

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re:

THE ADOPTION OF THE THIRD  
AMENDED EMPLOYMENT DISPUTE  
RESOLUTION PLAN

ADMINISTRATIVE ORDER 2011-01

In order to continue to provide rights and protections to employees of the United States Bankruptcy Court for the District of Nevada which are comparable to those provided to the legislative branch employees under the Congressional Accountability Act of 1995, and to incorporate amendments deemed necessary and appropriate, the Court hereby adopts its Third Amended Employment Dispute Resolution Plan (Part B) to the Court's EEO/EDR Plan. The Courts' First Amended Equal Employment Opportunity Plan (Part A) of this Court's EEO/EDR Plan, previously adoption on January 1, 1999, shall remain in full force and effect. A copy of the Court's EEO/EDR Plan, as hereby amended, is attached hereto.

Pursuant to Section 6, Chapter IX of the Third Amended Employment Dispute Resolution Plan, the Court has designated an EDR Coordinator

Subject to final approval of the Ninth Circuit Judicial Council, the provisions of the Third Amended Employment Dispute Resolution Plan (Part B) shall become effective March 1, 2011.

DATED: 1/13/11



Honorable Mike K. Nakagawa  
Chief Judge of the Bankruptcy Court, District of Nevada



## **EMPLOYEE DISPUTE RESOLUTION PLAN**

**Effective April 1, 2011**

**PART A**  
**UNITED STATES BANKRUPTCY COURT**  
**DISTRICT OF NEVADA**  
**EQUAL EMPLOYMENT OPPORTUNITY PLAN**

**§ 1 Preamble**

**A. Statement of Policy**

The Judicial Conference of the United States in 1987 directed that each court adopt a plan in conformance with the national policy of providing equal employment opportunity to all persons regardless of their race, sex, color, national origin, religion, age, or handicap.

The Judicial Council of the Ninth Circuit adopts this Model Plan (Part A) for all courts of the Ninth Circuit providing equal employment opportunity to all persons or classes of persons regardless of their race, color, national origin, gender, religion, age, disability and/or sexual orientation.<sup>1</sup>

The Judicial Council of the Ninth Circuit directs each court to adopt this Model Plan and complaint procedures or to submit an alternative plan for the review and approval of the Judicial Council of the Ninth Circuit.

Each appointing officer and supervisor will promote equal employment opportunity through a plan encompassing all facets of employment actions and conditions including recruitment, hiring, training, promotion, advancement, and supervision.

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

Retaliation by an appointing officer or supervisor, or by any other employee against an employee for having filed a discrimination or discriminatory harassment complaint, or against any persons involved in the processing of a complaint such as employee representatives or witnesses, is prohibited and constitutes grounds for disciplinary action. The filing of frivolous or harassing complaints, however, may also be grounds for

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disciplinary action.

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

Neither this Plan, nor the Employment Dispute Resolution Plan procedures set forth in Part B, shall constitute a contract or create any legally enforceable obligation. No actions taken or documents created or processed pursuant to this Plan or the EDR procedures related thereto are discoverable in any court proceeding, except as to documents that are part of final decisions and available to the public pursuant to chapter VIII.

## **B. Definitions**

1. **Age.** At least 40 years of age at the time of the alleged discrimination except for the age restrictions prescribed by 5 U.S.C. §8335(b) and 8425(b) and described in the Judiciary Salary Plan and the Court Personnel System, applying to the appointment and retirement of federal probation and pretrial services officers.

2. **Disability.** Formerly referred to as a “handicap.” Any physical or mental impairment which substantially limits one or more of a person’s major life activities where there is a record of such impairment and the person is regarded as having such impairment. A qualified disabled person is one who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who meets the criteria for appointment.<sup>2</sup>

Certain other conditions that are temporarily disabling such as pregnancy and childbirth are treated as disabilities for purposes of protections afforded under this Plan.<sup>3</sup>

3. **National Origin.** National origin includes ethnicity. Employees of the United States courts must be citizens of the United States or citizens of countries with treaty relations with the United States, as defined by the United States Department of State, or persons subject to the Chinese Student Protection Act, 8 U.S.C. §1255.

4. **Gender.** Discrimination on the basis of marital status or parenthood is also categorized as gender discrimination.

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5. **A Discrimination Complaint.** It is any allegation that a person has been denied employment, promotion or advancement, or has been affected in any other aspect of employment, because of his or her race, color, national origin, gender, religion, age, disability and/or sexual orientation.

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

6. **Sexual Harassment.** It is a form of gender discrimination. Sexual harassment is defined as unwelcome sexual advances, such as an overture, an offer, or requests for sexual favors, and other verbal or physical conduct of a sexual nature, when:

- a. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
- b. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment;<sup>4</sup> and
- d. Such conduct is engaged in either the workplace or outside the workplace, during working hours or after working hours, where there is a direct connection with workplace matters.

7. **Discriminatory Harassment.** Conduct, threats, insinuations, innuendo, or slurs, or other offensive statements or conduct based on race, color, national origin, gender, religion, age, disability and/or sexual orientation directed at an individual or a specific class or group is considered discrimination.

