Lhamon, Vice Chair Timmons-Goodson, and distinguished Members of the Commission, my name is Tamara Chrisler, and I am the Managing Director of Policy at The Leadership Conference on Civil and Human Rights (The Leadership Conference), which is a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States. Thank you for holding this hearing on sexual harassment in the Federal Workplace and allowing my testimony.

As written in my biography, I have had the honor of working in many aspects in the field of employment discrimination and have observed agency processes and procedures from varied perspectives: as agency counsel, tasked with defending the agency in claims of discrimination filed by agency employees; as a supervisory agency counsel, who was responsible for training managers on identifying behaviors that could lead to claims of harassment, and addressing behaviors to prevent such claims; as an administrator, overseeing the dispute resolution and claims processing procedures for claims filed by Legislative Branch employees; and as an EEO consultant, investigating claims of discrimination filed by Federal employees against their respective agencies, and advising agency officials on how to prevent harassing behavior in the workplace. My experience has given me a comprehensive view into varying processes and procedures, and I thank you for allowing me to share my experience, observations, and thoughts on how these processes and procedures impact claims of sexual harassment.

EEO COMPLAINTS PROCESS

Through my experience as an EEO consultant, I saw first-hand, and up-close, the cause of delays during the administrative EEO process, which are many times unnecessary delays, and the impacts the delays had on the parties and the substance of the investigation. These delays in the process leave complainants dismayed, disillusioned, and at risk for continued harassment. The delays also put agencies at risk for increased liability.

The claims process for a Federal employee is different from that of an employee in the private sector or in state government. 29 CFR §1614.105 requires a Federal employee to contact an EEO counselor within 45 days of an alleged violation, unless, under limited circumstances, the employee can establish the time

limit should be extended.[1] Either way, this initial contact begins the counseling process, which is a necessary step to file a complaint. The counselor ascertains information about the incident(s) from the employee, and then speaks with named management officials to informally inquire into the claim. Counseling is an informal way, prior to the filing of a complaint, that an employee may share their concerns, and the agency may be made aware of the concerns in order to address or resolve them. The employee may remain anonymous during the counseling period if they choose, or the employee may waive anonymity so that the counselor can discuss with management specifics of the claim and possible resolution of the claim. The counseling period lasts 30 days, and can be extended up to 90 days if necessary, only with the employee's consent.[2] Sometimes, an extension for counseling is required if the counselor is unable to connect with named managers, or if the counselor is attempting to facilitate an informal resolution. At the completion of counseling, the counselor prepares a report that is submitted to the agency's EEO office for consideration if a complaint is later filed. There is no legal threshold for engaging in counseling: that is, a counselor does not determine whether the claim has merit or whether a finding of discrimination or harassment is likely. The role of the counselor is essentially to make the employee aware of certain rights and responsibilities, receive information from the employee about their claim, receive information about the claim from other agency employees and managers, and document the issues raised by the employee for subsequent consideration by the agency if a complaint is filed by the employee.

Alternative Dispute Resolution (ADR) is offered to the employee as an option instead of counseling.[3] If the employee chooses to engage in ADR, then a mediator will be selected and provided by the agency to facilitate a discussion between the employee and named management officials to informally resolve the claims. The employee may or may not be represented during any part of the administrative process, to include mediation. If the employee chooses to be represented, they may select any representative of their choice: attorney, union representative, or even a family member. Typically, the agency's representative at the mediation will not be the named management officials, but instead, agency counsel or other such representative. This representative may or may not be given decision-making authority to utilize at the mediation, and may not be authorized to accept offers of resolution. In those instances, the agency representative will have to speak with another agency official to obtain authority to accept the offer of resolution. If the authorized agency official is within the line of supervision of the management official alleged to have engaged in discriminatory or harassing behavior, the authorized official could be seen as protecting the alleged harasser, presenting a conflict of interest.

