

# TIPS FOR WRITING TIMELY & EFFECTIVE FINAL AGENCY DECISIONS

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# GOALS FOR THIS SESSION

1. Walk through the **structure** of a Final Agency Decision.
2. Share **analytical insights** from the an EEOC and an Agency perspective.
3. Provide **practical suggestions** on how to make the Final Agency Decision drafting, reviewing, and issuance process simpler and faster.

# ROADMAP

- **The Context:** Why do we have Final Actions?
- **The Content:** What are the ingredients that make a model Final Action?
- **The Controversies:** What are the hot topics and how do we handle them?
- **The Conversation:** What are your questions?

# THE CONTEXT

# WHY IS THERE A FINAL ACTION?

The agency's issuance of a final action is the last step of federal sector EEO complaint process, pursuant to 29 C.F.R. § 1614.110.

The final action informs a complainant of:

- The outcome of claim(s) of discrimination
- Appeal rights to EEOC or to file a civil action
- Name of proper defendant
- Applicable time limits

# WHAT ARE THE TYPES OF FINAL ACTIONS?

## Final Orders

- Pursuant to AJ Decision
- Fully implement or appeal

## Final Agency Decisions

- Procedural and merits
- Damages and attorney fees

## Final Determinations

- Breach of settlement
- Compliance

# WHEN MUST FINAL ACTIONS BE ISSUED?

## ■ Final Order:

- 40 days after receipt of the AJ's decision

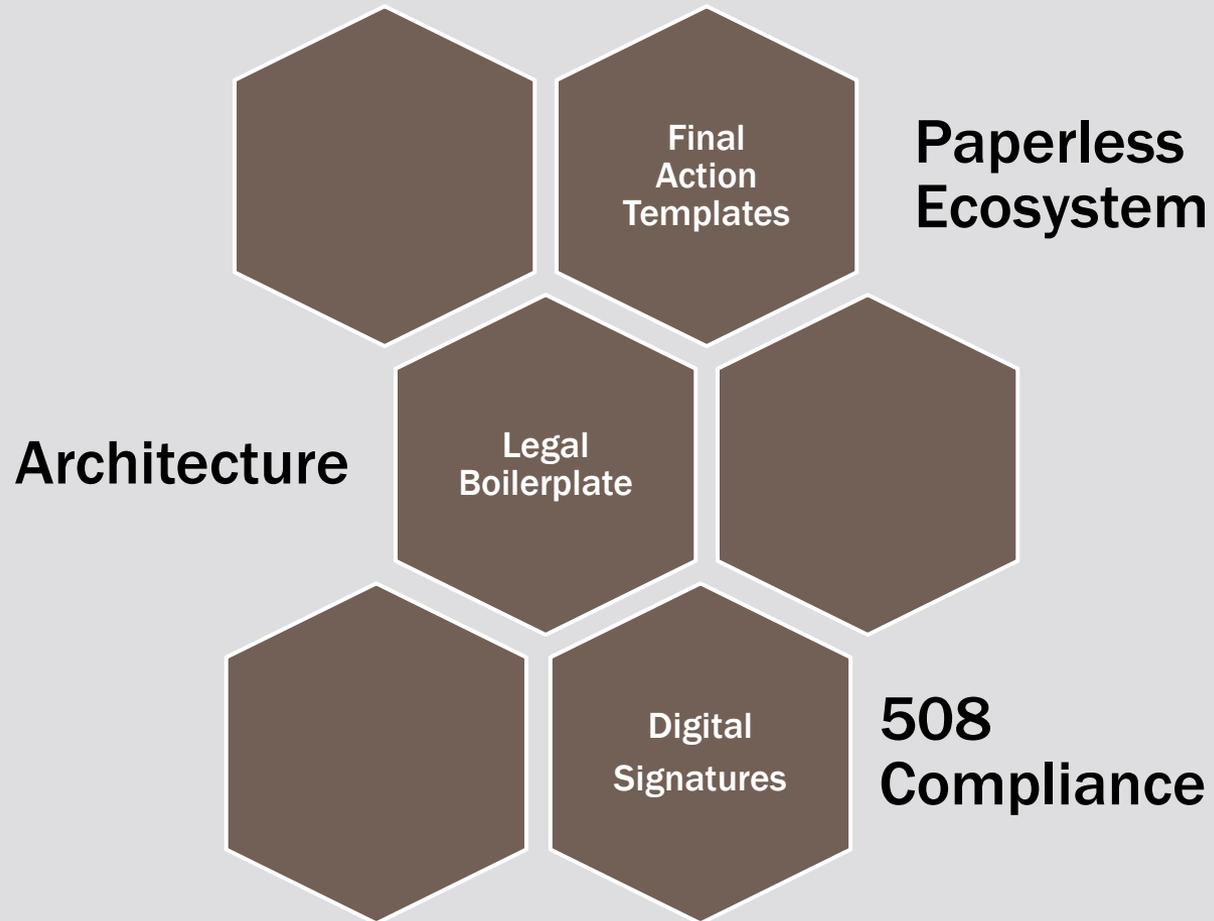
## ■ FAD:

- 60 days after C elects, or after election period ends
- 60 days after an AJ sends the case back to the agency
- 45 days for a mixed case
- See OFO's Order – 30, 45, 90, or longer

## ■ Final Determination:

- 35 days after receipt of breach claim

# DIGITAL PROCESSING



# THE CONTENT

# FAD FORMAT

- Agency Letterhead
- Caption
- Procedural History
- Statement of Claims
- Statement of Facts
- Legal Analysis
- Statement of Conclusions
- Statement of Relief
- Statement of Rights
- Dated and Signed
- Certificate of Service

# CASE CAPTION

- Complainant's Name
- Name of Agency and Title of Agency Head
- Case Numbers
  - Agency Number
  - EEOC Hearing Number
  - OFO Appeal Number

Office for Civil Rights and Civil Liberties  
U.S. Department of Homeland Security  
Washington, DC 20528



**Homeland Security**

Bruce Wayne,  
*Complainant*

v.

James Gordon, Commissioner,  
U.S. Department of Peace,  
*Agency*

Agency Case No. HS-BAT-012345-2014

**FINAL AGENCY DECISION**

Pursuant to 29 C.F.R. § 1614.110(b), the U.S. Department of Homeland Security (DHS), Office for Civil Rights and Civil Liberties (CRCL) hereby takes final action on the above-captioned complaint by issuing a Final Agency Decision (FAD).<sup>1</sup> Based on a review of the full Investigative File (IF), CRCL finds that Complainant failed to prove by a preponderance of the

# PROCEDURAL HISTORY

- Date of alleged incident(s)
- Date of EEO Counselor contact
- Date of C's receipt of Notice of Right to File
- Date of Formal Complaint filing
- Date of Acceptance
- Date of issuance of Investigative File and issuance of right to elect a hearing or FAD
- Date of election
- Date of hearing, if held
- Date agency received for Final Action
- Case consolidation or amendment history
- Appellate history at EEOC or MSPB

# STATEMENT OF CLAIM(S)

- An assertion of the unlawful employment practice(s), for which, if proven, a remedy exists:
  - Employment practice or policy
  - Basis of discrimination

## Avoid Fragmentation

C alleged disability discrimination when: 1) agency continuously failed to provide an accommodation and her supervisor ridiculed her about disability, and 2) supervisor watched her for an hour while she worked at her station.

Can Claim 2 be dismissed for failure to state a claim?



*Peterson v. Dep't  
of Defense, EEOC  
Appeal No.  
0120113345  
(July 16, 2013).*

# STATEMENT OF FACTS

- All relevant and material facts
  - Relevant: tends to prove or disprove a material issue
  - Material: relates to one or more of the claims raised
  - Reliable: if it is dependable or trustworthy
- Citations to the evidence in the case file
- Explanation of policy/procedures
- Identification of key individuals and offices
- Explanation of gaps in the record

★ **Stick to the facts over C's allegations**

## What's relevant here?

C filed a formal complaint when the agency failed to appoint her as the closeout Logistics Manager of the Earthquake Service Center. Agency introduced evidence regarding C's inability to amicably work with coworkers.

Is this relevant?



*Williams v. Dep't  
of Homeland Sec.,  
EEOC Appeal No.  
01A23026 (Apr.  
1, 2003).*

# LEGAL ANALYSIS

- A brief summary of the applicable general law
- Dismissed claims set forth at beginning of legal analysis
- Dismissals cannot be based on the ultimate merits of the allegation
- Determine the appropriate theories of law for case (Disparate Treatment, Disparate Impact, Hostile Work Environment, Reasonable Accommodation, Medical Examinations/Inquiries)
- Apply appropriate law, with citations, to specific facts
- Findings/Conclusions set forth at end of each legal element based on the evidence

## How do dismissals fit in?

Layla, who suffers from an allergic reaction to toxins, filed a formal complaint of disability discrimination in which she alleged that the Agency denied her request to move to another building and assign her to another position as a reasonable accommodation. Agency believes that Layla's condition does not rise to the level of a disability under the Rehabilitation Act.

Can Layla's complaint be dismissed for failure to state a claim?