8. **Employment Actions and Conditions.** Includes all employment and personnel decisions, actions, impacts, terms and conditions of a person's employment. Included are the following: recruitment, hiring, promotions, advancement, work assignments, compensation and benefits, training, education, disciplinary actions, terminations, and other such categories.
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## § II - SCOPE OF COVERAGE

This Equal Employment Opportunity Plan applies to all court personnel, and applicants for positions, defined as follows:

1. All judges and their staff;
2. Circuit executive and staff;
3. All circuit, district, and bankruptcy clerks of court and staff;
4. The staff attorney director, appellate commissioner, settlement conference director and their staff;
5. Circuit librarian and staff;
6. All chief probation and chief pretrial services officers and staffs; and
7. Federal public defenders and staff.

Article I and Article III judges and applicants for Article II judgeships may not file a complaint pursuant to this Plan. Complaints against judges are filed pursuant to judicial misconduct procedures, (See 28 U.S.C. § 372). Complaints about the conduct of the bankruptcy judge merit selection process should be submitted to the chief judge of the court of appeals. Complaints about the conduct of the magistrate judge merit screening process should be submitted to the chief judge of the district.

For the purposes of this Plan, all chambers and offices will be described as “employing offices.”

## § III -ORGANIZATION

### A. Implementation

Each appointing officer shall implement this Plan or such equal employment opportunity plan as has been approved by the Judicial Council of the Ninth Circuit.

### B. Appointing Officers

All appointing officers, including the judicial council, the court of appeals, the district court, the bankruptcy court, individual judges, and court unit heads must ensure that all vacancies, [with the exception of chambers law clerk vacancies], are publicly announced<sup>3</sup> to attract candidates who represent the make-up of persons available in the qualified labor market and that all hiring decisions are based solely on job-related factors. They should make reasonable efforts to see that the skills, abilities, and potential of each employee are identified and developed, and that all employees are given equal opportunities for promotions and for other advantageous employment actions and conditions.

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**C. Appointing Officers and Supervisors**

All appointing officers must apply equal employment opportunity practices and policies in their court units. This includes giving each employee a fair and equal opportunity to demonstrate his or her skills and, where those abilities exceed general performance standards, to be recommended for such personnel actions and awards recognizing such achievements as may be warranted and available.

**D. Equal Employment Opportunity Coordinator<sup>6</sup>**

The chief judge will designate one person to be the Equal Employment Opportunity (EEO) Coordinator for each district. Additional EEO coordinators may be appointed by the chief district judge in probation and pretrial services offices, and by the chief bankruptcy judge in the bankruptcy court, to facilitate the administration of the Plan. The chief judge of the circuit will designate one person to be the EEO Coordinator for the court of appeals and the circuit library. The chief judge of the circuit will designate one person to be the EEO Coordinator for the office of the circuit executive and the federal public defender offices.

The EEO Coordinator may be, but not necessarily is, the same person who serves as the EDR Coordinator pursuant to Chapter VII, Section 3 of Part B.

The EEO Coordinator should be a person committed to the goals of equal employment opportunity with the experience and training necessary to perform the investigative and record-keeping aspects of the position. An appointing officer should not be designated as the EEO Coordinator, except in very small courts where there is no one employed in the court unit except the appointing officer who is qualified to carry out the responsibilities of the EEO Coordinator.<sup>7</sup>

The EEO Coordinator will be responsible for preparing statements, collecting, analyzing, and consolidating statistical data, and submitting an annual EEO report as described in Sections VI and VII of this Plan. The EEO Coordinator will also seek to resolve disputes informally<sup>8</sup> and will provide EEO information to the public.

**§ IV - OBJECTIVES**

Each appointing officer will develop annual objectives which reflect those improvements needed in recruitment, hiring, promotions, and advancement, and will prepare a specific plan for the EEO

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Coordinator explaining how those objectives will be achieved.

## **§ V - PERSONNEL PRACTICES**

### **A. Discrimination-Free Workplace**

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

### **B. Recruitment**

All appointing officers will seek qualified applicants who reflect the make-up of all such persons in the relevant labor market. All vacancies, except those for judicial clerkships and externs, will be publicly announced.<sup>9</sup>

### **C. Hiring**

All appointing officers will make their hiring decisions based upon an evaluation of a person's qualifications and ability to perform the duties of the position satisfactorily.

### **D. Promotion**

All appointing officers will promote employees, if promotions are available, according to their experience, training, and demonstrated ability to perform duties of a higher level.

### **E. Advancement**

All appointing officers and supervisors will seek, insofar as appropriate and reasonably practical, to improve the skills and abilities of employees through cross-training, job restructuring, assignments, details, and outside training.

### **F. Employee Discrimination Complaints**

All appointing officers will adopt the procedures for resolving complaints of discrimination and discriminatory harassment set forth in the Employment Dispute Resolution Plan (Part B), or such procedures as have been approved by the Judicial Council of the Ninth Circuit.

