Policy Implication Of Rules Governing Harassment And Discrimination Complaints In Private And Federal Employment

Francis Achampong
POLICY IMPLICATIONS OF RULES GOVERNING HARASSMENT AND DISCRIMINATION COMPLAINTS IN PRIVATE AND FEDERAL EMPLOYMENT

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I. INTRODUCTION

Sexual harassment and other forms of discrimination present troubling issues in today’s workplaces. Discrimination suits have been filed under Title VII of the Civil Rights Act of 1964 ("Title VII") since its enactment. However, it was not until 1976 that sexual harassment resulting in job detriment was first recognized as a legitimate cause of action.² It was also later recognized as a viable cause of action in cases where, although no tangible employment action was taken, a hostile work environment had nonetheless resulted.³ In 1980, The Equal Employment Opportunity Commission ("EEOC or Commission") amended its Guidelines on Discrimination Because of Sex ("Guidelines"), to add a section expressly dealing with sexual harassment.⁴ The Guidelines recognized both a claim for harassment

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2. Williams v. Saxbe, 413 F. Supp. 654, 657-58 (D.D.C. 1976) (holding that the plaintiff’s allegations of harassment and termination for refusing a male supervisor’s sexual advances was a valid cause of action under Title VII), rev’d on other grounds and vacated in part by Williams v. Bell, 587 F.2d 1240, 1244 (D.C. Cir. 1978).
4. 29 C.F.R. § 1604.11 (2002); EEOC, Final Amendment to Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 74676 (Nov. 10, 1980) (to be codified at 29 C.F.R. § 1604.11)
resulting in a tangible employment action or "quid pro quo" harassment and harassment resulting in a hostile environment.\(^6\) In 1986, the Supreme Court, in *Meritor Savings Bank v. Vinson*,\(^7\) recognized sexual harassment as a valid cause of action under Title VII.\(^8\)

Much has been written about substantive issues in employment discrimination and sexual harassment. In the area of sexual harassment, for example, authors have explored the issue of employer liability for supervisor and coworker harassment,\(^9\) employer liability for harassment by non-employees,\(^10\) the proper perspective for determining whether a working environment is hostile,\(^11\) same-sex sexual harassment,\(^12\) and use

\(^3\) See 29 C.F.R. § 1604.11(a)(1)-(2) (describing quid pro quo sexual harassment); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760-62 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 790 (1998) (expressing a preference for the term harassment resulting in a "tangible employment action" as opposed to "quid pro quo" sexual harassment); see also Heyne v. Caruso, 69 F.3d 1475, 1478 (9th Cir. 1995) (noting that quid pro quo sexual harassment is established when the complainant shows "that an individual 'explicitly or implicitly condition[ed] a job, a job benefit, or the absence of a job detriment, upon an employee's acceptance of sexual conduct' (quoting Nichols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994))).

\(^4\) 29 C.F.R. § 1604.11(a)(3) (describing hostile environment sexual harassment); Gallant v. Bd. of Trs. of Cal. State Univ., 997 F. Supp. 1231, 1234 (N.D. Cal. 1998) (discussing that in a hostile environment, requests and conduct of a sexual nature are unwelcome and severe); EEOC Compl. Man. (CCH) § 615.2 (Nov. 21, 1991) [hereinafter Compliance Manual] (explaining the Because of Sex Guidelines and the EEOC's rules governing investigation of sexual harassment charges).


of arbitration to resolve sexual harassment complaints. Other writings have also addressed employer anti-harassment policies, the use of expert witnesses in hostile environment sexual harassment cases, and whether a single, sexual harassment event can create a hostile environment. Although there is also a plethora of writing on substantive issues in all areas of employment discrimination, the complex rules governing the processing of harassment and discrimination complaints in private and federal employment, as well as their policy ramifications, have been largely ignored.

This paper undertakes an examination of the procedural rules for filing harassment and other discrimination complaints in private and federal employment. It then examines the governmental policy objectives that underlie these rules, whether the different regulatory approaches in the federal and private sectors are rational from a policy viewpoint, and whether the regulatory measures are adequate to promote the government's policy goals.


II. HARASSMENT AND DISCRIMINATION CHARGES BY PRIVATE SECTOR EMPLOYEES UNDER TITLE VII

A. Role of the EEOC

The EEOC, established under Title VII of the Civil Rights Act of 1964, is responsible for enforcing the statute’s antidiscrimination provisions. It has five members who are appointed by the President of the United States with the advice and consent of the Senate. It has power to issue interpretative guidelines to aid compliance with Title VII and to conduct litigation to enforce it. The EEOC also has power to combat unlawful employment practices. It is illegal for an employer to discriminate against any individual with respect to compensation, conditions, or privileges of employment because of the individual’s race, color, religion, sex or national origin. Furthermore, it is unlawful to discriminate against an employee for opposing unlawful employment practices, or for participating in any manner in an investigation or hearing.

The EEOC has power to effectuate Title VII’s provisions through conference, conciliation and persuasion; it also has the power to intervene in civil actions brought by aggrieved persons against private-sector respondents. Where prompt judicial action is necessary to ensure that Title VII is not violated, the EEOC has the power to seek preliminary injunctive relief after a charge is filed. An employee may not, by signing a mandatory arbitration agreement, compromise the EEOC’s right to bring an action against an employer pursuant to its independent enforcement powers under Title VII.26

17. The rules discussed in this section apply to all private sector charges of discrimination under Title VII, including sexual harassment.
19. Id.
20. Id. §§ 2000e-4(b)(1), e-4(g).
21. Id. § 2000e-5(a).
22. Id. § 2000e-2(a)(1).
24. Id. § 2000e-5(f)(1). The EEOC may not intervene in actions against government agencies or political subdivisions.
25. Id. § 2000e-5(f)(2).
26. EEOC v. Waffle House, Inc., 534 U.S. 279, 291, 296 (2002). The Supreme Court held that an employee’s signing of a mandatory arbitration agreement does not preclude the EEOC from exercising its independent right of action to pursue both make-whole and victim-specific on the employee’s behalf. Id.
B. Procedure for Processing Charges

When an aggrieved person, someone acting on his or her behalf, or a member of the EEOC, files a charge alleging unlawful employment practices by a covered employer or organization, this triggers an action on the part of the EEOC. The EEOC is required to serve notice of the charge on the employer within ten days of its filing and to investigate the charge. If the EEOC decides after its investigation that the charge is not supported by reasonable cause, it will dismiss the charge and notify the charging party and the respondent of its action. If the charging party first appeared before a state, local, deferral or Fair Employment Practices ("FEP") agency, the EEOC will accord substantial weight to the final findings or orders of that agency in determining whether the charge is supported by reasonable cause. If the EEOC decides that the charge is supported by reasonable cause, it will use an informal and confidential process of conference, conciliation, and persuasion to attempt to eliminate the unlawful employment practice. The charge and any information produced by its investigation are confidential and may not be used in subsequent litigation. However, earlier disclosures made to state or local FEP agencies assisting the EEOC in its Title VII functions are not confidential. Where conciliation after a reasonable cause determination is successful, the EEOC is required to obtain the respondent's agreement to remove the unlawful employment practice and furnish appropriate relief.

A reasonable cause determination must be made within 120 days of the charge. If the charging party first proceeded before a state or local FEP agency, or if a member of the EEOC filed the charge, then the EEOC must make a reasonable cause determination within 120 days.

27. 42 U.S.C. § 2000e-5(e)(1). The employer must be informed of the date and the nature of the alleged unlawful employment practice. Id. § 2000e-5(b). The EEOC first determines that the employer is a covered employer with fifteen or more employees. Id.
28. Id.
29. Id.; 29 C.F.R. § 1601.74 (2002) (containing a list of state FEP agencies and section 1601 containing procedural requirements).
30. 29 C.F.R. § 1601.21(e). This does not include according weight to the FEP agency's conclusions of law but to its factual findings made from proceedings that are fair and regular, and orders based thereon. Id.
32. Id.
33. 29 C.F.R. § 1601.22 (2002).
34. Id. § 1601.24(a).
from the time it is authorized to act. Such a determination is not a judgment on the merits of the charging party’s allegations. Once a reasonable cause determination is made, prompt notice must be given to all parties involved. On the other hand, if the EEOC finds a lack of reasonable cause “to believe that an unlawful employment practice has occurred, or is occurring,” it will notify the parties of its no cause determination. A finding of reasonable cause or no cause may be reconsidered within certain limitations.

A charge may be dismissed for a number of reasons, including untimeliness, failure to state a Title VII claim or produce requested information, failure to attend conferences, and rejection by the charging party of a settlement which offers full relief after having had thirty days to consider the offer. A decision to dismiss may be reconsidered.