The ADR period lasts no longer than 90 days[4], and should mediation not successfully resolve the claim, the employee may proceed with the process, as if he or she had completed counseling. Either counseling

[1] "The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission." 29 CFR §1614.105(a)(2).
[2] 29 CFR §1614.105(2)(d) and (e).
[3] 29 CFR §1614.105(b)(2) and (f).
[4] 29 CFR §1614.105(f).

or ADR must be completed before an employee may file a formal complaint with the agency's EEO office. If the employee chooses to file a complaint, he or she must do so within 15 days of receiving a Notice of Right to File a Formal Complaint.[5] If the complaint is filed outside the 15-day window, it may ultimately be dismissed procedurally.[6]

Once a complaint is filed by an employee, the agency will conduct a review to determine whether procedural (i.e. timely counseling and timely filing of the complaint) and other requirements to that point have been met; and whether additional information is needed to clarify the issues in the complaint. The agency may choose to request additional information from the complainant, or the agency may dismiss the complaint, based on a number of factors to include, but not limited to, untimely filing, failure to state a claim upon which relief can be granted, or previously filing the claim in another forum. At any time before a request for hearing, the agency may determine to dismiss a complaint for these reasons.[7]

THE INVESTIGATION

If the complaint survives the agency's initial review, it will be accepted for investigation with the accepted issues framed by the agency. Though the agency uses the complainant's formal complaint and the counselor's report to frame the issues, there are instances where the accepted issues do not accurately reflect the intent of the complainant. If the employee recognizes the incorrect framing of the issues and notifies (within a proscribed time limit) the agency of the discrepancy, the agency may amend the accepted issues prior to the initiation of the investigation, in order to best capture the employee's allegations. The decision to amend the accepted issues remains with the agency, so the employee has no actual ability to change the issues unless the agency chooses to do so. This limited control over the allegations has left certain employees in the position of raising concerns with the investigator, who has no authority to amend the accepted issues and must only investigate within the scope of the accepted issues. Having to participate in an investigation that the employee knows is not reflective of the claims they intended to raise leads to frustration and distrust of the process.

After acceptance of the issues, an impartial investigator will be assigned by the agency to complete the investigation within 180 days of the filing of the complaint, or 360 days of any amendment made to the original complaint. A complainant may agree to extend the investigation up to 90 days beyond the 180 days, but may not extend beyond the 360 days.[8] Whereas most investigations had previously been conducted by employees of the agency, many agencies are now utilizing the investigative services of independent contractors or contracting firms to conduct investigations. There are a number of benefits to utilizing contractors: independent review of the claims, distance from agency dynamics that may interfere with an objective evaluation of the claims, and an appearance of objectivity, which all bring value to the overall credibility of the investigation.

[5] 29 CFR §1614.105 (d)€ and (f); 29 CFR §1614.106(b).
[6] 29 CFR §1614.107.
[7] 29 CFR §1614.107.
[8] 29 CFR §1614.106(e)(2); 29 CFR §1614.108(3).

During the investigation, the investigator interviews witnesses to obtain testimony on the matter(s) at issue. Typically, witnesses consist of the complainant, coworkers or management officials alleged to be responsible for the claimed discrimination or harassment, human resources staff, and employees who may have witnessed relevant events. In the case of sexual harassment claims, witnesses may also include those individuals who may not have directly witnessed any interaction between the complainant and management officials, but can instead provide testimony regarding the office environment, agency culture, and other insight that may be helpful to a trier of fact to understand the totality of the circumstances, which is necessary to evaluate a claim of sexual harassment. Human resources staff have been particularly helpful in indicating whether concerns of harassment had been raised with human resources or other appropriate management officials during the time of events at issue. This information can prove useful to the trier of fact to establish liability on the part of the agency, if the harasser was a coworker of the complainant and not a management official, the theory being, if the agency had knowledge of the alleged behavior and did nothing to prevent it, then liability comes into question.

In addition to obtaining testimony, an investigator gathers documents from complainants and the agency, relevant to the accepted issues, which may include memoranda written by management officials, leave records, and policies documenting processes and prohibitions against harassment.

Once all evidence has been obtained, a report of investigation (ROI) is prepared by the investigator, including sworn statements provided by the witnesses, documents gathered by the investigator, and a summary of the evidence obtained. The completed ROI is provided to the complainant, who has 30 days to request either a hearing before an administrative judge of the EEOC, or a final agency decision (FAD) based on the evidence contained in the ROI.[9] If a FAD is requested, a decision based on the merits of the case is rendered from an evaluation of the ROI, with the trier of fact issuing findings of fact and conclusions of law. The trier of fact may be an employee of an agency's Complaints Adjudication Office (which is independent of the agency's EEO office), or an independent contractor. Whether employee or contractor, the trier of fact is at liberty to request additional evidence, if necessary, from the investigator.

