

PART B

EMPLOYMENT DISPUTE RESOLUTION PLAN United States District Court for the Southern District of California

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 District Court for the Southern District of California in accordance with the Judiciary Model Plan adopted by the Judicial Conference of the United States in order to provide rights and protections to employees of the U.S. District Court within the Southern District of California which are comparable to those provided to legislative branch employees under the Congressional Accountability Act of 1995.

The Plan supersedes Appendix I ("Discrimination and Complaint Procedures") of the current Equal Employment Opportunity Plan ("EEO Plan") applicable to this court. Claims arising under Chapters II through VII of this Plan, or under Sections I through V of the EEO Plan (Part A), shall be treated in accordance with the procedures set forth in Chapter VIII of this Plan. The duties of the court's EEO Coordinator will be assumed by the Employment Dispute Resolution Coordinator (established in Section 3 of Chapter VIII 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 VIII 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 Plan adopted by the United States Judicial Conference. All 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. A copy of this plan and any subsequent modifications shall be filed with the Administrative Office. This court shall annually submit a report on the implementation of the plan to the 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.

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

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 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 the Plan), it may not be the subject of a complaint under the other.

This EDR Plan is not intended to duplicate the protections provided for the resolution of complaints of judicial officer misconduct or disability under 28 U.S.C. § 372(c) and otherwise is intended to be the exclusive remedy of the employee relating to rights enumerated under the Plan.

§ 2 Scope of coverage

This Plan applies to all Article III judges and other judicial officers of this district, as well as to all employees of the court and employing offices in this district including chambers staffs, and court unit heads and their staffs.

§ 3 Definitions

For purposes of this Plan:

- A.** The term "employee" includes all individuals listed in Section 2 of this Chapter, as well as applicants for employment and former employees, except as provided below. The term "employee" does not include applicants for positions that have a term of thirteen months or less, externs, applicants for magistrate judge positions, private attorneys who apply to represent indigent defendants under the Criminal Justice Act, contract court reporters, contract interpreters, contract electronic court recorders, or other individuals who are not employees of an "employing office" as that term is defined below.
- B.** The term "employing office" includes all offices of the United States District Court in the Southern District of California, including the offices of the Clerk, Probation, and Pretrial services. This Court is the employing office of a judicial officer's chambers staff.
- C.** The term "judicial officer" means a judge appointed under Article III of the Constitution, or a United States magistrate judge.
- D.** The term "court" refers to the United States District Court for the Southern District of California.

- E. The term "appointing officer," for purposes of this Plan only, refers to the court unit executive, if the complainant is an employee of the offices of the Clerk, Probation (including Probation Officers), or Pretrial Services. The appointing officer for an employee of a judge's chambers is the respective judge.
- F. The term "days" in all filing and other time periods specified in this plan shall mean calendar days, except that if the deadline date falls on a Saturday, Sunday, or holiday, the deadline shall be extended to the following court business day.

CHAPTER II - EQUAL EMPLOYMENT OPPORTUNITY AND ANTI-DISCRIMINATION RIGHTS

§ 1 General - Discrimination against employees based on race, color, religion, sex (including sexual harassment), national origin, age (at least 40 years of age at the time of the alleged discrimination), disability and sexual orientation is prohibited. The rights and protections of Sections I through V of the Equal Employment Opportunity Plan (Part A) shall also apply to employees.

§ 2 Definition - The term "disability" means--

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

See 42 U.S.C. § 12102(2).

§ 3 Special provision for probation and pretrial services officers - The age discrimination provision of Section I of this Chapter shall not apply to the initial hiring of probation and pretrial services officers. See *Report of the Proceedings of the Judicial Conference of the United States* (March 1991), pp. 16-17.

CHAPTER III - FAMILY AND MEDICAL LEAVE RIGHTS

§ 1 General - Title II of the Family and Medical Leave Act of 1993, 29 U.S.C. § 2611, applies to court employees in the manner prescribed in Volume I-C, Chapter X, Subchapter 1630.1, Section R, of the *Guide to Judiciary Policies and Procedures*.

