

Consolidated
Equal Employment Opportunity
and
Employment Dispute Resolution
Plan

*United States Court of Appeals
for the Third Circuit*

Effective April 11, 2013

NOTE: *This Consolidated Plan supersedes the Third Circuit Court of Appeals' Equal Employment Opportunity Plan; therefore, a claim that formerly would have been brought under the Court's EEO Plan must now be brought under this Consolidated Plan.*

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PREAMBLE

A. Purpose

This Plan shall be known as the Consolidated Equal Employment Opportunity and Employee Dispute Resolution Plan of the U.S. Court of Appeals for the Third Circuit (“Consolidated Plan”). This Consolidated Plan was approved by the Court to provide to court employees the rights and protections of the Model Equal Employment Opportunity Plan (“Model EEO Plan”) adopted by the Judicial Conference of the United States in March 1980 (and revised in September 1986) and the additional rights and procedures of the Model Employment Dispute Resolution Plan (“Judicial Conference Model EDR Plan”) adopted by the Judicial Conference of the United States in March 2010. This Consolidated Plan’s protections and procedures are comparable to those provided to legislative branch employees under the Congressional Accountability Act of 1995. This Consolidated Plan is based entirely on the Consolidated Model Equal Employment Opportunity and Employee Dispute Resolution Plan as approved by the Third Circuit Judicial Council.

This Consolidated Plan supersedes the Third Circuit Court of Appeals Equal Employment Opportunity Plan (Court of Appeals EEO Plan); therefore, a claim that rights formerly protected by the Court of Appeals EEO Plan have been violated shall be treated in accordance with the procedures set forth in this Consolidated Plan.

This Consolidated Plan is to be implemented in the same manner as the Model EEO Plan. A copy of this plan and any subsequent modifications shall be filed with the Administrative Office. The Court shall annually submit a report on the implementation of its plan to the Circuit Executive’s Office and to the Administrative Office of the U.S. Courts.

B. Coverage

This Consolidated Plan addresses the following workplace and employment issues:

- (1) equal employment opportunity and anti-discrimination rights;
- (2) personnel practices, including recruitment, hiring, promotion and advancement;
- (3) family and medical leave rights;
- (4) sexual harassment;
- (5) worker adjustment and retraining notification rights;
- (6) employment and reemployment rights of members of the uniformed services;
- (7) occupational safety and health protections;
- (8) polygraph tests; and
- (9) employee dispute resolution procedures for claims of the denial of the rights afforded under this Consolidated Plan.

Individuals covered under the scope of this Consolidated Plan may seek timely redress of discrimination complaints through these procedures. These procedures, however, are not intended to be a replacement for the working relationship which must exist between supervisors and employees, nor are they intended to interfere with the administrative processes of the courts. Employees should always bring their concerns to their direct supervisor and then through the chain of command, if necessary, to attempt informal resolution.

This Consolidated Plan is not intended to duplicate the protections provided for the resolution of complaints of judicial misconduct or disability under 28 U.S.C. §§ 351 et seq. It is intended to be the exclusive remedy of the employee relating to rights enumerated under this Consolidated Plan.

Copies of these procedures shall be given to all employees, except applicants, and upon request, to applicants and members of the public.

CHAPTER 1. PURPOSE AND SCOPE OF THE PLAN

1.1 Scope of Coverage.

1.1.1 Who is covered. This Consolidated Plan applies to:

- (a) All judges of the United States Court of Appeals for the Third Circuit;
- (b) all judges' chambers staff; and
- (c) the unit executive and staff of the following court support offices:
 - (1) Office of the Circuit Executive;
 - (2) Office of the Clerk of the Court of Appeals for the Third Circuit, including the Appellate Mediation Program Office;
 - (3) Office of the Staff Attorneys;
 - (4) Office of the Circuit Librarian, including satellite branches;
 - (5) Federal Public Defenders Offices within the Third Circuit;
 - (6) Any other court support office not named here; and
 - (7) Any additional court support offices created after adoption of this Consolidated Plan.