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## § VI - EVALUATIONS

The EEO Coordinator will prepare a compiled annual report for each court unit, summarizing the appointing officers' efforts to provide equal employment opportunities in recruitment, hiring, promotions and advancement. The EEO Coordinator will collect this information through evaluations prepared by all appointing officers, addressing these areas of concern:

### **A. Recruitment**

The report will briefly describe efforts made to bring a fair cross-section of the pool available for the position into its applicant pool, including listing all employment sources used (state employment offices, schools, organizations, etc.). Each appointing officer will also explain the methods used to publicize vacancies.

### **B. Hiring**

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

### **C. Promotions**

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

### **D. Advancement**

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

In addition, this evaluation should include information on factors inhibiting achievement of EEO objectives, such as no vacancies or minimal numbers of qualified applicants in the relevant labor market, and on all persons in the court who have received relevant training. This report will also include a breakdown according to the race, gender, color, national origin, and disability of the personnel involved on forms to be provided by the Administrative Office of the United States Courts. The report will cover personnel actions occurring in the year ending September 30 and will be submitted to the Administrative Office by November 1 of each year.

## **§ VII - ANNUAL REPORT**

The EEO Coordinator in each court will submit to the chief judge of the court for his or her approval the annual report for the year ending September 30. The EEO Coordinator for the circuit executive will prepare for the judicial council's approval an annual report for the year ending September 30. The report for the court of appeals or the district will consist of the consolidated reports and data received from each reporting court unit.

The report will describe instances where significant achievements were made in providing equal employment opportunities, identify areas where improvements are needed, and explain factors inhibiting achievement of equal employment opportunity objectives. The report will be the same report as that submitted annually to the Administrative Office of the United States Courts.

The individual court unit reports will be submitted to the Judicial Council of the Ninth Circuit. The reports for the bankruptcy court and the probation and pretrial services offices of a district will be consolidated with the report for the district court and submitted to the Administrative Office of the United States Courts. The reports of the court of appeals, circuit library, federal public defenders, and judicial council (office of the circuit executive) will be consolidated into a report submitted to the Administrative Office of the United States Courts.

These consolidated reports will be submitted by the chief judge to the Administrative Office of the United States Courts by November 30 of each year. A copy of the consolidated reports will be submitted to the Judicial Council of the Ninth Circuit.

Copies of the annual EEO reports will be made available to the public upon request.

## **§ VIII - DISTRIBUTION AND PUBLIC NOTICE**

Copies of these procedures shall be available to all employees and, upon request, to applicants for positions of employment with the United States Courts.

## ENDNOTES

1. The federal government, including the federal courts, is bound by 38 U.S.C. § 4301 pertaining to the employment of individuals with military reserve status. While the federal courts are not required to honor veterans' preference in employment decisions, the federal courts are prohibited from denying hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces. 38 U.S.C. § 4301(b)(3). Federal court employees are also guaranteed re-employment rights if their employment is interrupted by active military duty in any branch of the armed forces, by reserve training activities, or by reporting for examinations to determine their fitness for military service.
2. Further clarification of this definition can be found in 29 CFR § 1614.203. That section provides that "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, breathing, learning and working. Under the standard of "Reasonable Accommodation" the court unit shall reasonably accommodate to the known physical or mental limitations of a qualified disabled applicant or employee unless the court can demonstrate that the accommodation would impose an undue hardship on the court's operations. Such accommodations may include, but shall not be limited to : (1) making facilities readily accessible to and usable by disabled persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers and interpreters and other similar actions.
3. HIV infection is considered to be a non-interfering disability absent medical and workplace documentation regarding the extent to which the infection may affect job performance, leave or conduct.
4. Prohibited unwelcome conduct includes offensive sexual flirtations, suggestive comments, sexual innuendo, unwanted physical contact, impeding or blocking movement, repeated requests or pressure for dates, advances, propositions, insults or verbal abuses of a sexual nature, graphic verbal comments about an individual's body, sexually degrading words describing an individual, humor and jokes about sex or gender-specific traits, or the display of sexually suggestive objects or pictures. Prohibited discriminatory conduct also includes non-verbal, suggestive, or sexually insulting actions such as leering, whistling, suggestive sounds, and obscene gestures. Prohibited touching includes any unwelcome touching of a sexual nature, pinching, intentional brushing of the body, sexual assault, and coerced sexual acts.
5. A "public announcement" is a reasonable attempt to notify applicants and potential applicants about the existence of job vacancies. In some situations this will involve the placement of a job notice in a widely circulated publication, whereas in others it may simply involve the posting of a notice on bulletin boards in appropriate places. The purpose of a public announcement is to afford all possible applicants, including women and minorities, an opportunity to compete for the position(s) in question.
6. Also, see Chapter VII, §3 of the Employment Dispute Resolution Plan (Part B).
7. For purposes of processing and investigating discrimination complaints in small courts, it would usually be necessary to obtain the services of an employee of another court unit to fulfill these functions to ensure objectivity and avoid any appearance of conflict of interests.
8. Informal resolutions are solutions to disputes that are satisfactory to all parties involved that are arrived at through discussion, mediation, and/or other techniques short of a complete processing of a complaint to a written decision. Experience has shown that such resolutions are generally preferable to the parties involved and less disruptive to the work environment than formal decisions rendered in an adversarial context.
9. See Endnote 5.