CHAPTER 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. (1) at least 33 percent of the employees (excluding any part-time employees); and
(2) at least 50 employees (excluding any part-time employees); or
 - b. at least 500 employees (excluding any part-time employees).

See 29 U.S.C. § 2101.

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

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

CHAPTER VI - OCCUPATIONAL SAFETY AND HEALTH PROTECTIONS

§ 1 General - Each employing office is committed to the principle of providing 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. Complaints which seek a remedy that is exclusively within the jurisdiction of the General Services Administration (“GSA”) to provide are not cognizable under this Plan; such requests should be filed directly with GSA.

§ 2 Court program requirements - The court has implemented a Health and Safety Plan to achieve the protections set forth in Section 1 of this Chapter.

CHAPTER VII - POLYGRAPH TESTS

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

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

- A. counseling, conference with appointing officer, 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 Ninth Circuit.

§ 2 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 complaint pursuant to this Plan. Likewise, any person who participates in the filing or processing of a complaint, such as an employment dispute resolution coordinator, 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 at his or her expense by a person of his or her choice if such person is available and consents to be a representative. *The employing office may also be represented by a person designated by the court unit executive, or the court.* A court employee may accept the responsibilities of representation if it will not interfere with his or her court duties or constitute a conflict of interest, as determined by the representative's appointing officer.
- C. Case preparation** - To the extent feasible, every individual invoking the dispute resolution procedures of this Plan may use a reasonable amount of official time to prepare his or her case, so long as it does not interfere with the performance of his or her duties.
- D. Extensions of time** - The chief judge of the court, or other presiding judicial officer, may extend any of the deadlines set forth in this Chapter for good cause.

§ 3 Designation and duties of employment dispute resolution coordinator - The court shall designate a person from each court unit to serve as the 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.** The Chief Judge and the EDR Coordinator will coordinate and organize the procedures and establish and maintain official files of the court pertaining to complaints and other matters initiated and processed under the court's employment dispute resolution plan, subject to further order of the court. 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.
- C.** to coordinate the counseling of individuals in the initial stages of the complaint process, in accordance with Section 5 of this Chapter; and
- D.** to collect, analyze, and consolidate statistical data and other information pertaining to the court's employment dispute resolution process.

When the appointing officer for an employee who claims a denial of rights under the Plan is a judicial officer, the Chief Judge will designate an individual to serve as the counselor, item C of this section, after consultation with the appointing officer, if appropriate. The EDR Coordinator for the Clerk's Office will be responsible for items A, B, and D of this section. However, the duties of item A are limited to providing a copy of the Plan to such employees or making the Plan available to such employees.

§ 4 Disqualification Provision- Any person seeking disqualification or recusal of an EDR counselor, mediator, or reviewing official shall promptly submit a written statement to the chief judge explaining the reasons for the requested disqualification or recusal. In determining whether

disqualification or recusal is warranted, the chief judge shall consider the factors, circumstances and considerations set forth in 28 U.S.C. § 455. If disqualification or recusal is warranted, the chief judge shall designate another individual to act as the EDR counselor, mediator, or reviewing official. Disqualification or recusal of the EDR counselor, mediator or reviewing official of a court shall not be warranted merely because the court is named as a responding party.

§ 5 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 within 30 days of the alleged violation or within 30 days of the time the employee knew or should have known of the alleged violation; and
3. must be made in writing (copy of approved form is contained in Appendix 1). Except with the permission of the EDR Coordinator for purposes of clarification, requests for counseling may not be amended after they have been submitted. If the employee wishes to seek counseling on issues that were not raised in a Request for Counseling that has already been submitted to the EDR Coordinator, the employee should submit an additional Request for Counseling. Any such additional Request for Counseling must also be timely (that is, submitted within 30 days of the alleged violation or within 30 days of the time the employee first knew or should have known of the alleged violation), and new time limits shall apply to the issues raised in it.