1.2 Definitions for purposes of this Consolidated Plan:

1.2.1 Definition of "claim." The term "claim" means the filing of a request for counseling as set forth in Chapter X, which may be further pursued by the filing of a request for mediation and a request for hearing.

1.2.2. Definition of "employee" and "staff." The term "employee" and the term "staff" include all individuals listed in Section 1.1 of this Chapter and all applicants for employment and former employees, except the following individuals, who are *specifically excluded and are not covered* under this Consolidated Plan:

- (a) externs and interns providing gratuitous service;
- (b) applicants for federal public defender positions;
- (c) criminal defense investigators not employed by federal public defenders;
- (d) volunteer counselors or mediators; and
- (e) private attorneys who apply to represent indigent defendants under the Criminal Justice Act;
- (f) other individuals who are not employees of an "employing office" as that term is defined in Section 1.2.4 below.

1.2.3 Definition of “unit executive.” The term “unit executive” includes:

- (a) the Circuit Executive;
- (b) the Clerk of the Court of Appeals;
- (c) the Director of the Staff Attorneys’ Office;
- (d) the Circuit Librarian;
- (e) the federal public defenders; and
- (f) the chief executive officer of any unit of the court that may be created in the future.

1.2.4 Definition of “employing office.” The term “employing office” includes all offices of the United States Court of Appeals for the Third Circuit, including:

- (a) Court of Appeals’ chambers;
- (b) Office of the Circuit Executive;
- (c) Offices of federal public defenders;
- (d) Office of the Clerk of Court including the Appellate Mediation Program Office;
- (e) Office of the Staff Attorneys;
- (f) Circuit Libraries; and
- (g) Any such offices that might be created in the future.

The U.S. Court of Appeals for the Third Circuit is the employing office of the judicial officer and his or her chambers staff.

1.2.5 Definition of “judicial officer” and “judge.” The terms “judicial officer” and “judge” mean a judge appointed pursuant to Article III of the United States Constitution.**1.2.6 Definition of “court.”** The term “court” refers to the U.S. Court of Appeals for the Third Circuit.**1.2.7 Definition of “disability.”** A disability is:

- (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).

1.2.8 Definition of “sexual harassment.” Sexual harassment is unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when it is unwelcome and:

- (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 or hostile working environment.

See 42 U.S.C. §2000e et seq.

1.2.9 Definition of “day.” For purposes of determining periods of time in the procedural sections of this Consolidated Plan, the word “day” pertains to a calendar day, not a business day.

1.3 Determination of Proper Forum

1.3.1 Transfer to Proper Forum. If an employee covered under the scope of this Consolidated Plan seeks redress of an employment dispute in the improper forum (either by bringing a general grievance or adverse action claim to the Employment Dispute Resolution Coordinator [EDR Coordinator] or by bringing an EDR/EEO claim as a general grievance or adverse action claim), the Chief Judge of the Court of Appeals may elect to transfer the complaint to the proper forum for resolution at any time. In the event the Chief Judge is disqualified under Section 10.7 of this Consolidated Plan, or is unavailable to serve, the provisions of Section 10.7 of this Consolidated Plan will apply.

1.3.2 Exclusivity of forum. In seeking relief, employees must select between:

- (a) this Consolidated Plan; and
- (b) the General Grievance or Adverse Action appeal procedures of the U.S. Court of Appeals for the Third Circuit.

If a complaint has already been processed under one of these procedures, it may not be the subject of a complaint under the other. A complaint will be resolved in one forum only.

CHAPTER 2.

EQUAL EMPLOYMENT OPPORTUNITY AND ANTI-DISCRIMINATION RIGHTS

2.1 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), and disability 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 Sections I through VII of the Judiciary’s Model Equal Employment Opportunity Plan shall also apply to employees.