## **PART B**

### **UNITED STATES BANKRUPTCY COURT DISTRICT OF NEVADA EMPLOYMENT DISPUTE RESOLUTION PLAN**

**Amended and Approved by Judicial Council of the Ninth Circuit February 24, 2011<sup>10</sup>**

#### **CHAPTER I - GENERAL PROVISIONS**

##### **§ 1 Preamble**

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

The Plan supersedes all previous versions of the EDR Plan and Chapter VII (“Annual Report”) of the Equal Employment Opportunity Plan (“EEO Plan”) imposing requirements on the court or office unit. Claims arising under Chapters II through VII of this Plan, or under Chapters I through VI of the EEO Plan, shall be treated in accordance with the procedures set forth in Chapter IX of this Plan. The duties of the court’s EEO Coordinator will be assumed by the Employment Dispute Resolution (EDR) Coordinator (established in Section 6 of Chapter IX of this Plan), except that the dispute resolution duties assigned to the EEO Coordinator under the EEO Plan will be replaced by the dispute resolution procedures set forth in Chapter IX of this Plan.

This Plan is to be implemented in the same manner as the EEO Plan. This court has adopted and implemented this plan based upon the Model EDR Plan adopted by the Judicial Conference of the United States. Modifications from the Model EDR Plan have been approved by the Ninth Circuit Judicial Council. All future modifications to the EDR Plan must likewise be approved by the Ninth Circuit Judicial Council through the Office of the Circuit Executive. A copy of this Plan and any subsequent modifications shall be available to each covered employee and shall be posted on this court/office’s internal and external website(s). A copy of this Plan and any subsequent modifications shall be filed with the Office of the Circuit Executive and the Administrative Office. This court/office shall annually submit a report on the implementation of the Plan to the

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<sup>10</sup> Originally enacted and approved by the Judicial Council in August 1997, amended and approved May 1999 and July 2004.

Administrative Office for inclusion in the Director's Annual Report to the Judicial Conference. A copy of this annual report shall also be provided to the Ninth Circuit Judicial Council through the Office of the Circuit Executive.

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

This Plan is not intended to duplicate the protections provided for the resolution of complaints of judicial officer misconduct or disability under 28 U.S.C. §351 - 364 , and otherwise is intended to be the exclusive remedy of the employee relating to rights enumerated under this Plan.

## **§ 2 Scope of coverage**

This Plan applies to all bankruptcy judges of this district, as well as to all employees of the courts and employing offices in this district including judges' chambers staffs and court unit heads and their staffs.

## **§ 3 Definitions**

For purposes of this Plan—

- A.** The term “claim” means the filing of a request for counseling as set for in Chapter IX, which may be further pursued by the filing of a request for mediation and a request for hearing.
- B.** The term “employee” includes all individuals listed in Section 2 of this Chapter, as well as applicants for employment and former employees, except as provided below. The term “employee” does not include interns or externs providing gratuitous service, applicants for bankruptcy judge or magistrate judge positions, private attorneys who apply to represent indigent defendants under the Criminal Justice Act, criminal defense investigators not employed by federal public defenders, volunteer counselors or mediators, or other individuals who are not employees of an “employing office” as that term is defined below.
- C.** The term “employing office” includes all offices of the United States Bankruptcy Court in the District of Nevada, including the offices of the clerk of court, and any such offices that might be created in the future. This court is the employing office of a judicial officer's chambers staff.
- D.** The term “judicial officer” means a judge appointed under Article III of the

Constitution, a United States bankruptcy judge, a United States magistrate judge, or a judge of any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States.

- E. The term “court” refers to the appropriate court (appeals, district or bankruptcy) in which is located the employing office which would be responsible for redressing, correcting or abating the violation alleged in the complaint.

## **CHAPTER II - EQUAL EMPLOYMENT OPPORTUNITY AND ANTI-DISCRIMINATION RIGHTS**

**§ 1 General** - Discrimination against employees based on race, color, religion, sex (including pregnancy and sexual harassment), national origin, age (at least 40 years of age at the time of the alleged discrimination), disability and sexual orientation is prohibited. Harassment against an employee based upon any of these protected categories or retaliation for engaging in any protected activity is prohibited. All of the above constitute “wrongful conduct.” The rights and protections of Chapters I through VI of the EEO Plan (Part A) shall also apply to employees.

**§ 2 Definition** - The term “disability” means—

- A. a physical or mental impairment that substantially limits one or more of the major life activities of an employee,
- B. a record of such an impairment, or
- C. being regarded as having such an impairment.

*See* 42 U.S.C. §12102(2).

## **CHAPTER III - FAMILY AND MEDICAL LEAVE RIGHTS**

Title II of the Family and Medical Leave Act of 1993, 5 U.S.C. §6381 - 6387, applies to court employees in the manner prescribed in Volume 12, Chapter 9, of the Guide to Judiciary Policy.