C. Procedures

1. **Who may serve as counselor** - The counseling shall be conducted by the court's EDR Coordinator, unless the EDR Coordinator is disqualified from serving as counselor under Section 4 of this Chapter, or is otherwise unavailable. In such instances, the chief judge of the court shall designate another qualified individual to perform the counseling function. If the dispute involves an alleged violation of this Plan by a judicial officer, the person who conducts the counseling shall be a judicial officer designated by the chief judge.
2. **Purposes of counseling** - The purposes of the counseling shall be to discuss the employee's concerns and elicit information regarding the matter which the employee believes constitutes a violation; to advise the employee of his or her rights and responsibilities and the procedures of the court applicable to the employment dispute resolution process; to evaluate the matter; and to assist the employee in achieving an early resolution of the matter, if possible.

3. **Confidentiality** - Any person or party involved in the counseling process shall not disclose information or records obtained through, or prepared specifically for, the counseling process, in whole or in part, except as needed to facilitate the counseling process, and then on a need to know basis only and/or as necessary to consult the employing office or to attempt a resolution of the disputed matter. A written record of all such contacts must be kept by the counselor and made available for review by the affected person(s).
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 a conference with the appointing officer, in accordance with Section 6 of this Chapter.

§ 6 Conference with Appointing Officer

A. Initiation - Within 10 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 a conference with the Appointing Officer. The request must be made in writing and must state the claim(s) presented (copy of approved form is included as Appendix 2). Failure to pursue a conference with the Appointing Officer will preclude further processing of the employee's claim under any other provisions of this Chapter.

B. Procedures -

1. **Purpose of conference with Appointing Officer** - The Appointing officer shall meet with the employee and his or her representative, if any, and discuss alternatives for resolving the dispute, including any and all possibilities of reaching a voluntary, mutually satisfactory resolution.
2. **Confidentiality** - No person or party involved in the conference shall disclose, in whole or in part, any information or records obtained through, or prepared specifically for the conference with the Appointing Officer, except as necessary to consult with the parties or their representatives, and then only with notice to all parties. A written record of all such contacts must be kept and made available for review by the affected person(s). In addition, in the event the employee files a complaint pursuant to Section 8 of the Chapter, the hearing officer shall have access

to the record of any claims raised in this conference.

3. **Form of Settlement** - The Appointing Officer shall reduce to writing any settlement achieved during the conference and secure the signature of the employee, and his or representative, if any.

C. Duration of conference with Appointing Officer period - the conference period shall be 30 days, or a shorter period if a settlement is achieved at an earlier date, beginning on the date the request for the conference is received. The employee is required to attend at least one conference with the Appointing Officer. Thereafter, after receiving notice of the end of the conference period, he or she may proceed to file a request for mediation.

D. Conclusion of conference period and notice - Prior to the conclusion of the conference period, the Appointing Officer will notify the EDR Coordinator of the outcome of the conference. If no settlement has been achieved, the EDR Coordinator shall notify the employee in writing of the end of the conference 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 7 of this Chapter.

§ 7 Mediation

A. Initiation - Within 15 days after receipt by the employee of the notice of the conclusion of the conference 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 3). Failure to pursue mediation will preclude further processing of the employee's claim under any other provisions of this Chapter.

B. Procedures -

1. **Designation of mediator** - As soon as possible after receiving the request for mediation, the EDR Coordinator will provide a copy of the request to the presiding magistrate judge, who shall designate a mediator and provide written notice of such designation.
2. **Who may serve as mediator** - The presiding magistrate judge will select a magistrate judge to serve as a mediator under this Plan. If the complaint alleges that a judicial officer has violated the rights protected by this Plan, the mediator shall be a judicial officer designated by the chief judge.
3. **Purpose of mediation** - The mediator shall meet separately and/or jointly with the employee and his or her representative, if any, and the employing office to discuss alternatives for resolving a dispute, including any and all possibilities of reaching a voluntary, mutually satisfactory resolution.