When investigating a charge, the EEOC has authority to conduct a fact-finding conference with the parties and request statements from the charging party regarding the details of the alleged harassment or discriminatory practice before making a good-faith determination. The charging party must be able to provide a statement as to why an employment practice is believed to be unlawful. The conference allows a definition of the issues, determination of disputed facts, and possible settlement. The parties may agree to settle on the condition that a charge is withdrawn.

The EEOC has power to subpoena witnesses and records to facilitate the performance of its functions. Any member of the EEOC can issue a subpoena to compel the attendance of witnesses to testify and the production of evidentiary materials. Witnesses are entitled to the

36. Id.
37. 29 C.F.R. § 1601.21(a).
38. Id. § 1601.21(b).
39. Id. § 1601.19(a).
40. Id. § 1601.19(b) (discussing the reconsideration of no cause determinations). For example, there may not be a reconsideration of a reasonable cause determination after suit has already been filed or ninety days have expired since the issuance of a right to sue letter. Id. § 1601.28(e)(1).
41. 29 C.F.R. § 1601.18.
42. Id. § 1601.18(f).
43. Id. § 1601.15(b)-(c).
44. Id. § 1601.15(b)(2).
45. Id. § 1601.15(c).
46. 29 C.F.R. § 1601.20(b).
47. Id. § 1601.16(a).
48. Id.
same fees and mileage available in the courts and are subject to penalties for failure to comply. 49

It must be noted that “an aggrieved individual may not withdraw her charge without the consent of the EEOC.” 50 If the EEOC denies an individual’s consent to withdraw a charge, the EEOC may proceed to prosecute its own civil action against an employer on the basis of that charge. 51 The EEOC depends on the filing of charges for notification of potential sexual discrimination. 52 Furthermore, courts have observed that individuals may not contract away their rights to file a charge because such contracts are void as against public policy. 53 Thus, “an individual may not, in an effort to effectuate her own interests, take away the enforcement authority of the EEOC even if she wishes to withdraw her charge of discrimination.” 54

C. Contents of a Charge

An aggrieved person, or any person, agency, or organization acting on the aggrieved person’s behalf, 55 may file a charge alleging sexual harassment or discrimination in violation of Title VII. 56 The charge must be written, signed, and verified, 57 and must indicate the name, address, and telephone number of the person making the charge. 58 It must also give the name and address of the respondent, and an account of the facts grounding the charge with relevant dates. 59 If proceedings have been commenced with a state or local FEP agency, then the charge must state that fact. 60 Additionally, amendments that relate to, or grow out of, the subject matter of the original charge, such as retaliation following the

49. Id. § 1601.16(d)-(e).
50. EEOC v. Frank’s Nursery & Crafts, Inc., 177 F.3d 448, 456 (6th Cir. 1999) (citing 29 C.F.R. § 1601.10).
51. See 29 C.F.R. § 1601.10; Frank’s Nursery & Crafts, 177 F.3d at 456.
52. EEOC v. Cosmair, Inc., 821 F.2d 1085, 1090 (5th Cir. 1987).
53. Id.
54. Frank’s Nursery & Crafts, 177 F.3d at 456.
55. Although both men and women may be victims of sexual harassment, “[t]he lion’s share of sexual harassment situations features the man as the harasser and the woman as the harasssee.” Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344, 1353 (7th Cir. 1995).
56. 29 C.F.R. § 1601.7(a).
57. Id. § 1601.9. The EEOC will allow a complainant to file by mail or telephone, in which case the EEOC drafts a formal charge and sends it to the complainant for signature. Id. §§ 1601.9, 1601.7.
58. Id. § 1601.12(a).
59. Id. § 1601.12(a)(2)-(3).
60. 29 C.F.R. § 1601.12(a)(5).
filing of the original charge, are allowed by the EEOC, and are retroactive to the date of the original charge.

**D. Time Period for Filing a Charge**

Where a charging party is not subject to a state or local FEP agency, a charge must be filed within 180 days of the alleged violation. Even though there may be a FEP agency, this same time period applies where that agency has no jurisdiction in sex discrimination matters. Where the charging party is subject to the jurisdiction of a Fair Employment Practices' agency, the EEOC will defer to that agency, unless the agency waives its right to exclusively process the charge within the sixty-day period. Where a FEP agency has jurisdiction, the charging party must file a charge with the EEOC within 300 days of the alleged violation. This 300-day time period applies even where the FEP agency waives its right to exclusively process the charge for the sixty-day period, or terminates its proceedings earlier. Only a few states do not have such a deferral agency. The time period for filing a charge is subject to equitable tolling, waiver, and estoppel, and is not a jurisdictional prerequisite to filing a Title VII suit.

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61. Id. § 1601.12(b).
62. Id.
63. Id. § 1601.13(a)(1).
64. Id. § 1601.13(a)(2).
66. Id. § 1601.13(a)(4)(ii)(A).
67. Id. § 1601.13(b)(1). The collaboration between the EEOC and the state FEP agency in such cases is pursuant to a worksharing agreement. Id. § 1601.13(c); 42 U.S.C. § 2000e-5(1) (2000); EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 125 (1988).
68. LAWRENCE SOLOTOFF & HENRY S. KRAMER, SEXUAL DISCRIMINATION AND SEXUAL HARASSMENT IN THE WORKPLACE 2-13 to 2-15 (Release 14 2002). Only four states, Alabama, Georgia, North Carolina, and Mississippi, do not have a deferral agency with jurisdiction analogous to that of the EEOC. Id. Georgia's statute applies only to the public sector; North Carolina's statute merely declares that discrimination is against public policy. Id. at 2-15 n.1.
69. See Zipes v. TWA, Inc., 455 U.S. 385, 393 (1982) (holding that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"). The Court also noted that the provision granting district courts jurisdiction under Title VII does not limit it to those cases in which there has been a timely filing with the EEOC. Id.; see also Llewellyn v. Celanese Corp., 693 F. Supp. 369, 379 (W.D.N.C. 1988) (holding equitable tolling was allowed because psychological problems resulting from the sexual harassment prevented the plaintiff from filing a timely charge).
for acts falling outside the time period, as long as they are part of a pattern of behavior.\textsuperscript{70}

In \textit{Klein v. McGowan},\textsuperscript{71} the plaintiff sued under both federal law and the Minnesota Human Rights Act, after filing a sexual harassment charge with the EEOC more than ten months after resigning.\textsuperscript{72} The district court dismissed the Title VII claim as being untimely.\textsuperscript{73} On appeal, the Eighth Circuit determined that the plaintiff had to file the EEOC charge within 300 days of the event that gave rise to the cause of action.\textsuperscript{74} The 300-day period applied because Minnesota’s FEP agency had jurisdiction over the matter.\textsuperscript{75} The court stated conduct occurring before this period cannot be grounds for a suit unless it is part of a continuing violation.\textsuperscript{76} It further stated that to fall under the exception, the plaintiff must prove some incident of harassment within the 300-day period and a sufficient nexus between that incident and the other instances of harassment.\textsuperscript{77} Affirming the lower Eighth Circuit, the court found that the four incidents alleged during the 300-day period did not amount to severe or pervasive harassment, nor were they based on sex.\textsuperscript{78}

In \textit{Chambers v. Wal-Mart Stores, Inc.},\textsuperscript{79} the plaintiff’s Title VII sexual harassment suit was dismissed for failure to file a charge within 180 days of the offending conduct.\textsuperscript{80} Georgia does not have a comprehensive FEP statute giving its FEP agency jurisdiction over private plaintiffs.\textsuperscript{81} Its statute only applies to the public sector, hence the 180-day period.\textsuperscript{82}

\begin{footnotesize}
\begin{enumerate}
\item SOLOTOFF & KRAMER, \textit{supra} note 68, at 2-12.29 to 2-12.30. The Supreme Court has validated the concept of a continuing violation, giving plaintiffs a cause of action under Title VII for incidents occurring before and after the limitation period, provided that: (1) at least one incident occurred within the limitation period; and (2) the filing is timely as measured from that event. This is justified on the basis that continuing violation cases are distinct from the state cases that the statute of limitations is designed to keep out of the courts. \textit{Id}. In its very recent decision in \textit{National Passenger Rail Road Corp. v. Morgan}, 536 U.S. 101 (2002), the Supreme Court held that the entire scope of a hostile environment claim may be considered in determining liability, as long as any contributing act falls within the statutory period.
\item 198 F.3d 705 (8th Cir. 1999).
\item \textit{Id}. at 707.
\item \textit{Id}. at 708.
\item \textit{Id}. at 709.
\item \textit{Id}. at 710.
\item \textit{Id}. at 709.
\item \textit{Klein}, 198 F.3d at 709.
\item \textit{Id}.
\item \textit{Id}. at 710.
\item 70 F. Supp. 2d 1311 (N.D. Ga. 1998).
\item \textit{Id}. at 1314.
\item \textit{Id}. at 1313.
\item GA. CODE. ANN. §§ 45-19-21 to 45-19-22 (1990); SOLOTOFF & KRAMER, \textit{supra} note 68, at 2-14;
\end{enumerate}
\end{footnotesize}
In *Chambers*, the court pointed out that the 180-day period begins to run from the date of the discriminatory act.83