THE HEARING

If a hearing before the EEOC is requested, the ROI becomes part of the record of the administrative hearing process. At this point, the process includes discovery, written pleadings, witnesses at an administrative hearing, and a legal decision by an administrative judge. Both the administrative judge's decision and the FAD are appealable to the Office of Federal Operations of the EEOC. The administrative judge is required to issue a hearing within 180 days of receiving the ROI from the agency, unless good cause is determined by the administrative judge to extend the time.

REMEDIES

Whether the complaint is adjudicated on the developed ROI through a FAD, or whether an administrative judge renders a decision after a hearing on the merits, a finding of discrimination or harassment may

[9] 29 CFR §1614.108(f); 29 CFR §1614.110

result in a remedy provided to the complainant. Remedies are typically in the form of "make whole relief;" they are not punitive. Complainants have been awarded monetary damages, to include pecuniary damages, compensatory damages, and attorney's fees. Remedies have also included notice posting, training for employees, and reassignment of employees.[10]

DELAYS IN ADMINISTRATIVE PROCESS

Based on the timelines provided for counseling/ADR, investigation, and hearing, the goal for the length of the administrative process is 395 days with no extensions of deadlines, to 575 days with extensions, or 665 days if the complaint is amended. These numbers reflect the ideal scenario. In reality, however, it has taken anywhere from three to five years for some complainants to see final disposition of their EEO claims, which is an excruciating amount of time for someone enduring a harassing work environment with no interim relief or remedy. Because a complainant must exhaust their administrative remedies, certain steps of this process, including counseling/ADR, filing a complaint, and conducting an investigation, must be completed before an administrative hearing can be held, or before a complainant can bring forth a civil action in district court. In some cases where the process took a long time to complete, relevant witnesses have left the federal government and did not cooperate with the administrative process, since they were no longer required to do so. Some cases have also lost witnesses due to the witnesses having passed away prior to the completion of the process. It is clear that a delayed administrative process not only brings frustration to complainants, but they also significantly impact the substantive evidence that is presented to evaluate the claims.

There have been instances where individuals have shied away from filing an EEO complaint because the process is so lengthy. Instead, employees who are members of a union have filed claims through their agency's negotiated grievance process. Other employees, who are not affiliated with a collective bargaining unit, have either sought transfers within the agency to remove themselves from the discrimination or harassment, found employment outside of the agency, or have suffered through the discrimination or harassment until the manager left, or other circumstances intervened to stop the harassment. In one particular case, an employee had endured a sexually harassing environment for over three years because the thought of participating in a lengthy EEO process brought her too much anxiety.

CULTURE OF THE AGENCY

The culture of an agency plays a vital role in whether an employee will report claims of discrimination or harassment. Of particular concern is a complainant who has alleged claims of sexual harassment. Individuals enduring sexual harassment may be reluctant to bring forth a claim to their manager, as the manager may be the alleged harasser. There is also fear of retaliation, fear of being labeled a troublemaker, questioning the employee's reasons for bringing forth the claim, and fear of isolation (co-workers not wanting to be associated with a complainant). Certain agencies maintain long-standing practices of "toughening out" unprofessional behavior, and anyone who challenges that practice is seen as disloyal to the agency and not a team player. In the case of sexual harassment, employees are seen as "weak" if they cannot endure inappropriate comments, gestures, or behavior. They are taunted and

[10] 29 CFR §1614.501.

ridiculed for not accepting the comments and behavior, and are cast aside. As a result, impacted individuals may bring their concerns in confidence to like-minded co-workers or management officials other than those engaged in the behavior. Those managers involved in the behavior are either involved directly by participating in the conversation or laughing at the comments or gestures; or they are involved indirectly, by ignoring the conversation or by suggesting that behavior is "not that big of a deal." If the impacted individual has a confidential conversation with a co-worker or management official, and those individuals do not raise the complainant's concerns with anyone else in the agency, it is conceivable that nothing will be done to stop the harassment. The harassment continues, the harasser feels emboldened, the impacted individual continues to suffer, and informed staff within the agency feel disillusioned and unsupported. This vicious cycle is toxic to a workplace, yet it is part of many workplaces.

There are also situations where complainants present their concerns to a management official or human resources office, only to receive the improper advice to deal directly with the alleged harasser to stop the behavior[11], or to have their concerns dismissed with a suggestion to ignore the behavior. Neither suggestion is the appropriate way to respond to concerns of sexual harassment: advising an aggrieved individual to approach the harasser implies that the behavior is occurring through fault of the individual receiving the harassment, and makes that person responsible for stopping the harassment. This approach relieves the harasser of responsible and places it squarely at the feet of the impacted individual where it does not belong. Similarly, advising the aggrieved individual to ignore the behavior implies that the behavior is not the problem, but how the individual perceives the behavior is the problem, which, again, places the responsibility on the aggrieved, and not the harasser.