2.2 Promotion of Equal Employment Opportunity

The Judicial Conference of the United States has 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, color, religion, sex, national origin, age (at least 40 years of age at the time of the alleged discrimination), or disability. The U.S. Court of Appeals for the Third Circuit will promote equal employment opportunity through a program encompassing all facets of personnel management including recruitment, hiring, promotion and advancement. This program, 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.

2.2.1 Unit Executives. It is incumbent upon each court unit executive to advance not only the letter of this plan but also its spirit so that a discrimination-free work place is provided to all employees and applicants.

2.2.2 Equal Employment Opportunity Reporting. The Court’s primary EDR Coordinator is responsible for collecting, analyzing, consolidating and reporting the EEO statistical data and statements prepared by each court unit, as outlined further in Chapter 12 of this Consolidated Plan.

CHAPTER 3. PERSONNEL PRACTICES

3.1 Recruitment

Each court unit executive will seek qualified applicants who reflect the make-up of all such persons in the relevant labor market. Each unit will also use reasonable available means to publicize the existence of vacancies to the relevant labor market.

3.2 Objectives

3.2.1 Law Clerks. Each judge acknowledges that a judicial clerkship is a significant educational and professional experience which should be available to qualified persons regardless of their race, sex, color, national origin, religion, age or disability, to the extent possible. Recognizing that reliance on applications received and on recommendations from faculty members as the sole means of hiring law clerks may not produce significant numbers of law clerks from groups generally recognized as minorities, efforts should be made by either the individual judge or the Circuit Executive, on behalf of all the judges, to make the availability of law clerkship positions known to qualified members of such groups so as to encourage applications from such individuals. It is the position of the Third Circuit Judicial Council that the prime criteria for law clerk selection are grades, law review experience, and other indicia of superior academic achievement and intellectual ability and that judges are under no obligation to depart from these criteria.

3.2.2 Court Unit Executives. It is the objective of court unit executives' offices that the total work force reflect the relevant qualified labor pool.

3.3 Hiring

Each court unit executive shall take steps in hiring in light of the goal that their employees will be fairly representative of the diverse groups comprising the qualified relevant labor pool. Individual hiring decisions will be made upon an evaluation of an applicant's qualifications and ability to perform the duties of the position satisfactorily.

3.4 Promotion

Each court unit will promote employees according to their experience, training, and demonstrated ability to perform duties of a higher level.

3.5 Advancement

To the extent possible, each court unit will seek to improve the skills and abilities of its employees through cross-training, job restructuring, assignments, details, and outside job-related training, when appropriate.

3.6 Temporary Appointments

In some cases, appointments of limited duration to meet critical temporary emergency needs must be made, and compliance with the recruitment requirements of this plan may not be feasible. In making temporary appointments the following guidelines should be followed:

- 3.6.1 Indefinite duration.** The March 2011 session of the Judicial Conference of the United States eliminated the temporary indefinite appointment type, resulting in the automatic conversion of all such appointments to temporary appointments not-to-exceed four years effective March 2011.
- 3.6.2 Limited duration.** Temporary appointments of limited duration, where there is a reasonable anticipation that the appointee will eventually receive a permanent appointment, should be treated as if they were permanent appointments.
- 3.6.3 Effort to comply.** Every effort should be made to anticipate the need for temporary positions to allow sufficient time for compliance with the recruitment requirements of this plan.
- 3.6.4 Emergency needs.** Full compliance with the recruitment requirements of this plan need not be followed in filling temporary positions of limited duration to meet unanticipated emergency needs.
- 3.6.5 Conversion to permanent status.** Temporary employees should not be converted to permanent status without full compliance with the recruitment procedures of this plan.

CHAPTER 4. FAMILY AND MEDICAL LEAVE RIGHTS

4.1 General

Title II of the Family and Medical Leave Act of 1993, 5 U.S.C. §§ 6381 et seq., applies to court employees in the manner prescribed in Volume 12, Chapter 9, Section 920.20.35 of the *Guide to Judiciary Policy*.