A charging party who first proceeds to a state or local FEP agency may request the agency to file the charge with the EEOC.84 In that case, it is deemed filed with the EEOC within sixty days of sending a written, signed statement to the FEP agency by registered mail.85 In the alternative, it is deemed filed after receipt of the statement by the FEP agency, or upon whichever of the following alternatives first occurs, either termination of the FEP agency’s proceedings or the FEP agency’s waiver of the right of exclusive processing.86 Also, the charging party may choose to file the charge initially with the EEOC, a state FEP agency, or both.87

E. Serving a Charge

The EEOC must serve a charge on the respondent within ten days of being filed.88 Service may be by mail or in person.89 However, failure to serve the charge within the ten-day period is not an absolute bar to the enforcement of Title VII’s provisions.90 The EEOC must show that its failure to give timely notice was not willful or in bad faith, and the respondent must show that it has been prejudiced by the delay.91

F. Right to Sue

As pointed out in the recent case of *EEOC v. Frank’s Nursery & Crafts, Inc.*,92 “[a]n individual may not file suit under Title VII if she does not possess a ‘right to sue’ letter from the EEOC.”93 A charging party may request that the EEOC issue a right to sue letter after the

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83. *Chambers*, 70 F. Supp. 2d at 1317.
85. *Id.*
86. *Id.* The sixty-day period may be extended to 120 days where appropriate.
87. *Id.* § 1601.13(b)(2).
88. *Id.* § 1601.14(a).
89. 29 C.F.R. § 1601.14(a).
91. *Id.* at 721 (holding that Congress did not intend to prevent the EEOC from suing because of an unintentional defect in compliance, without showing that such non-compliance has prejudiced the defendant-employer).
92. 177 F.3d 448 (6th Cir. 1999).
93. *Id.* at 456.
expiration of 180 days from the filing of the charge.\textsuperscript{94} If the respondent is the government, a government agency, or political subdivision, then the Attorney General issues the right to sue letter.\textsuperscript{95} The EEOC may still assist the charging party after issuing the letter, unless the charging party’s attorney requests authority to file a lawsuit.\textsuperscript{96} The EEOC may then file an amicus brief that presents its position to the court.\textsuperscript{97} Otherwise, issuance of the letter normally ends the EEOC’s proceedings with respect to the charge.\textsuperscript{98} A charging party has ninety days from the receipt of the letter to commence suit, although the period may be tolled for equitable reasons.\textsuperscript{99} In \textit{Smith-Haynie v. District of Columbia},\textsuperscript{100} the plaintiff filed suit ninety-two days after receiving the right to sue letter.\textsuperscript{101} Her case was dismissed by the district court.\textsuperscript{102} On appeal, she argued that the limitations period should be tolled on equitable grounds because the harassment rendered her \textit{non compon mentis}, causing her to be too distraught to grasp the significance of the ninety-day limitations period.\textsuperscript{103} Affirming the lower court, the Court of Appeals for the District of Columbia found no evidence that she did not understand the meaning of the time limit in the letter, or that she was unable to engage in rational thought and deliberate decision making sufficient to pursue her claim.\textsuperscript{104} Where the charging party does not have legal representation, the EEOC may elect to file suit on behalf of the aggrieved party or parties after conciliation fails.\textsuperscript{105}

The EEOC has issued an early right to sue regulation which allows it, upon a complainant’s request, to authorize a private suit at any time prior to the expiration of 180 days from the date of filing the charge with the Commission.\textsuperscript{106} However, an appropriate Commission official must determine that “it is probable that the Commission will be unable to

\begin{footnotes}
\footnotetext{94. Id.}{\textit{Id.}}
\footnotetext{95. 29 C.F.R. § 1601.28(d) (2002).}{\textit{Id.}}
\footnotetext{96. \textit{Id.} § 1601.28(a)(4), (b)(4).}{\textit{Id.}}
\footnotetext{98. 29 C.F.R. § 1601.28(a)(3).}{29 C.F.R. § 1601.28(a)(3).}
\footnotetext{99. \textit{Id.} § 1601.28(e)(1). Notice to the charging party's attorney is sufficient notice to the charging party.}{\textit{Id.} § 1601.28(e)(1). Notice to the charging party's attorney is sufficient notice to the charging party.}
\footnotetext{100. 155 F.3d 575 (D.C. Cir. 1998).}{155 F.3d 575 (D.C. Cir. 1998).}
\footnotetext{101. \textit{Id.} at 577.}{\textit{Id.} at 577.}
\footnotetext{102. \textit{Id.}}{\textit{Id.}}
\footnotetext{103. \textit{Id.}}{\textit{Id.}}
\footnotetext{104. \textit{Smith-Haynie}, 155 F.3d at 580.}{\textit{Smith-Haynie}, 155 F.3d at 580.}
\footnotetext{106. 29 C.F.R. § 1601.28(a)(2) (2002).}{29 C.F.R. § 1601.28(a)(2) (2002).}
\end{footnotes}
complete its administrative processing of the charge within 180 days from the filing of the charge. There is a split in the federal circuit courts and the federal district courts as to whether this regulation is valid, since Title VII provides for the issuance of a right to sue letter after the expiration of 180 days from the filing of the charge. The Ninth and Eleventh Circuits have upheld this regulation and allowed early suits. However, the District of Columbia Circuit has found the regulation contrary to Congress’ clearly expressed intent in Title VII and has refused an early right to sue. The D.C. Circuit believes that Congress clearly intended to prohibit private suits within 180 days after charges are filed and that allowing the Commission to issue early right to sue letters would be an abdication of its statutory duty to investigate every charge.

III. HARASSMENT AND DISCRIMINATION CHARGES BY EMPLOYEES OF FEDERAL AGENCIES

A federal employee who has been sexually harassed or discriminated against must follow specified complaint-processing procedures in seeking relief and protection against discrimination. These procedures for processing employee discrimination complaints are established by respective federal agencies under the authority of regulations issued by the EEOC. The procedures apply to discrimination complaints by employees of federal agencies under Title

107. Id. § 1601.28(a)(1).
108. Id.
110. Martini v. Fed. Nat’l Mortgage Ass’n, 178 F.3d 1336, 1347 (D.C. Cir. 1999) (refusing an early right to sue). The D.C. Circuit based its decision on 42 U.S.C. § 2000e-5(b) which states that “the Commission ‘shall’ investigate a charge and ‘shall’ make a reasonable cause determination ‘as promptly as possible’ and, so far as practicable, not later than one hundred and twenty days from the filing of the charge.” Id. at 1346 (citing 42 U.S.C. § 2000e-5(b)). The Martini court could not reconcile early termination of the process with this section’s express directive that the EEOC investigate all charges. Id. at 1341-42.
111. Id. at 1347-48. Since the plaintiff was allowed to sue twenty-one days after her charge was filed, the court vacated the lower court’s judgment and remanded with instructions to dismiss the plaintiff’s case without prejudice until the EEOC had attempted to resolve her charge for an additional 159 days. Id. The plaintiff could file a new suit if there was no resolution after the 180 days. Martini, 178 F.3d at 1347-48.
112. 29 C.F.R. § 1614.104(a) (2002).
Harassment and Discrimination Complaints


A. Conciliation

The first step in seeking relief is conciliation in an attempt to informally resolve the complaint. The aggrieved person must first confer with an Equal Employment Opportunity Counselor ("Counselor") prior to filing a complaint in order to try to informally resolve the matter. The aggrieved person must contact a Counselor within forty-five days of the alleged harassment. The Counselor advises the aggrieved person in writing of his or her rights and responsibilities, including the right to request a hearing or an immediate final decision after an agency investigation. The Counselor also advises the aggrieved person of the right to file a notice of intent to sue and to choose between participating in the agency's alternative dispute resolution program and counseling.