RECOMMENDATIONS

The testimony that I provide is designed to serve as a practical perspective, a lens from which the Commission can see more clearly the process of bringing forth a claim of discrimination or harassment in the Federal workplace, and the impact that delays in the process have on the people involved in the claim. I have observed how improperly trained staff can have a detrimental effect on the process. I have observed how the culture of an agency can hamper its ability to address and resolve claims of harassment and discrimination. The recommendations I suggest below, if implemented, can not only help to improve the complaints process, but also restore confidence in the process that many complainants have lost.

CHANGE THE CULTURE OF THE AGENCY

1. Require every agency component to have, and periodically review, anti-harassment policies that are distributed to all new hires and to employees annually or when there is an update.

   Some agencies within a department do not maintain their own anti-harassment policy, but instead rely on the larger department's policy to inform employees of the agency's stance against harassment and to provide the employees with processes and procedures.

[11] It must be noted that although a complainant need not present their concerns to the alleged harasser, alerting some management official can be essential to stop the harassment.

Though agency components may follow the process and procedures of the parent department, having their own policies directly condemning harassment sends the message that the head of the agency recognizes the severity of these claims, their impact on the workplace, and the need to prevent the conduct that leads to such claims. A culture change can result from not just issuing the policy, but "living" it as well: modeling the behavior they want to see; thoroughly addressing each claim of harassment and not turning a blind's eye to inappropriate behavior or making excuses for it; and implementing practices that reduce or prevent inappropriate behavior that becomes part of the daily operations: inappropriate jokes and comments, for example.

2. Build trust in the EEO process.

   Employees who, in their perspective have been wronged by management, or have had their concerns about poor treatment ignored or dismissed by management, may develop a distrust of agency process. This distrust can be based on the employee's view that the process itself is administered by a management team that, in the employee's mind, has already engaged in violations of policy and law. The employees develop skepticism of the people managing the program, and the program itself, and are reluctant to seek the process for resolution.

   If employees choose to engage in the process, their doubts about the integrity of the program can prevent their full participation and their belief that their claims will be fairly resolved.

   Agencies can build trust in their programs by complying with procedures, meeting deadlines, ensuring that counselors properly encapsulate the issues so that when the agency accepts the complaint and frames the issues, the accepted issues are reflective of the complainant's concerns. Agencies should be mindful of appearances of impropriety and remove from the complaints process management officials who are alleged to have engaged in wrongful behavior. If a conflict exists, or the appearance of a conflict exists, agencies must act to correct it.

3. Incorporate administrative inquiries into agency procedures

   Some agencies have incorporated administrative inquiries into their process, wherein witnesses are interviewed and documents gathered by a neutral third party, to determine whether agency policy, not necessarily the law, has been violated. This inquiry is separate from the EEO process, and it is not designed to replace the EEO process, nor is it designed to render a finding of discrimination. The inquiry serves as a means to immediately address claims of discrimination or harassment, and to determine whether agency policy was violated.

   These inquiries have been an important tool in responding to claims of harassment, because they can be initiated quickly, without the procedural statutory requirements of the EEO process. Inquiries generally take between one and three months to complete, which is the same amount of time it takes for complainants to complete the initial step (counseling) of the EEO process. At the conclusion of the inquiry, recommendations are made by the investigator, which may include training for staff, organizational restructuring, and further investigation if it is determined

that agency policy was violated. The immediate inquiry and resulting action that can be taken demonstrate the agency's commitment to addressing claims of harassment and discrimination and provides timely solutions to existing concerns. Again, this process does not replace the EEO process, as the administrative inquiry does not yield a determination that the law was violated. It does, however, focus on following agency policy and can provide resolution to violations of policy, if that determination is made.

TRAINING

1. Increase Training for Agency EEO Staff, and Managers

   EEO counselors and staff who are responsible for framing issues accepted for investigation are developing the foundation for the claims process, so their knowledge and skills are necessary to ensure a solid process throughout. Training counselors to timely complete counseling without additional extensions and to speak with relevant individuals to properly cover the issues raised by complainants will provide for a comprehensive framework for the development of the accepted issues. EEO staff who then subsequently frame the issues in the complaint will more accurately capture the incidents raised by complainants and the essence of their concerns.