4. **Confidentiality** - No person or party involved in the mediation process shall disclose, in whole or in part, any information or records obtained through, or prepared specifically for, the mediation process, except as necessary to consult with the parties or their representatives, and then only with notice to all parties.
 5. **Form of settlement** - The mediator shall reduce to writing any settlement achieved during the mediation process and secure the signature of the employee, his or her representative, if any, and the member of the employing office who is authorized to enter into settlement on the employing office's behalf.
- C. Duration of mediation period** - The mediation period shall be 30 days (or a shorter period if mediation is concluded at an earlier date), beginning on the date the request for mediation is received. The employee is required to attend at least one mediation session. Thereafter, he or she may proceed to file a complaint.
- D. Conclusion of mediation period and notice** - If, at the end of the mediation period, the parties have not resolved the matter that forms the basis of the request for mediation, the EDR Coordinator shall provide the employee, the employee's representative, if any, and the employing office with written notice that the mediation period has concluded. The notice shall also inform the employee of his or her right to file a complaint under Section 8 of this Chapter.

§ 8 Complaint, review and hearing

A. Complaint- Not later than 15 days after receiving written notice of the end of the mediation period, the employee alleging a violation of the EDR Plan who participated in the mediation may file a complaint. The complaint must be in the form approved by the court (see approved form in Appendix 4), and must be filed with the chief judge of this court. 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. The functions of a court unit executive counselor, mediator, or adjudicator are adjudicative. Any designated judge is performing an adjudicative function. No individual shall be named as a respondent in the complaint. Without limiting the foregoing, no counselor, mediator, or adjudicative officer shall be a named party to any appeal or review unless the appellate court so orders.

B. Review of pleadings

1. **Reviewing official** - The complaint and any other documents shall be reviewed by the chief judge of the court, or by another judicial officer of the court designated by the chief judge. In the case of a complaint alleging that an Article III judge has violated rights protected by the Plan, that judge may elect to have a hearing conducted by a judge of another court, as designated by the Judicial Council of the Ninth Circuit. Any designation of a judicial officer from another court to hear and decide the case shall be arranged by agreement of the chief judges of the affected courts. In the event, the chief judge is unavailable to serve under this subsection or

has disqualified or recused himself or herself pursuant to § 4 of this Chapter, the chief judge will designate another judicial officer to serve as the reviewing official.

2. **Review procedures** - After notice to the complainant and an opportunity to respond, the chief judge or designated judicial officer may dismiss in writing any complaint that is found to be frivolous, unduly repetitive of a previous complaint, that fails to state a claim upon which relief may be granted, or that makes claims that were not advanced in mediation.

C. Hearing procedures

1. **Hearing officer** - If the chief judge or designated judicial officer does not dismiss the complaint under the preceding subsection, the chief judge or designated judicial officer, acting as the hearing officer, shall hold a hearing on the merits of the complaint unless he or she determines that no material factual dispute exists.
2. **Specific provisions** - The presiding judicial officer may provide for such discovery and investigation as is necessary. In general, the presiding judicial officer shall determine the time, place, and manner of conducting the hearing. However, the following specific provisions shall apply to hearings conducted under this Section:
 - a. the hearing shall be commenced no later than 60 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 whenever such individual is a judicial officer or when the presiding judicial officer otherwise determines such notice to be appropriate;
 - c. at the hearing, the complainant will have the rights to representation, to present evidence on his or her behalf, and to cross-examine adverse witnesses; the employing office will have the rights to present evidence on its behalf and to cross-examine adverse witnesses;
 - d. a verbatim record of the hearing must be kept and shall be the sole official record of the proceeding;
 - e. in reaching his or her decision, the chief judge or designated 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 of the appropriate circuit under Section 9 of this Chapter;
 - f. remedies may be provided in accordance with Section 10 of this Chapter where the hearing officer finds that the complainant has established by a preponderance of the evidence that a substantive right protected by this Plan

has been violated;

- g.** the final decision of the chief judge or designated judicial officer must be issued in writing not later than 30 days after the conclusion of the hearing; and
- h.** all parties, or any aggrieved individual, shall have the right to written notice of any action taken as a result of a hearing.

§ 9 Review of decision - A party or individual aggrieved by a final decision of the chief judge or designated 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 designated 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 the decision of the chief judge or designated judicial officer or summary dismissal shall be affirmed if supported by substantial evidence.

§ 10 Remedies

- A.** Where judicial officers acting pursuant to section 8 or 9 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 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.

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.

§ 11. Record of final decisions - The conclusion of the reviewing panel in any final decisions reached in accordance with the provisions of §9 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.

§12 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.