The Counselor is required to submit a written report to the agency and the aggrieved person within fifteen days concerning the issues discussed and action taken during counseling. Unless the aggrieved person chooses an alternative dispute resolution or agrees to extend the counseling period, the Counselor must conduct a final interview with the aggrieved person within thirty days of the date the complainant contacted the agency's Equal Employment Opportunity office to request counseling. If the matter is not resolved, the Counselor then notifies the aggrieved person, no later than thirty days after the Counselor was contacted, of the right to file a complaint within fifteen days of receipt of the notice and the appropriate official with whom to file it. This notice may be delayed by agreement between the aggrieved person and the

114. Id. §§ 791-794a.
115. See id. § 206. Procedures for filing discrimination complaints by federal agency employees under 29 C.F.R. section 1614.103.
116. 29 C.F.R. § 1614.105(a)(1).
117. Id. § 1614.105(b)(1).
118. Id.
119. Id. § 1614.105(b)(2). Each federal agency is required to make available an alternative dispute resolution program for both the pre-complaint and the formal complaint process, to provide for the counseling of aggrieved persons, and the processing of individual and class complaints. Id.
120. 29 C.F.R. § 1614.105(c).
121. Id. § 1614.105(d).
122. Id.
agency to extend the counseling period for an additional period not to exceed sixty days.\textsuperscript{123}

Where the aggrieved person chooses alternative dispute resolution, the period for resolution is ninety days.\textsuperscript{124} If there is no resolution within that time period, the Counselor then informs the aggrieved person of the right to file a formal complaint.\textsuperscript{125} Unless the employee authorizes the Counselor to reveal his or her identity, the employee's identity is kept confidential until a formal complaint is filed.\textsuperscript{126}

A formal complaint must be in writing, signed, and filed with the agency that allegedly discriminated against the complainant.\textsuperscript{127} The complaint must be filed within fifteen days of receiving notice from the Counselor of the right to file a formal complaint.\textsuperscript{128} According to the regulations, a document is "deemed timely [filed] if it is received or postmarked before the expiration of the applicable filing period, or, in the absence of a legible postmark, if it is received by mail within five days of the expiration of the applicable filing period."\textsuperscript{129} The complaint may be dismissed for, among other things, failure to state a claim or untimeliness, unless the agency extends the time limits.\textsuperscript{130}

When an agency dismisses a complaint or receives a request for an immediate final decision, the agency shall issue a final decision consisting of its findings on the merits of the issues, the rationale for dismissing the complaint, or if discrimination is found, appropriate remedies and relief.\textsuperscript{131} An agency is required to issue a final decision within sixty days of a request by the complainant.\textsuperscript{132} Where no request is made for a final decision or a hearing before an administrative judge, a final decision must be issued within sixty days after the end of the thirty-day period during which the complainant should have made such a request.\textsuperscript{133} The final action shall notify the complainant of the right to appeal to the EEOC or file a civil lawsuit, and the applicable time limits for appeals and lawsuits.\textsuperscript{134}

\begin{itemize}
  \item \textsuperscript{123} Id. § 1614.105(e).
  \item \textsuperscript{124} Id. § 1614.105(f).
  \item \textsuperscript{125} 29 C.F.R. § 1614.105(d).
  \item \textsuperscript{126} Id. § 1614.105(g).
  \item \textsuperscript{127} Id. § 1614.106(a)-(c).
  \item \textsuperscript{128} Id. § 1614.106(b).
  \item \textsuperscript{129} Id.
  \item \textsuperscript{130} 29 C.F.R. § 1614.107(a)(1)-(2).
  \item \textsuperscript{131} Id. § 1614.110(b).
  \item \textsuperscript{132} Id.
  \item \textsuperscript{133} Id.
  \item \textsuperscript{134} Id.
\end{itemize}
B. Investigation

The agency is required to acknowledge receipt of the complaint in writing and advise the complainant of the EEOC office where a request for a hearing shall be sent.\(^{135}\) The acknowledgment shall also inform the complainant that the agency is required to conduct an impartial and appropriate investigation within 180 days of the filing of the complaint, unless the parties agree in writing to extend the time period.\(^{136}\) If the complainant has amended the complaint after it was first filed, then the agency is required to “complete its investigation within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint.”\(^{137}\) However, the “complainant may request a hearing from an administrative judge on the consolidated complaints any time after 180 days from the date of the first filed complaint.”\(^{138}\)

The agency against which the complaint is filed conducts the investigation.\(^{139}\) The agency is required to develop an impartial and appropriate factual record which they use to make findings on the issues raised in the written complaint.\(^{140}\) Fact-finding methods that “efficiently and thoroughly address the matters at issue,”\(^{141}\) such as interrogatories, exchanging of letters and memoranda and fact-finding conferences, may be used.\(^{142}\) The agency should attempt to use alternative dispute resolution techniques during the investigation to facilitate early resolution of complaints.\(^{143}\)

Within 180 days from the filing of the complaint, or where amended, within the earlier of 180 days after the last amendment or 360 days after the original complaint, the agency “shall provide the complainant with a copy of the investigative file.”\(^{144}\) It shall also notify the complainant that within thirty days of receipt of the file, the complainant has the right to request a hearing and decision from an administrative judge or an immediate final decision from the agency.\(^{145}\)

\(^{135}\) 29 C.F.R. § 1614.106(e).
\(^{136}\) Id. § 1614.106(e)(2).
\(^{137}\) Id.
\(^{138}\) Id. § 1614.106(e)(2).
\(^{139}\) Id. § 1614.108(a).
\(^{140}\) 29 C.F.R. § 1614.108(b).
\(^{141}\) Id. § 1614.108(b).
\(^{142}\) Id.
\(^{143}\) Id.
\(^{144}\) Id. § 1614.108(f).
\(^{145}\) 29 C.F.R. § 1614.108(f).
After receiving the required notice, or at any time following 180 days from the time of the filing of the complaint, the complainant may submit a written request for a hearing to the EEOC and a copy to the agency’s Equal Employment Opportunity office. Within fifteen days of receiving the request, the agency must furnish the EEOC with a copy of the entire complaint file. A copy shall also be given to the complainant if that has not already been done.

C. Hearing

When a complainant requests a hearing, the EEOC appoints an administrative judge ("judge") to conduct the hearing. The judge assumes full responsibility for adjudicating the complaint and "overseeing development of the record." The judge may dismiss a complaint on his own initiative, or on the motion of the agency, for reasons including untimeliness and failure to state a claim. At any time after a written complaint is filed, but before a judge has been appointed to the hearing, the agency may make a written offer to resolve or settle the case. The offer must include attorney’s fees and costs and must specify any non-monetary relief. Monetary relief may be offered in the form of a lump sum or itemized amounts according to types of relief. The complainant has thirty days from the date of receipt of the offer to accept it. No payment for attorney’s fees and costs incurred after the expiration of the thirty-day acceptance period shall be made if the complainant does not accept the offer, and then subsequently fails to obtain a more favorable award by the judge, the agency, or the EEOC on appeal. The acceptance must be in writing and postmarked or received within the thirty-day period. Other offers or settlement attempts may still be made after an offer is rejected.

146. Id. § 1614.108(g).
147. Id. § 1614.108(g).
148. Id.
149. Id. § 1614.109(a).
150. 29 C.F.R. § 1614.109(a).
151. Id. § 1614.109(b).
152. Id. § 1614.109(c)(1).
153. Id. § 1614.109(c)(3).
154. Id.
155. 29 C.F.R. § 1614.109(c)(3).
156. Id.
157. Id.
158. Id.
The judge "shall notify the parties of the right to seek discovery prior to the hearing and may issue such discovery orders as are appropriate." The judge shall limit attendance at hearings to individuals that he determines maintain direct knowledge about the complaint. Hearings are closed to the public because they are part of the investigative process. Rules of evidence are not strictly applied. A party believing there is no genuine issue of material fact in the matter may file a statement with the judge at least fifteen days before the hearing and serve it on the opposing party. After considering opposing statements, where discrimination is found to have taken place, the judge may issue a decision without a hearing or make such other ruling as is appropriate. A decision may also be issued without a hearing on the judge's own initiative if he determines that there is no genuine issue of material fact, after hearing responses from the parties. The judge shall render a decision and order appropriate relief where discrimination is found within 180 days of receiving the complaint file from the agency, unless this time period is extended. The decision of the judge is the final action of the agency unless the agency issues its own final order within forty days of receipt of the judge's decision.

If the agency issues its final order within forty days of receipt of the judge's decision, the final order must notify the complainant as to whether the agency will enforce the judge's decision. The complainant must be informed of the right to appeal to the EEOC or file a civil lawsuit. The notice is required to inform the complainant of the applicable time limits for appeals and lawsuits. If the agency's order does not fully enforce the judge's decision, the agency shall simultaneously appeal to the EEOC and append a copy of the appeal to its final order.