## **CHAPTER IV - WORKER ADJUSTMENT AND RETRAINING NOTIFICATION RIGHTS**

**§ 1 General** - No “employing office closing” or “mass layoff” (as defined in Section 2 of this Chapter) may occur until the end of a 60-day period after the employing office serves written

notice of such prospective closing or layoff to employees who will be affected. This provision shall not apply to an employing office closing or mass layoff that results from the absence of appropriated funds.

## **§ 2 Definitions**

- A.** The term “employing office closing” means the permanent or temporary shutdown of a single site of employment if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees.
- B.** The term “mass layoff” means a reduction in force which:
- 1.** is not the result of an employing office closing; and
  - 2.** results in an employment loss at the single site of employment during any 30-day period for
    - a.** at least 33 percent of the employees (excluding any part-time employees); and
    - b.** at least 50 employees (excluding any part-time employees); or
    - c.** at least 500 employees (excluding any part-time employees).

*See 29 U.S.C. §2101.*

## **CHAPTER V - EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES**

An employing office shall not discriminate against an eligible employee or deny an eligible employee reemployment rights or benefits under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §4301 - 4335.

## **CHAPTER VI - OCCUPATIONAL SAFETY AND HEALTH PROTECTIONS**

- § 1 General** - Each employing office shall provide to its employees a place of employment which is free from recognized hazards that cause or are likely to cause death or serious physical harm to employees. Claims that seek a remedy that is exclusively within the

jurisdiction of the General Services Administration (“GSA”) or the United States Postal Service (“USPS”) to provide are not cognizable under this Plan; such requests should be filed directly with GSA or the USPS as appropriate.

**§ 2 Court program requirements** - The court shall implement a program to achieve the protections set forth in Section 1 of this Chapter.

## **CHAPTER VII - POLYGRAPH TESTS**

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

## **CHAPTER VIII - REPORTS OF “WRONGFUL CONDUCT”**

A report of “wrongful conduct” is not the same as initiating or filing a claim under this Plan; thus, employees who wish to file an EDR claim relating to any alleged “wrongful conduct” as defined in Chapter II, Section 1 must follow the procedures set forth in Chapter IX of this Plan.

Judges and employees are encouraged to report “wrongful conduct” to the court’s EDR Coordinator, the chief bankruptcy judge, unit executive, human resources manager, or their supervisor as soon as possible, before it becomes severe or pervasive. Retaliation against any employee making a report of “wrongful conduct” is prohibited. The person receiving such a report has the responsibility to notify the EDR Coordinator as soon as possible.

The EDR Coordinator shall promptly inform the chief bankruptcy judge and unit executive of any report. The chief bankruptcy judge and/or unit executive shall ensure that the allegations in the report are appropriately investigated, either by the human resources manager or other person.

All individuals involved in the investigation shall protect the confidentiality of the allegations of “wrongful conduct” to the extent possible. Information and records about the allegations shall be shared on a need-to-know basis.

Employees found by the chief bankruptcy judge and/or unit executive to have engaged in “wrongful conduct,” as defined in this Plan, may be subject to disciplinary action.

## **CHAPTER IX - DISPUTE RESOLUTION PROCEDURES**

**§ 1 General procedure for consideration of alleged violations** - An employee who claims a denial of the rights granted under Chapters II through VII of this Plan, or who claims a violation of the prohibition against retaliation set forth in Section 5.A. of this chapter, shall

seek resolution of such claims through the procedures of this Chapter. Generally, the procedural process consists of—

- A. counseling and mediation;
- B. hearing before the chief judge of the court (or a designated judicial officer) in which the alleged violation arises; and
- C. review of the hearing decision under procedures established by the judicial council of the circuit.

**§ 2 Alleged Violation by Employee** - Before invoking a request for counseling, an employee (to the extent feasible) is encouraged to bring his or her concerns to his or her supervisor or unit executive, unless the supervisor or unit executive is the alleged violator. In such a situation, the court or employing office should specify alternative neutral points of contact for the initial inquiry. An employee alleging that any of the rights granted under the EEO Plan or this Plan have been violated, and who seeks relief under this Plan, must file a request for counseling with their court's EDR Coordinator in accordance with Section 8 of this Chapter.

**§ 3 Alleged Violation by Judge** - Any employee alleging that a judge violated any rights granted under the EEO Plan or this Plan may file an EDR claim in accordance with this Plan. In such an instance, however, all the claims procedures of this Chapter shall be performed by the circuit judicial council, either by members of the council directly or by persons designated to act on its behalf, which may include the chief judge of the circuit. If a judge becomes the subject of both an EDR claim and a judicial misconduct complaint under the Judicial Conduct and Disability Act, 28 U.S.C. §351-364, the circuit judicial council or its designee, which may include the chief judge of the circuit, will craft a procedure for determining any common issues of fact and processing both complaints, subject to all requirements of the Act, the Rules for Judicial-Conduct and Judicial-Disability Proceedings, and, as practicable, this Plan. In so doing, the council or its designee, who may include the chief judge of the circuit, may determine that all or part of the EDR claim must be abated until action is taken on the judicial misconduct complaint.