*King v. Dep't of  
the Navy, EEOC  
Appeal No.  
01A40422 (Mar.  
17, 2004).*

# LEGIT, NONDISCRIMINATORY REASON

- The LNR must be sufficiently clear so that C will have a “**full and fair opportunity**” to demonstrate pretext.
  - The LNR must “provide a **specific, clear, and individualized explanation** for the treatment accorded the affected employee.”
- ★ **If no LNR, then the inference stands.**

## How specific does the LNR need to be?

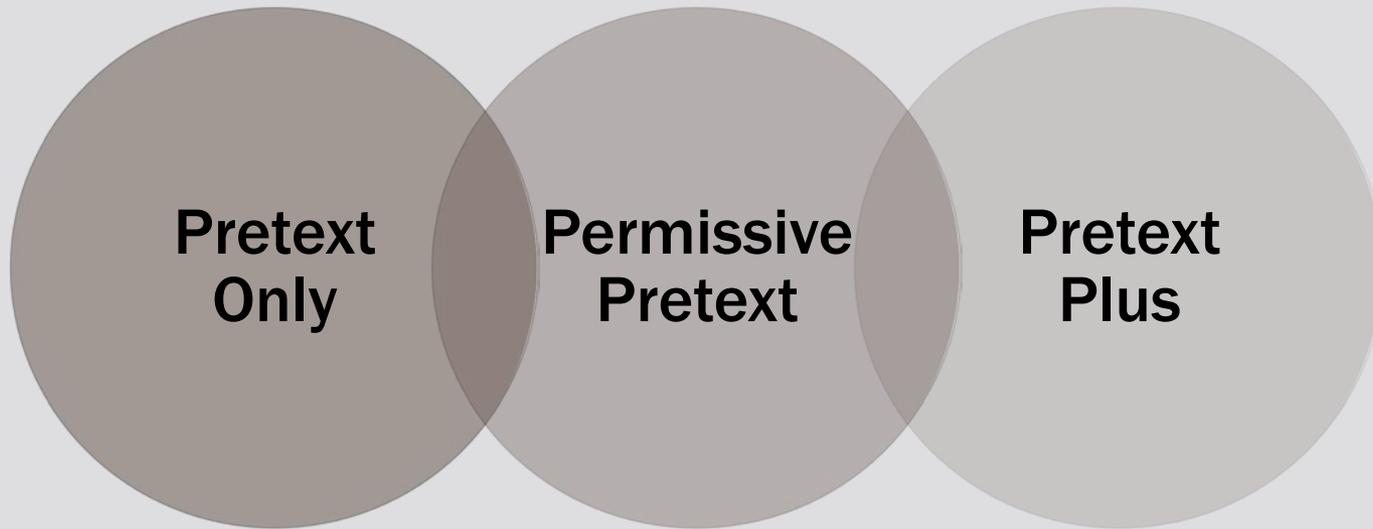
Agency explained that the selection decision was made pursuant to procedure known as the “Rule of Three.” No other substantive explanation is given for why C was not selected.

Has the burden of production been met?



*Sharpe v. U.S. Postal Serv.,*  
EEOC Appeal No. 01986852 (Aug. 14, 2001).

# PRETEXT



- Is the LNR factually incorrect?
- Is the LNR not credible?
- Is the LNR unworthy of credence?
- Evidence showing that the LNR is weak, implausible, inconsistent, incoherent, or contradictory.

# WHAT TIPS THE PRETEXT BALANCE?

- Departure from usual business procedures or a suspect practice or procedure
- Evidence of a general atmosphere of discrimination or proof of history of discriminatory practices
- Failure of Agency to preserve documentary evidence pertinent to its actions
- Shifting or inconsistent versions of the facts from the Agency, especially from investigation to hearing
- Vague, non-responsive, or incomplete responses to investigatory (or obvious) questions
- For non-selections and non-promotions, evidence that Complainant was plainly superior to selectee

- Use IRAC.
- Write in active voice. It's a FAD, not a mystery novel.
- Less may be more and better.
- Write clearly and use plain English and simple, non-flowery words and do so without redundancy or unnecessary repetition or saying the same thing again and again.
- Focus on the facts and cite to the record.