159. Id. § 1614.109(d).
160. 29 C.F.R. § 1614.109(e).
161. Id.
162. Id. § 1614.109(e).
163. Id. § 1614.109(g).
164. Id. § 1614.109(2).
165. 29 C.F.R. § 1614.109(g)(3).
166. Id. § 1614.109(h)(i).
167. Id. § 1614.109(h)(i).
168. Id. § 1614.110(a).
169. Id.
170. 29 C.F.R. § 1614.110(a).
171. Id.
D. Class Complaints

The EEOC’s revised federal sector complaint-processing regulations allow class complaints to be filed. An employee wishing to file a class complaint must still undergo counseling.172 Where an individual complaint is filed, the “complainant may move for class certification at any reasonable point in the process when it becomes apparent that there are class implications…. ”173 Within fifteen days of receiving notice of the right to file a class complaint, the agent for the class must file a class complaint with the agency that allegedly discriminated.174 The regulations contain rules on hearings in class complaints, final agency decisions, settlement offers, the right to appeal or file a civil action, and relief for individual class members.175

E. Appeal

Complainants are permitted to appeal an agency’s final action or dismissal of a complaint.176 As discussed earlier, the agency may also appeal simultaneously where its final action does not fully implement the decision of the judge.177 Appeals by complainants or class agents “must be filed within 30 days of receipt of the dismissal, final action or decision.”178 Appeals by the agency “must be filed within 40 days of receipt of the hearing file and decision.”179 The appeal is filed with the Office of Federal Operations at the EEOC.180 It may be mailed, delivered in person, or sent by facsimile, with a copy furnished to the opposing party.181

The Office of Federal Operations, on behalf of the EEOC, issues a written decision with the reasons for its conclusion.182 If discrimination is found, “appropriate remedies shall be included in the decision.”183 Where appropriate, entitlement to interest, attorney’s fees or costs must be

172. Id. § 1614.204(b).
173. Id.
174. Id. § 1614.204(c)(2).
175. 29 C.F.R. § 1614.204.
176. Id. § 1614.401(a).
177. Id. § 1614.110(a).
178. Id. § 1614.402(a).
179. Id.
180. 29 C.F.R. § 1614.403(a).
181. Id.
182. Id. § 1614.405(a).
183. Id. § 1614.405(a).
indicated. The decision is required to be transmitted to both the complainant and the agency by first class mail, and to inform the complainant of his or her civil action rights. The decision is final unless the EEOC grants a request for reconsideration within its discretion.

F. Time Period for Filing Suit

An individual complainant, class agent or claimant who has filed for individual relief pursuant to a class complaint, may file suit in the appropriate district court, provided that certain conditions are met. The suit must be filed within ninety days of receiving notice of the EEOC’s final decision on an appeal, or where no appeal is filed, within ninety days of final action by the appropriate agency. Thus, in Ellison v. Brady, an IRS employee filed civil suit after the EEOC determined that the IRS had taken prompt and adequate remedial action following her complaint of sexual harassment to the agency. The time period for filing suit is subject to equitable tolling.

G. Relief

Where a finding is made that a complainant has been subjected to sexual harassment or another form of discrimination, the agency where he or she works is required to provide full relief, including, but not limited to, lost earnings, reinstatement and corrective action to prevent recurrence of the discriminatory conduct. An applicant for employment who was turned down for a position because the applicant was discriminated against or because the applicant refused either to submit to sexual advances or to requests for sexual favors, must be offered the position, or an equivalent one in writing. Such an offer is not required if there is clear and convincing evidence that the applicant

184. Id.
185. 29 C.F.R. §1614.405(a).
186. Id. § 1614.405(b).
187. Id. § 1614.407.
189. 924 F.2d 872 (9th Cir. 1991).
190. Id. at 873-75.
192. 29 C.F.R. § 1614.501.
193. Id. § 1614.501(b)(2).
would not have been selected even absent the discrimination. The offer must be accepted or rejected within fifteen days of receipt. Back pay shall be awarded from the date the applicant would have commenced duty until the date he or she actually begins duty. Where the offer is declined, back pay with interest is still payable from the time the applicant would have commenced duty to the date the offer is declined. In its offer of employment, the agency is required to inform the applicant of the right to an award of back pay in the event that the offer is declined. Where adverse action affecting an agency employee stemmed from his or her response to sexual harassment, the adverse action may be rescinded and the employee made whole. Back pay may be recovered. The agency, the judge, or the EEOC can grant an award consisting of attorney’s fees and expert witness fees or costs. Such an award will be paid by the agency. Attorney’s fees are not recoverable for the pre-complaint process, unless an agency refuses to implement a judge’s decision, and that decision is affirmed by the EEOC on appeal.

Where the agency requests reconsideration of an EEOC decision ordering it to retroactively restore an employee who was removed, separated from employment or suspended for a period continuing beyond the date of the requested reconsideration, the agency is required to temporarily reinstate the employee, pending the outcome of its request. If, however, the EEOC ordered the agency to pay monetary relief, the payment may be delayed pending reconsideration of the EEOC’s decision, except that the agency must pay interest from the date of the appellate decision if the monetary payment is affirmed. The agency’s decision regarding temporary reinstatement or delay of payment must be communicated in writing to the EEOC and the employee simultaneously with the request for reconsideration, or the EEOC will dismiss the request for reconsideration. If the agency does not request reconsideration, or a request for reconsideration is denied,

194. Id. § 1614.501(b)-(c).
195. Id. § 1614.501(b)(1)(i).
196. Id. § 1614.501(b)(1)(ii).
197. 29 C.F.R. § 1614.501(b)(1)(iii).
198. Id. § 1614.501(b)(1)(iii).
199. Id. § 1614.501(a)(4).
200. Id. § 1614.501(c)(1).
201. Id. § 1614.501(e).
203. Id. § 1614.501(e)(iv).
204. Id. § 1614.502(b).
205. Id. § 1614.502(b)(2).
206. Id. § 1614.502(b)(3).
then the agency shall provide the full relief ordered within sixty days after receiving the final decision. The EEOC shall notify a complainant of the right to file a civil action or seek judicial review when it determines that an agency is not complying with a decision.

H. Interim Relief

When an agency appeals a judge’s decision to retroactively restore an employee who was removed or suspended for a period continuing beyond the date of the appeal, the agency shall temporarily restore the employee pending the outcome of the appeal. "The employee may decline the offer of interim relief." The agency can also delay paying a back pay award until an appeal is resolved. However, the agency must pay interest from the date of the original decision if the monetary award is affirmed. If the agency determines that returning the complainant to the workplace will be unduly disruptive to the work environment, the agency can, after notice to the complainant, decline restoration. “However, prospective pay and benefits must be provided.” The agency’s decision regarding temporary restoration or delay of payment must be communicated in writing to the EEOC and the employee at the same time as the appeal, or the EEOC will dismiss the appeal. A complainant may request dismissal of an appeal if the agency refuses the required interim relief.

207. 29 C.F.R. § 1614.502(c).
208. Id. § 1614.503(g).
209. Id. § 1614.505(a)(1).
210. Id.
211. Id. §1614.505(a)(3).
212. 29 C.F.R. § 1614.505(a)(3).
213. Id. § 1614.505(a)(5).
214. Id.
215. Id. § 1614.505(a)(4).
216. Id. § 1614.505(b).
IV. POLICY IMPLICATIONS OF COMPLAINT-PROCESSING AND STATUTORY FRAMEWORK

A. The Private-Sector Framework

1. The Public Policy Goal of Maximizing the Value of the Private Sector as a Tool for Economic Growth

There are several policy objectives behind the complaint-processing regulatory framework. One such policy objective is to maximize the value of the private sector as a means of driving economic growth by minimizing the risk of employment practices liability. Unlike the federal sector complaint-processing regulations, the government does not directly incorporate provisions in the private sector rules aimed at eliminating or minimizing the cost of liability for sexual harassment and other unlawful employment practices to private sector employers. Instead, the government attempts to achieve its policy objective through the remedial scheme of providing victims of employment discrimination with equitable relief, compensatory and punitive damages, and attorney’s and expert’s fees under Title VII. This scheme induces private employers to adopt and implement risk management programs which minimize their risk of employment practices liability and maximize the value of their firms to drive economic growth.