**§ 4 Confidentiality** - The court or employing office shall protect the confidentiality of allegations filed under this Plan to the extent possible. However, information about allegations filed under this Plan shall be shared on a need-to-know basis. Records relating to violations under this Plan shall be kept confidential on the same basis.

**§ 5 General provisions and protections**

- A. **Prohibition against retaliation** - Complainants under this Plan have the right to be free from retaliation, coercion, or interference because of filing a claim pursuant to

this Plan. Likewise, any person who participates in the filing or processing of a claim, such as an employment dispute resolution coordinator, mediator, witness, representative, or co-worker, is also entitled to freedom from retaliation.

- B. Right to representation** - Every individual invoking the dispute resolution procedures of this Plan has the right to be represented by a person of his or her choice if such person is available and consents to be a representative. A court employee may accept the responsibilities of representation if it will not unduly interfere with his or her court duties or constitute a conflict of interest, as determined by the representative's appointing officer. A representative who is an office employee shall be free from restraint, interference, coercion, discrimination, and reprisal, and shall have a reasonable amount of official time to accompany, represent, and advise the complainant or the person complained against at any stage in the complaint procedures. The employing office also has the right to representation.
- C. Case preparation** - To the extent feasible, every individual invoking the dispute resolution procedures of this Plan may use a reasonable amount of official time to prepare his or her case, so long as it does not unduly interfere with the performance of his or her court duties.
- D. Extensions of time** - The chief bankruptcy judge of the court, or other presiding judicial officer, may extend any of the deadlines set forth in this Chapter for good cause. The EDR Coordinator and the assigned mediator may likewise, after notification to the parties involved, extend the deadlines related to their functions for good cause.
- E. Dismissal of claim** - On his or her own initiative or at the request of any party, the chief bankruptcy judge or presiding judicial officer may at any time in the proceedings, dismiss a claim on the grounds that it does not invoke violations of the rights or protections granted under the EEO Plan or this Plan, is untimely, is unduly repetitive of a previous claim, adverse action, or grievance, is frivolous, or fails to state a claim upon which relief may be granted. The complaint will be stayed until the request for dismissal is decided.
- F. Records** - At the conclusion of formal and informal proceedings under this Plan, all papers, files, and reports will be filed with the EDR Coordinator. No papers, files, or reports relating to a dispute will be filed in any employee's personnel folder, except as necessary to implement an official personnel action.

**§ 6 Designation and duties of EDR Coordinator** - The court shall designate a person to serve as the EDR Coordinator. The court may designate more than one EDR Coordinator. The duties of such person shall include the following:

- A.** to provide information to the court and employees regarding the rights and

protections afforded under this Plan;

- B.** to coordinate and organize the procedures and establish and maintain official files of the court pertaining to claims and other matters initiated and processed under the court's employment dispute resolution plan;
- C.** to coordinate the counseling of individuals in the initial stages of the claim process, in accordance with Section 8 of this Chapter; and
- D.** to collect, analyze, and consolidate statistical data and other information pertaining to the court's employment dispute resolution process.

**§ 7 Disqualification Provision** - Any person seeking disqualification or recusal of an EDR coordinator, counselor, mediator, or reviewing official shall promptly submit a written statement to the chief bankruptcy judge explaining the reasons for the requested disqualification or recusal. In determining whether disqualification or recusal is warranted, the chief bankruptcy judge shall consider the factors, circumstances and considerations set forth in 28 U.S.C. §455. If disqualification or recusal is warranted, the chief bankruptcy judge shall designate another individual to act as the EDR coordinator, counselor, mediator, or reviewing official. In the event, the chief bankruptcy judge is unavailable to serve under this subsection or has disqualified or recused himself or herself pursuant to this provision, the chief bankruptcy judge will designate another judicial officer to serve as the reviewing official. Disqualification or recusal of the EDR coordinator, counselor, mediator or reviewing official of a court shall not be warranted merely because the court is named as a responding party. However, to avoid possible conflict of interests if the court/office unit executive, e.g., clerk of court, is the alleged violator of the Plan's provisions, the chief bankruptcy judge may designate another party to represent the employing office in mediation and/or at the formal hearing.

## **§ 8 Counseling**

- A. Initiating a proceeding; formal request for counseling** - An employee who believes that his or her rights under Chapters II through VII of this Plan have been violated must first request counseling.
- B. Form and manner of requests** - Requests for counseling:
  - 1.** are to be submitted to the court's EDR Coordinator;
  - 2.** must be made in writing and contain all the violations asserted by the claimant (copy of approved form is contained in Appendix 1); and
  - 3.** must be made within 30 days of the alleged violation or within 30 days of the time the employee first becomes aware of the alleged violation.