2. Increase Training for Human Resources (HR) Staff

   HR staff are typically the agency staff who respond to investigators' requests to interview witnesses and requests for documents. The investigation is oftentimes unnecessarily delayed because HR staff have not provided the investigator contact information for witnesses or the requested documents. Training for HR staff to develop systems to properly handle requests from investigators can result in more efficient investigations which will lead to a more expedient process overall.

   As noted above, there are cited incidents where complainants' concerns of harassment have been met with indifference or disbelief, and complainants have been advised to ignore the harassing behavior, confront the harasser, or consider the behavior as just a character flaw of the harasser. Of course, these responses are completely unacceptable and do nothing to foster trust in the process. Ensuring that first points of contact – human resources staff, in particular – know how to properly address employees who raise concerns about harassment will engender trust by complainants, and will demonstrate the agency's commitment to eradicating harassment and discrimination from the workplace.

3. Increase Training for Managers

   Identifying Harassing Behaviors

   Managers are in the position to stop harassing behaviors before they start, or rid the work environment of these behaviors before they start to poison the workplace. From team leads to branch chiefs, managers set the tone for what is considered to be acceptable behavior. Modeling

appropriate behavior themselves and noting whether staff are modeling such behavior is a proactive approach to ensuring a harassment-free workplace. Being able to identify and eliminate harassing behavior is another. Managers need to be trained on what harassing behavior looks like, how to stop it, and how to repair damage that was caused from it.

Correcting Harassing Behaviors

When managers are found to have engaged in harassing or discriminating behaviors, agencies should hold them accountable and ensure that the behavior is corrected. If, after a final disposition of an EEO complaint, there is a finding of discrimination, the trier of fact may order that the agency conduct further investigation into the wrongful behavior and issue appropriate discipline. Every order, however, does not include an element of discipline for the wrongdoer: it is not required relief under Federal regulations.[12] In those instances, it is within the discretion of the agency to further investigate the wrongful behavior and hold accountable the wrongdoer. Similarly, in an administrative investigation, the investigator may conclude that policy was violated, and recommend further investigation and possible corrective action for the wrongdoer. Such further action is at the discretion of the agency.

If discrimination or harassment has occurred, the individual responsible for inflicting the discrimination or harassment must be held accountable. There should be no discretion in determining whether, after a finding of discrimination or harassment, or finding that agency policy was violated, some type of corrective action be instituted against the wrongdoer. I am not suggesting that every incident requires discipline. I do suggest, however, that every incident requires corrective action, even if it is training for an individual or an evaluation of certain processes to determine where the system failure or the wrongful behavior was allowed.

REQUIRED COOPERATION AND WORKPLACE CLIMATE SURVEYS

1. Require former Federal employees to cooperate with the administrative process

When an employee leaves the Federal service due to change in careers, retirement, or other circumstances, the employee is no longer required to participate in the EEO administrative process. In these circumstances, testimony from crucial witnesses is lacking, and the evaluation of the claim falls short.

Regulations should mandate participation by these individuals, regardless of their employment status. Admittedly, it is easier to enforce participation in an agency process when witnesses are employees of the particular agency: federal employees are generally required to participate in official investigations in their agencies, and they can face discipline should they refuse to participate. Once an employee leaves federal service, the requirement to participate in an official investigation no longer exists. If, however, a Federal employee acknowledged, at the time of hire, that participation in administrative processes extends beyond their employment, then the requirement would survive separation from

[12] 29 CFR §1614.501

employment. With this agreement, agencies would be able to continue to require the employee's participation, and the administrative complaints process would be improved.

2. Require workplace climate surveys be conducted

The aftermath of a harassment claim, regardless of whether there was a finding of violation of policy from an administrative inquiry, or a violation of the law from the final disposition of an EEO claim, can leave employees feeling deflated and managers feeling tentative about how to approach employees. During the course of these proceedings, trust among staff and between staff and managers has often diminished, and there exists a question of how to "move forward." A workplace climate survey, or a similar tool to determine the state of a particular workplace can provide the necessary insight for a manager to facilitate the healing that needs to occur after trust is broken. Giving such attention to the workplace can help to build a more cohesive work environment, one that honors communication and respect.

Thank you for holding this briefing and for allowing this practical perspective regarding the EEO complaints process for claims of discrimination and harassment in the Federal workplace.