The government strengthened the inducement of private employers to adopt prophylactic measures to prevent and remedy harassment and discrimination by passing the Civil Rights Act of 1991. Section 1981a of the Act allows a complaining party to recover compensatory and punitive damages for intentional discrimination. A plaintiff may also recover expert’s fees as part of an award of attorney’s fees. In sexual harassment cases, the damages are capped according to the number of employees the employer had “in each day of 20 or more calendar weeks in the preceding or current calendar year,” as follows:

218. Id. § 1981a(a)(1).
219. Id. § 1981a.
220. Id. § 1981a(a)-(b).
221. Id. § 1981a.
(A) $50,000 for employers with 15-100 employees;
(B) $100,000 for employers with 101-200 employees;
(C) $200,000 for employers with 201-500 employees;
(D) $300,000 for employers with more than 500 employees. 222

A party seeking money damages can demand a jury trial. 223 The jury is not to be informed of the statutory caps. 224 In Pollard v. E.I. Du Pont De Nemours & Co., 225 the Supreme Court recently held that front pay awards are not an element of compensatory damages and, therefore, not subject to the statutory caps on damages. 226 The prospect of employment practices liability arising from a judgment or settlement, including court costs and attorney's fees, represents a significant exposure. The median compensatory award in discrimination and sexual harassment cases was reported to be $250,000 in 1997. 227 The median award for punitive damages in sexual harassment cases was reported to be $100,000 for the same period. 228

The Supreme Court has also recently reinforced the objective of Title VII by inducing private employers to implement prophylactic measures to prevent and remedy discrimination. 229 In Kolstad v. American Dental Ass'n, 230 the Court held that an employer might be found liable for punitive damages if a managerial agent acted within the scope of employment and with knowledge that its actions may violate federal law. 231 However, the employer may avoid liability if it has made good faith efforts to comply with the antidiscrimination provisions of Title VII. 232

The Supreme Court has also redefined the contours of employer liability for harassment by a supervisor. In Faragher v. City of Boca

223. Id. § 1981a(c)(1).
224. Id. § 1981a(c)(2).
226. Id. at 852-54.
228. Id.
230. Id. at 526.
231. Id. at 536.
232. Id. at 545-46; Cadena v. Pacesetter Corp., 224 F.3d 1203, 1210 (10th Cir. 2000) (holding that evidence that managers repeatedly ignored sexual harassment complaints negated the defense that the employer made good faith efforts to comply with Title VII; punitive damages were, therefore, justified); EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241, 1246, 1248-49 (10th Cir. 1999) (applying the Kolstad standard to find the employer liable because although the employer had a written and disseminated antidiscrimination policy, some of its own managers were unaware of it, and had not received training on how to enforce it).
Raton and Burlington Industries, Inc. v. Ellerth, both decided the same day, the Court held that an employer is vicariously liable for harassment by a supervisor, even when it did not result in an adverse employment action, unless it can establish an affirmative defense. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. No affirmative defense is available where the harassment results in an adverse employment action or tangible job detriment.

The government has also issued guidelines for private sector employers to help them minimize their risk of employment practices liability. In the Guidelines, the EEOC states that “prevention is the best tool for the elimination of sexual harassment.” The EEOC advises employers to have an explicit policy on harassment that is clearly communicated to employees and effectively implemented.

2. The Public Policy Goal of Equal Employment Opportunity (“EEO”) in Private Employment

Another policy goal behind the private statutory and complaint-processing framework is equal employment opportunity. Title VII of the Civil Rights Act of 1964 was enacted in an attempt to combat discrimination in the American workplace. The government’s overriding policy objective behind the statute was its concern for equal employment opportunity. However, the Court held that an employer is vicariously liable for harassment by a supervisor, even when it did not result in an adverse employment action, unless it can establish an affirmative defense. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. No affirmative defense is available where the harassment results in an adverse employment action or tangible job detriment.

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234. 524 U.S. 742 (1998). Liability for harassment by coworkers and third parties is still governed by negligence principles. In such cases, the plaintiff must show that the employer knew or should have known of the harassment, yet failed to take prompt remedial action. Id. at 758-59; Faragher, 524 U.S. at 789.
235. Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807.
236. Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807.
237. Ellerth, 524 U.S. at 765.
238. 29 C.F.R. § 1604.11 (2002); Because of Sex Guidelines, supra note 4, at 74676.
239. Because of Sex Guidelines, supra note 4, at 74676; Compliance Manual, supra note 6, § 615.3.
240. 29 C.F.R. § 1603.11(f).
employment opportunity. The statute’s legislative history reveals that it was designed as a step toward eradicating significant areas of discrimination on a nationwide basis. In the House Report accompanying the bill, Representative George Meader stated that it was the official policy of the U.S. Government to treat all citizens alike and that the purpose of the bill was to effectuate this longstanding national policy. He further stated that Congress can and should take action within its constitutional powers to carry out our national policy against discrimination and use tried and established sanctions to enforce public policy in such legislation. As previously seen, the EEOC provides guidance to private employers on addressing harassment and providing a discrimination-free workplace.

The complaint-processing regulations do not directly incorporate measures specifically designed to promote the government’s policy objective of equal employment opportunity. Instead, the government uses the remedial scheme of the antidiscrimination statutes to promote this policy objective by providing equitable relief, compensatory and punitive damages, attorney’s and expert’s fees to private plaintiffs who prevail in Title VII cases. This statutory scheme, buttressed by judicial definitions of the parameters governing the award of compensatory and punitive damages, induces private employers to adopt antidiscrimination policies that promote a discrimination-free workplace.

3. The Public Policy Goal of Providing Private Sector Discrimination Victims With Full, Fair and Prompt Relief in a Non-Adversarial Manner

Alternative dispute resolution has played an increasingly vital role in the American judicial system in the past decades. The advantages of securing expeditious and less costly ways of resolving disputes are clearly recognized. The Federal Arbitration Act of 1925 (“FAA”) gives clear support to the principle of alternative dispute resolution within well-defined limits. In Circuit City Stores, Inc. v. Adams, the Supreme Court held that the FAA applies to all employment contracts
except those of workers in the transportation industry. The Court stressed that requiring the FAA to exclude all employment contracts would undermine the statute’s pro-arbitration purposes and breed litigation from a statute that seeks to avoid it.

In passing the Civil Rights Act of 1991, the government specifically incorporated a provision encouraging the use of alternative dispute resolution where appropriate, and to the extent authorized by law. Alternative dispute resolution mechanisms are quicker, cheaper and less adversarial than litigation, thus allowing for a more expeditious resolution of discrimination complaints. Another policy objective clearly emerges from the above statutory framework, namely, providing discrimination victims with prompt relief in a non-adversarial manner.

The government does not directly incorporate provisions in the private sector complaint-processing regulations aimed at promoting this objective. Instead, it uses the statutory framework of the FAA and the Civil Rights Act of 1991 to induce private sector employers to utilize alternative dispute resolution mechanisms to promote this policy objective.

B. The Federal Sector Framework

1. The Public Policy Goal of Minimizing the Government’s Employment Practices Liability

Unlike the indirect inducements it uses in the private sector framework to promote its policy objectives in the employment arena, the government specifically incorporates direct measures in the federal sector framework to promote those objectives. The mandatory alternative dispute resolution mechanisms and provisions for agencies to

250. Id. at 109.
251. Id. at 123. Section 1 of the Act excludes “contracts of employment of seamen, railroad employees, or any other class of workers engaged in commerce.” Id. at 109 (citing 9 U.S.C. § 1). All circuits except the Ninth Circuit held the exception to apply only to transportation industry employment contracts, not all employment contracts. The Supreme Court applied the ejusdem generis rule to hold that the term “any other class of workers engaged in commerce” should be controlled and defined by reference to “seamen” and “railroad employees.” Id. at 114.
253. Id.
254. Circuit City Stores, 532 U.S. at 123.
256. Id.; 29 C.F.R. § 1614.102(b)(2) (2002).
offer permanent and temporary relief in the federal sector framework are
designed to reduce the government's risk of potential liability from
litigation for employment discrimination in order to maximize the value
of the federal treasury. This, in turn, would allow the government to
pursue its economic agenda more successfully.

The government also seeks to prevent liability for employment
discrimination by requiring the education of new and existing hires on
discrimination issues. Agencies must communicate their policies to all
job candidates and employees and provide training to managers and
supervisors on their equal opportunity programs.

The federal sector regulations do not allow complainants to recover
punitive damages in employment discrimination cases, thus limiting the
government's potential liability. The regulations only provide for
payment on a make-whole basis.

Each federal agency is required to establish a system for
periodically evaluating the effectiveness of the agency's overall equal
employment opportunity effort. Agencies must also, at regular
intervals, appraise their personnel operations to assure conformity with
programs, regulations and management directives of the EEOC.

In order to motivate complainants to settle their complaints to
reduce costs to the government, the regulations allow agencies to make
offers of resolution to aggrieved persons after the filing of a written
complaint. Offers of resolution are required to be in writing, and must
include attorney's fees and costs, along with any non-monetary relief.