## C. Procedures

1. **Who may serve as counselor** - The counseling shall be conducted by the court's EDR Coordinator, unless the EDR Coordinator is disqualified from serving as counselor under Section 7 of this Chapter, or is otherwise unavailable. In such instances, the chief bankruptcy judge of the court shall designate another qualified individual to perform the counseling function and the EDR Coordinator shall promptly provide a copy of the request for counseling to the unit executive and the chief bankruptcy judge of the court.
  2. **Purposes of counseling** - The purposes of the counseling shall be to discuss the employee's concerns and elicit information regarding the matter which the employee believes constitutes a violation; to advise the employee of his or her rights and responsibilities and the procedures of the court applicable to the employment dispute resolution process; to evaluate the matter; and to assist the employee in achieving an early resolution of the matter, if possible.
  3. **Confidentiality** - Unless the employee agrees in writing to waive confidentiality, the court or employing office shall protect the confidentiality of allegations filed under this Plan to the extent possible. However, information about allegations filed under this Plan shall be shared on a need-to-know basis. Records relating to violations under this Plan shall be kept confidential on the same basis.
  4. **Form of settlement** - The EDR Coordinator shall reduce to writing any settlement achieved during the counseling process and secure the signatures of the employee, his or her representative, if any, and the member of the employing office who is authorized to enter into settlement on the employing office's behalf.
- D. Duration of counseling period** - The period for counseling shall be 30 days (or a shorter period if counseling is concluded at an earlier date), beginning on the date that the request for counseling is received by the EDR Coordinator.
- E. Conclusion of the counseling period and notice** - The EDR Coordinator shall notify the employee in writing of the end of the counseling period. As part of the notice, the EDR Coordinator shall inform the employee of the right and obligation, should the employee choose to pursue his or her claim, to file with the EDR Coordinator a request for mediation in accordance with Section 9 of this Chapter.

## § 9 Mediation

- A. Initiation** - Within 15 days after receipt by the employee of the notice of the conclusion of the counseling period, the employee may file with the EDR Coordinator a request for mediation. The request must be made in writing and must state the claim(s) presented (copy of approved form is included as Appendix 2). The

EDR Coordinator shall promptly provide a copy of the request for mediation to the Clerk of Court and the chief bankruptcy judge of the court. Failure to pursue mediation (unless waived by mutual agreement of both parties) will preclude further processing of the employee's claim under any other provisions of this Chapter.

**B. Procedures -**

1. **Designation of mediator** - As soon as possible after receiving the request for mediation, the chief bankruptcy judge or EDR Coordinator shall designate a mediator and provide written notice to the parties of such designation.
2. **Who may serve as mediator** - Any person with the skills to assist in resolving disputes, except the court's EDR Coordinator, may serve as a mediator under this Plan.
3. **Purpose of mediation** - The mediator shall meet separately and/or jointly with the employee and his or her representative, if any, and the employing office to discuss alternatives for resolving a dispute, including any and all possibilities of reaching a voluntary, mutually satisfactory resolution.
4. **Confidentiality** - Any person or party involved in the mediation process shall not disclose, in whole or in part, any information or records obtained through, or prepared specifically for, the mediation process, except as necessary to consult with the parties or their representatives, and then only with notice to all parties.
5. **Form of settlement** - The mediator shall reduce to writing any settlement achieved during the mediation process and secure the signature of the employee, his or her representative, if any, and the member of the employing office who is authorized to enter into settlement on the employing office's behalf. A notice that settlement was reached will be provided to the EDR Coordinator for report purposes.

**C. Duration of mediation period** - The mediation period shall be 30 days unless waived (or a shorter period if mediation is concluded at an earlier date), beginning on the date the request for mediation is received. The employee is required to attend at least one mediation session. Thereafter, he or she may proceed to file a complaint and request for hearing.

**D. Conclusion of mediation period and notice** - If, at the end of the mediation period, the parties have not resolved the matter that forms the basis of the request for mediation, the mediator shall provide the employee, the employee's representative, if any, and the employing office with written notice that the mediation period has concluded. A copy of this notice shall be sent to the EDR Coordinator who, in turn, shall inform the employee of his or her right to file a complaint under Section 10 of

this Chapter.

## § 10 Complaint, review and hearing

- A. Complaint-** Not later than 15 days after receiving written notice of the end of the mediation period, the employee may file a complaint alleging a violation of the EDR Plan. The complaint shall be in the form approved by the court/office (see approved form in Appendix 3), and must be filed with the chief bankruptcy judge of the court of the employing office with a copy to the employing office and to the EDR Coordinator. Claims that were not presented in the request for mediation under Section 9(A) may not be pursued except in instances in which mediation has been waived. The respondent in all complaints shall be the employing office which would be responsible for redressing, correcting or abating the violation(s) alleged in the complaint. No individual shall be named as a respondent in the complaint.
- B. Hearing procedures**
- 1. Presiding judicial officer** - If the chief bankruptcy judge or designated judicial officer does not dismiss the complaint, the chief bankruptcy judge or designated judicial officer shall hold a hearing on the merits of the complaint unless he or she determines that no material factual dispute exists. Generally, the scope of the hearing should be limited to a review of the documents and other written evidence submitted, rather than a full evidentiary hearing or trial with live witnesses, except where extraordinary circumstances are presented or the presiding judicial officer believes the allegation(s) contained in the complaint require appearances.
  - 2. Specific provisions** - The presiding judicial officer may provide for such discovery and investigation as is necessary. In general, the presiding judicial officer shall determine the time, place, and manner of conducting the hearing if appearances are required. However, the following specific provisions shall apply to hearings in which appearances are required under this Section:
    - a.** the hearing shall be commenced no later than 60 days after the filing of the complaint;
    - b.** the complainant and the head of the office against which the complaint has been filed must receive written notice of the hearing; such notice shall also be provided to the individual alleged to have violated rights protected by this Plan;
    - c.** at the hearing, the complainant will have the right to representation, to present evidence on his or her behalf, and to cross-examine adverse witnesses; the employing office will have the rights to present evidence on its behalf and to cross-examine adverse witnesses;