# STATEMENT OF CONCLUSIONS

- **Summary of the conclusions reached on the claims**
- **One-sentence statement of whether discrimination found**

# STATEMENT OF RELIEF

- **If discrimination found, set forth remedies awarded**
  - **Monetary:** Back pay, Compensatory Damages, Attorney's Fees, Costs
  - **Non-Monetary:** placement in position, promotion, reinstatement, benefits (leave, seniority, insurance, annuity), reasonable accommodation, training, expungement of records, correction of discriminatory policies, notice posted of discrimination finding
- **If no finding of discrimination, state that there is no entitlement to relief**

# STATEMENT OF NOTICE AND RIGHTS

- **All Final Actions require an Agency to:**
  - Give notice of appeal right to EEOC or MSPB
  - Identify time frames for filing an appeal
  - Give notice of right to file a civil action in U.S. District Court, and the applicable time frame for doing so (90 days from date of receipt of Final Action)
- **The Final Action must also include:**
  - Printed name, title, and signature of issuer
  - Date the final action is signed or issued
  - A copy of EEOC Form 573

# CERTIFICATE OF SERVICE

- Statement attests that Final Action was delivered to the parties
- Statement confirms address to which Final Action was sent
- Statement specifies the method of delivery of Final Action
- Statement contains the printed name, title, and signature of person responsible for delivery of Final Action
- Statement confirms the date that the Final Action was mailed/sent to Complainant

# DIGITAL ISSUANCE

## DIGITAL SIGNATURE

- Insert a digital signature while in Word
- Convert it to PDF
- Check accessibility, including reading order and alt text
- Re-save PDF
- Attach a Certificate of Service with the date of issuance

## EMAIL OUTPROCESSING

- Use requested email or agency email address, or both
- Apply read receipt option
- Request confirmation of receipt and of ability to access attachments

## Proving Receipt of an Email

Agency issues an ROI via email (both to the agency email and to C's private email). C acknowledges receipt of the ROI via a response email back to the Agency. Record contains receipt of delivery at both email addresses, and a print-out reflecting the date when C read the email to the work account.

Is C's acknowledgement email and other evidence enough to prove receipt for starting the clock for electing a hearing?



*Watts v. Dep't of  
the Navy, EEOC  
Appeal No.  
120080121  
(Sept. 18, 2009).*

# EMERGING ISSUES AND CONTROVERSIES

# SEX STEREOTYPING

- Title VII's prohibition on sex discrimination applies to discrimination based on biological sex (male and female) as well as discrimination based on gender stereotypes.
  - *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
- Gender stereotypes are cultural or social expectations about how men or women should act or appear.

# GENDER IDENTITY & TRANSGENDER INDIVIDUALS

- Discrimination against a transgender individual because that person is a transgender individual is discrimination “based on sex” and such discrimination therefore violates Title VII.
  - *Macy v. Dep’t of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2012).
- “Transgender” is an umbrella term for persons whose gender identity, gender expression, or behavior does not conform to that typically associated with the sex to which they were assigned at birth.

# SEXUAL ORIENTATION

- Title VII's prohibition of discrimination does not explicitly include sexual orientation as a basis. However, Title VII prohibits sex stereotyping discrimination.
- The Commission has held that the view that men should not have romantic relationships with men, or women with women, is a sex stereotype about gender roles. Therefore, actions based on this sex stereotype state a claim in the EEO process.
  - *Veretto v. USPS*, EEOC Appeal No. 0120110873 (July 1, 2011).
  - *Costello v. USPS*, EEOC Appeal No. 0520110649 (Dec. 11, 2011).

# PROCESSING SEX/GENDER STEREOTYPING CLAIMS

- The fact that a Complainant has characterized the basis of discrimination as “gender identity” or “sexual orientation” instead of “sex” does not defeat an otherwise valid sex discrimination claim.
  - *Baker v. Social Security Administration*, EEOC Appeal No. 0120110008 (Jan. 11, 2013).

# BACKGROUND EVIDENCE

- “Untimely discrete acts, however, may be used as **background evidence** in support of timely actions.”
  - EEOC Q&A re Issuance of Revision to EEOC Compliance Manual Section on Threshold Issues, July 22, 2005
- “...untimely discrete discriminatory acts may be considered as **background evidence** if they are relevant to the determination of whether acts taken inside the filing period were discriminatory.”
  - EEOC Compliance Manual Section 2; Threshold Issues

## How intensive an investigation?

Footnote 2: “The Commission reminds the Agency to investigate the denial of Complainant’s hardship request to the extent that it is background evidence for Complainant’s hostile work environment claim.”

For background evidence purposes, do untimely discrete acts need to be investigated to the same degree of thoroughness as a timely discrete acts?



*Complainant v.  
Dep’t of Veterans  
Affairs, EEOC  
Appeal No.  
0120140463  
(Mar. 7, 2014).*

# THE CONVERSATION

# Q&A

- **What are the driving problems?**
- **What has worked most effectively?**
- **Where do you see opportunity for innovation?**

**THANK YOU!**

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**Office of Federal Operations**

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