With respect to monetary relief, an agency may make a lump sum offer
covering all forms of monetary liability, or itemize the amount and types
of monetary relief offered. The employee has thirty days from receipt
of the offer to accept. The regulations provide that if a settlement offer
is rejected, and relief that is subsequently granted by an administrative
judge, agency, or the EEOC on appeal, is not more favorable than the

257. 29 C.F.R. § 1614.102(b)(2). The median compensatory award for discrimination and
sexual harassment in 1997 was $250,000. See Jury Awards, supra note 227, at 4.
258. 29 C.F.R. § 1614.102(a)(4)-(5).
259. Id.
260. Id. § 1614.501 (failing to mention punitive damages).
261. Id. § 1614.501(a)(4).
262. Id. § 1614.102(a)(10).
263. 29 C.F.R. § 1614.102(b)(3).
264. Id. § 1614.109(c)(1).
265. Id. § 1614.109(c)(3).
266. Id.
267. Id.
offer, the complainant shall not receive attorney’s fees or costs incurred after the expiration of the acceptance period. Offers for full relief may include offering applicants a position they were denied, or reinstating employees with back pay and interest because of harassment or discrimination (where sovereign immunity has been waived).

2. The Public Policy Goal of Equal Employment Opportunity in Federal Employment

Having determined employment discrimination practices to be serious social and public ills, Congress attempted to combat the practices through a number of important statutes. The most comprehensive of these antidiscrimination statutes is Title VII of the Civil Rights Act of 1964. Congress also recognized that discrimination in federal sector employment was a serious problem, and extended the protections of Title VII to the federal sector through the Equal Employment Opportunity Act of 1972. The purpose of the statute was to strengthen the EEOC’s enforcement powers and extend protection to federal, state and local government employees.

The statute’s legislative history states that it was an effort to implement in a meaningful way the national policy of equal employment opportunity. The House Conference Report stated that the persistence of discrimination required a reaffirmation of the national policy of equal opportunity in employment. The House Report also noted that equal employment opportunity in federal employment is based on the due process clause of the Fifth Amendment to the United States Constitution, and Congress’ own statement of policy. Congress stated “[i]t is the policy of the United States to insure equal employment opportunities for federal employees without discrimination because of race, color,
religion, sex, or national origin." ²²⁷ It further noted that a critical defect of the federal government’s equal employment opportunity program was the failure of the complaint process, and the general lack of confidence in the effectiveness of the procedure on the part of federal employees. ²²⁸

To promote its policy objective of ensuring equal opportunity in federal employment, the government has incorporated measures for investigating and conciliating discrimination claims and compensating discrimination victims. ²²⁹ Also, agencies must designate a Director of Equal Employment Opportunity ("EEO Director") and EEO Officers. ²³⁰ The names and numbers of the director and officers must be publicized to all employees at all times. ²³¹ Written materials are to be made available to all employees and applicants informing them of equal employment opportunity programs and remedial procedures available to them. ²³² The written materials are to be posted in all personnel and EEO offices throughout the workplace. ²³³

Occasionally, each EEO Director is required to evaluate "the sufficiency of the total agency program for equal employment opportunity and report[,] to the head of the agency . . . ." ²³⁴ The report is to be submitted with recommendations for improvement and correction, including disciplinary action with respect to managerial, supervisory, or other employees who have failed in their responsibilities. ²³⁵ When authorized by the agency head, the EEO Director can make changes in programs and procedures designed to eliminate harassment and other discriminatory practices. ²³⁶

Agencies must establish a system to collect and maintain accurate employment information for use in studies and analyses that contribute to achieving the government’s goal of equal employment opportunity. ²³⁷ They must report to the EEOC information on pre-complaint counseling and the status, processing and disposition of complaints under the regulations; then they must describe the allocation of personnel and

²²⁶. Id. (quoting 5 U.S.C. § 7151 (Supp. II 1965, 1966)).
²²⁷. Id. at 2158-59.
²²⁸. Id. at 2145-47.
²²⁹. 29 C.F.R. § 1614.102(b)(4) (2002).
²³⁰. Id § 1614.102(b)(7).
²³¹. Id. § 1614.102(b)(5).
²³². Id. § 1614.102(b)(5), (b)(7).
²³³. Id. § 1614.102(c)(2).
²³⁴. 29 C.F.R. § 1614.102(c)(2).
²³⁵. Id. § 1614.102(c)(3).
²³⁶. Id. §§ 1614.102(a), 1614.601(a), (e).
resources proposed by the agency to carry out its equal employment opportunity program.\footnote{287}{Id. § 1614.104(b).}

The government specifically states in the federal sector complaint-processing regulations that its policy is “to provide equal opportunity in employment for all persons, to prohibit discrimination in employment . . . and to promote full realization of equal employment opportunity through a continuing affirmative program in each agency.”\footnote{288}{Id. § 1614.101(a).} Each agency must “maintain a continuing affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies.”\footnote{289}{29 C.F.R. § 1614.102(a).} Agencies must also conduct a continuing campaign to rid discrimination from their work policies, procedures and environment.\footnote{290}{Id. § 1614.501(a).}

In furtherance of the government’s policy objective, remedial action is required when discrimination is found.\footnote{291}{Id. § 1614.204(k)(1).} In the case of a class complaint, the agency must eliminate or modify the employment policy or practice out of which the complaint arose.\footnote{292}{Id. § 1614.501(a).} In the case of an individual complaint, full relief shall be provided, which includes a commitment to take “corrective, curative or preventive action” to prevent recurrence,\footnote{293}{Id. § 1614.501(a)(5).} and a commitment by the agency to cease from engaging in the specific unlawful employment practice found to exist.\footnote{294}{29 C.F.R. § 1614.501(a)(2), (a)(5).}

3. The Public Policy Goal of Providing Discrimination Victims in Federal Sector Employment with Full, Fair and Prompt Relief in a Non-Adversarial Manner

Before the federal complaint-processing regulations were revised by section 1614, there was a continuing perception of unfairness in the federal complaint process.\footnote{295}{Federal Sector Equal Employment Opportunity Commission, 57 Fed. Reg. 12634, 12637 (Apr. 10, 1992) (to be codified at 29 C.F.R. 1614) [hereinafter Federal Sector Equal Employment Opportunity].} Because agencies, under the old rules, could revise decisions of administrative judges regarding whether the agency had violated the law, there were widespread perceptions that the process

\footnotesize{287. Id. § 1614.104(b).}
\footnotesize{288. Id. § 1614.101(a).}
\footnotesize{289. 29 C.F.R. § 1614.102(a).}
\footnotesize{290. Id. § 1614.102(a)(3).}
\footnotesize{291. Id. § 1614.501(a).}
\footnotesize{292. Id. § 1614.204(k)(1).}
\footnotesize{293. Id. § 1614.501(a)(5).}
\footnotesize{294. 29 C.F.R. § 1614.501(a)(2), (a)(5).}
was not impartial. The revised regulations, therefore, aimed at promoting the governmental objective of providing discrimination victims with full, fair and prompt relief in a non-adversarial manner. The mandatory alternative dispute resolution procedures and provisions for permanent and interim relief are designed to achieve this policy objective.

The federal regulations require the EEOC to "periodically review agency resources and procedures to ensure that an agency makes reasonable efforts to resolve complaints informally, to process complaints in a timely manner, to develop adequate factual records, [and] to issue decisions consistent with acceptable legal standards. . . ." Federal agencies must also provide for the prompt, fair and impartial processing of complaints. They must establish and make available an alternative dispute resolution program for both the pre-complaint and the complaint process. Each EEO Director is responsible for "[a]ssuring that individual complaints are fairly and thoroughly investigated and that final action is taken in a timely manner in accordance" with the regulations. The counseling and alternative dispute resolution process may allow a result by informal resolution.

To promote the government's objective of providing discrimination victims with full, fair and prompt relief in a non-adversarial manner, the regulations allow agencies to make offers of resolution to aggrieved persons after the filing of a written complaint. Offers of resolution are required to be in writing, and must include attorney's fees and costs, along with any non-monetary relief. With respect to monetary relief, an agency may make a lump sum offer covering all forms of monetary liability, or itemize the amount and types of monetary relief offered. The employee has thirty days from receipt of the offer to accept. The regulations provide that if a settlement offer is rejected, and relief

296. Id. at 12636-37; 29 C.F.R. § 1614.501(c)(iv).
297. 29 C.F.R. § 1614.102(a)(2), (b)(2).
298. See Federal Sector Equal Employment Opportunity supra note 295, at 12634. In announcing the adoption of the final rules for section 1614, the EEOC commented on how the new rules sought to address the perceived unfairness of the federal complaint process. See id. at 12636.
299. 29 C.F.R. § 1614.104(b).
300. Id. § 1614.102(a)(2).
301. Id. § 1614.102(b)(2).
302. Id. § 1614.102(c)(5).
303. Id. §§ 1614.102, 1614.105.
304. 29 C.F.R. § 1614.109(c)(1).
305. Id. § 1614.109(c)(3).
306. Id.
307. Id.
that is subsequently granted by an administrative judge, agency, or the EEOC on appeal is not more favorable than the offer, the complainant cannot receive attorney's fees or costs incurred after the expiration of the requisite acceptance period. 308 Offers of full relief may include offering applicants a position they were denied because of harassment or discrimination, or reinstating employees who lost their jobs as a result of harassment or discrimination, with back pay and interest (where sovereign immunity has been waived). 309

V. RATIONALITY OF THE PRIVATE AND FEDERAL REGULATORY FRAMEWORKS AND THE ADEQUACY TO PROMOTE THE GOVERNMENT'S PUBLIC POLICY GOALS

A. The Private Sector Framework

As discussed above, the private sector complaint-processing rules do not directly incorporate measures designed to promote the government's policy goals. Instead, the government uses the framework of antidiscrimination statutes and their judicial interpretation to induce private sector employers to implement prophylactic measures to prevent and remedy discrimination, thereby promoting the policy goal of maximizing the value of private firms as a tool for economic growth. 310 Measures aimed at preventing and remedying harassment also promote the policy goal of equal employment opportunity.