- d. the Federal Rules of Evidence need not be followed, but may be used as a guide;
- e. a verbatim record of the hearing must be kept and shall be the sole official record of the proceeding;
- f. in reaching his or her decision, the chief bankruptcy judge or presiding judicial officer shall be guided by judicial and administrative decisions under the laws related to Chapters II through VII of this Plan and by decisions of the judicial council Section 11 of this Chapter;
- g. remedies may be provided in accordance with Section 12 of this Chapter where the hearing officer finds that the complainant has established by a preponderance of the evidence that a substantive right protected by this Plan has been violated;
- h. the final decision of the chief bankruptcy judge or designated judicial officer must be issued in writing not later than 30 days after the conclusion of the hearing with or without appearances; and
- i. all parties, or any aggrieved individual, shall have the right to written notice of any action taken as a result of a hearing.

**§ 11 Review of decision** - A party or individual aggrieved by a final decision of the chief bankruptcy judge or presiding judicial officer, or by a summary dismissal of the complaint, may petition for review of that decision. Such review must be requested in writing to the Judicial Council of the Ninth Circuit no later than 30 days following the date of the final decision of the chief judge or the presiding judicial officer or following the date of a summary dismissal of the complaint. Any review will be conducted by the members of the Executive Committee of the Ninth Circuit Judicial Council or their designees. The decision of the Executive Committee shall be based on the record created by the hearing officer, and shall be affirmed if supported by substantial evidence. (See Appendix 4 for “Procedures for Review of EDR Hearing Officer Decision by the Executive Committee of the Judicial Council of the Ninth Circuit”).

**§ 12 Remedies**

- A. Where judicial officers acting pursuant to Section 10 or 11 of this Plan find that a substantive right protected by this Plan has been violated, they may order a necessary and appropriate remedy. A remedy may be directed at correcting a past violation, prospectively insuring compliance with the rights protected by this Plan, or both. A remedy shall be tailored as closely as possible to the specific violation involved.
- B. Remedies which may be provided to successful complainants under this Plan include, but are not limited to:

1. placement of an employee in a position previously denied;
2. placement in a comparable alternative position;
3. reinstatement to a position from which the employee was previously removed;
4. prospective promotion to a position;
5. priority consideration for a future promotion or position;
6. back pay and associated benefits, including attorney's fees, where the statutory criteria of the Back Pay Act, 5 U.S.C. § 5596, are satisfied;
7. records modification and/or expungement;
8. "equitable" relief, such as temporary stays of adverse actions;
9. granting of family and medical leave; and
10. accommodation of disabilities through the purchase of specialized equipment or the restructuring of duties and work hours, or other appropriate means.

C. Remedies which are *not* legally available include:

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

**§ 13 Record of final decisions** - The conclusion of the reviewing panel in any final decisions reached in accordance with the provisions of Section 11 of this Chapter shall be made available to the public from the Office of the Circuit Executive upon written request. Only in the event the panel determines that all or portions of the entire decision should be made public shall additional portions of the decision be made available to the public. The reviewing panel, in the interests of justice and of fairness to the parties, may determine not to make available to the public the conclusion of any final decision if public disclosure would compromise the integrity or legitimate confidentiality of the parties or the court, or to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense, or for any other reason that the administration of justice may require.

**§ 14 Election of remedies** - If an employee or an employee representative files an appeal of an adverse action or a grievance in addition to a complaint under this Plan concerning the same or substantially the same subject matter, the employee must elect either (a) the EDR Plan or (b) the grievance/adverse action appeal procedures under which the complaint is to be

processed. An employee may not utilize both (a) and (b). Similarly, if a complaint has already been processed under one of these procedures (i.e., the grievance/adverse action appeal procedure or the procedures in this Plan), it may not be the subject of a complaint under the other.

**§ 15 Determining Time Periods** - The word “days” in all filing and other time periods specified in this Plan shall mean calendar days, except that if the deadline date falls on a Saturday, Sunday or holiday, the deadline shall be extended to the following Monday or court business day respectively.

**§ 16 Annual Report** - The EDR Coordinator will prepare an annual report for the fiscal year, indicating:

1. The number and type of alleged violations for which counseling was conducted.
2. The number and type of alleged violations for which mediation was conducted.
3. The number and type of complaints filed.
4. The number and type of hearings conducted.
5. The number and type of final decisions rendered reflecting the number for which some relief was granted.
6. With respect to all the data supplied in items 1 through 5 above, the allegations or complaints shall be reported according to the Chapter(s) of the EDR Plan involved and, with respect to allegations or complaints under Chapter II, according to the type(s) of discrimination alleged.