With respect to the government’s public and social policy goal of ensuring that employment discrimination victims are compensated fully, fairly and promptly in a non-adversarial manner, the government has provided the legal framework to induce the voluntary use of arbitration in the private sector regulations. 311 The attraction of a quicker, cheaper

308. Id.
309. 29 C.F.R. § 1614.501(a)-(c).
310. In Faragher v. City of Boca Raton, the Supreme Court held that an employer is vicariously liable for harassment by a supervisor not involving an adverse employment action, unless it can establish an affirmative defense showing. 524 U.S. 775, 780 (1998). In Kolstad v. American Dental Ass'n, the Supreme Court held that an employer might be found liable for punitive damages if a managerial agent acted within the scope of employment and with knowledge that its actions may violate federal law. 527 U.S. 526, 545-46 (1998). An employer may avoid liability, however, if it has made good faith efforts to comply with the antidiscrimination provisions of Title VII. Id. Liability for harassment by coworkers and third parties is still governed by negligence principles. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Brooks v. City of San Mateo, 229 F.3d 917, 922 (9th Cir. 2000).
and less adversarial process for resolving employment discrimination complaints has led many employers to require mandatory arbitration of employment disputes as a condition of employment. The Supreme Court’s ruling in *Circuit City Stores* will likely fuel this trend. The private sector framework, therefore, is adequate to promote the government’s policy goals.

The private sector framework is rational from a policy viewpoint. It allows the government to promote its policy goals in private employment without legislating the measures private employers must take. Incorporating specific measures in the private sector framework to promote the government’s policy goals would amount to the government assuming the role of risk manager of employment practices for the private sector. This result would be neither practical nor desirable. The approach would also raise legitimate questions of excessive regulation and complicate issues of liability.

105, 122-23 (2001) (discussing the FAA’s policy favoring arbitration and narrowly construing the FAA section exempting certain employment contracts from its scope).

312. *Circuit City Stores*, 532 U.S. at 123.

313. Employers must, of course, be cognizant of the legal constraints governing arbitration agreements. For example, federal circuits are split on the validity of arbitration agreements that require the parties to split the arbitrator’s fees. See, e.g., Perez v. Globe Airport Sec. Servs., Inc., 253 F.3d 1280, 1287 (11th Cir. 2001) (holding that an arbitration agreement in an employment contract requiring the parties to share equally arbitration fees and costs is illegal and unenforceable because it limits the rights of prevailing parties to obtain fees and costs normally allowed under Title VII); Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1233, 1235-36 (10th Cir. 1999) (holding that a mandatory arbitration agreement entered into as a condition of continued employment, which requires an employee to pay a portion of the arbitrator’s fees, is unenforceable under the FAA); Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465, 1485 (D.C. Cir. 1997) (finding that the plaintiff could not be required to agree to arbitrate his public law claims as a condition of employment if the agreement requires him to pay all or part of the arbitrator’s fees and expenses); cf. Bradford v. Rockwell Semiconductor Sys., Inc., 84 Fair Empl. Pract. Cas. (BNA) 1358, 1362-63 (4th Cir. 2001) (holding that an arbitration agreement mandating the splitting of fees and costs is not per se unenforceable, but subject to a case-by-case analysis to see if the employee is able to pay fees and costs, and whether doing so would deter the employee from bringing a claim); Koveleskie v. SBC Capital Mkts., Inc., 167 F.3d 361, 366 (7th Cir. 1999) (ruling that judicial review of arbitration awards is sufficient to protect statutory rights); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 16 (1st Cir. 1999) (upholding both arbitration agreements on grounds that the plaintiffs are not usually asked to bear forum fees in the securities industry and judicial review would be available if unreasonable fees were imposed). Furthermore, commentators believe the decision in *Circuit City Stores* will boost the popularity of an already popular way of settling disputes. *Arbitration Isn’t Only Tool*, BUS. INS., Apr. 2, 2001, at 8.

314. For example, what principles would govern the liability of an employer who implemented specific measures relating to employment practices dictated in legislation?
B. The Federal Sector Framework

The federal regulations contain detailed measures specifically designed to achieve the government’s policy goals in the federal employment arena. As already discussed, the government has adopted detailed measures governing conciliation, investigation, hearings of complaints, and the offer of permanent and temporary relief by agencies. The regulations also provide for the education of new and existing hires on discrimination issues and the training of managers and supervisors. The regulations limit the government’s liability by excluding the recovery of punitive damages. The government also seeks to limit its total costs for employment practices liability by inducing complainants to accept settlement offers that are fair. Thus, if a settlement offer is rejected but the complainant subsequently fails to get more favorable relief, the complainant cannot recover attorney’s fees or costs incurred after the settlement offer expired. In the aggregate, these measures are adequate to promote the government’s policy goal of minimizing its potential liability for employment practices and maximizing the value of the federal treasury.

Several measures combine to promote the policy objective of equal employment opportunity in the federal workplace. The regulations incorporate provisions for investigating discrimination complaints and compensating victims of discrimination. All agencies must designate EEO Directors and officers and inform employees in writing of equal employment opportunity programs and remedies. Equal opportunity programs must be evaluated and recommendations for improvement and correction must be made to the agency head. Agencies must collect and maintain accurate data for use in studies that promote equal employment opportunity. Agencies must also identify and eliminate discriminatory practices and policies and conduct a campaign to eradicate discrimination from their work environment. The breadth and specificity of these collective measures ensure their adequacy to promote

316. Id. § 2000e-16(b).
317. Id. § 1981a(b)(3).
318. 29 C.F.R. §§ 1601.20, 1614.109(c) (2002).
319. Id. § 1614.109(c)(3).
320. Id. § 1614.
321. Id. § 1614.102(b).
322. Id. § 1614.102(c)(2).
323. See 29 C.F.R. § 1614.102(a)(1), (c)(2).
324. Id. § 1614.102(c)(3); 42 U.S.C. § 2000e-4(e) (2000).
the government's policy goal of equal employment opportunity in the federal workplace. 

Finally, the federal regulations again employ a multiplicity of specific measures to promote the government's policy objective of providing federal discrimination victims with full, fair and prompt relief in a non-adversarial manner. The federal sector rules are designed to minimize lawsuits and facilitate informal resolution of federal employment discrimination complaints by requiring alternative dispute resolution programs at both the pre-complaint and complaint stages. The EEOC is required to periodically review agency procedures to ensure that they are making reasonable efforts to resolve complaints informally and in a timely manner. The processing of complaints is required to be prompt, fair and impartial. EEO Directors are required to ensure that complaints are fairly and thoroughly investigated and that final action is taken in a timely manner. The regulations allow agencies to make offers of resolution to employees who file written complaints. These measures, in the aggregate, are adequate to promote the government's policy objective of providing discrimination victims with full, fair and prompt relief in a manner that is as non-adversarial as possible.

The government's incorporation of specific measures in the federal regulatory framework to promote its policy objectives is rational from a policy viewpoint. The government does not leave individual federal agencies to adopt and implement measures to promote its policy objectives, an approach that would in all likelihood result in inconsistency, lack of coordination and, possibly, inadequate measures at the individual agency level. Instead, the government legislates the measures all agencies must take and, thus, properly assumes the role of risk manager of its employment practices in a coordinated and integrated manner that promotes its policy objectives.

VI. CONCLUSION

Extensive rules govern the processing of harassment and discrimination complaints in both the private and federal employment sectors. Unlike the private sector framework, the federal sector rules
incorporate layers of pre-complaint and complaint procedures with built-in mechanisms to directly promote the government's policy goals. Although using different approaches, both the federal and private regulatory schemes are rational from a policy viewpoint, and contain adequate measures to promote the government's employment related policy objectives.