CHAPTER 5. WORKER ADJUSTMENT AND RETRAINING NOTIFICATION RIGHTS

5.1 General

No “employing office closing” or “mass layoff” (as defined in Section 5.2 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.

5.2 Definitions in Worker Adjustment and Retraining Notification Rights

5.2.1 Definition of “employing office closing.” 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.

5.2.2 Definition of “mass layoff.” The term “mass layoff” means a reduction in force which:

- (a) is not the result of an employing office closing; and
- (b) results in an employment loss at the single site of employment during any 30-day period for:
 - (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**
 - (3) at least 500 employees (excluding any part-time employees).

See 29 U.S.C. §2101.

**CHAPTER 6.
EMPLOYMENT AND REEMPLOYMENT RIGHTS
OF MEMBERS OF THE UNIFORMED SERVICES**

6.1 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 7.
OCCUPATIONAL SAFETY AND HEALTH PROTECTIONS**

7.1 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. Complaints which 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 Consolidated Plan. Such requests should be filed directly with GSA or the USPS as appropriate.

7.2 Court program requirements

The Court of Appeals will implement a program to achieve the protections set forth in Section 7.1 of this Consolidated Plan and will select a court unit executive to be formally charged with the responsibility of implementing a safety program. The safety program shall be guided by materials furnished by the Administrative Office of the United States Courts as revised from time to time.

**CHAPTER 8.
POLYGRAPH TESTS**

8.1 General

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

CHAPTER 9. WHISTLEBLOWER PROTECTION

9.1. General - Any employee who has authority to take, direct others to take, recommend, or approve any personnel action shall not, with respect to such authority, take or threaten to take an adverse employment action with respect to an employee (excluding applicants for employment) because of any disclosure of information to –

- a. the appropriate federal law enforcement authority, or
- b. a supervisor or managerial official of the employing office, a judicial officer of the court, or the Administrative Office of the United States Courts,

by the latter employee, which that employee reasonably and in good faith believes evidences a violation of any law, rule, or regulation, or other conduct that constitutes gross mismanagement, a gross waste of funds, or a substantial and specific danger to public health or safety, provided that such disclosure of information –

- a. is not specifically prohibited by law,
- b. does not reveal case-sensitive information, sealed material, or the deliberative processes of the federal judiciary (as outlined in the *Guide to Judiciary Policy*, Vol. 20, Ch. 8), and
- c. does not reveal information that would endanger the security of any federal judicial officer.

9.2. Definition - For purposes of this Chapter, an “adverse employment action” means a termination, demotion, transfer, or reassignment; loss of pay, benefits, or awards; or any other employment action that is materially adverse to the employee’s job status, compensation, terms, or responsibilities, or the employee’s working conditions.

CHAPTER 10. REPORTS OF WRONGFUL CONDUCT

A report of wrongful conduct is not the same as initiating or filing a claim under this Consolidated Plan; thus, employees who wish to file an EDR claim relating to any alleged wrongful conduct as defined in Chapter 2, Section 2.1 must follow the procedures set forth in Chapter 10 of this Consolidated Plan.

Judges and employees are encouraged to report wrongful conduct to the court's EDR Coordinator, the chief judge, unit executive, human resources representative, 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 judge and unit executive of any report. The chief judge and/or unit executive shall ensure that the allegations in the report are appropriately investigated, either by the human resources representative 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 judge and/or unit executive to have engaged in wrongful conduct, as defined in this Consolidated Plan, may be subject to disciplinary action.

CHAPTER 11. DISPUTE RESOLUTION PROCEDURES

11.1 General procedure for consideration of alleged violations

An employee covered under this Consolidated Plan who claims a denial of the rights granted hereunder 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 U.S. Court of Appeals for the Third Circuit (or his or her designee); and
- (c) review of the hearing decision under procedures established by the judicial council of the circuit, as outlined in Section 11.11 of this Consolidated Plan.

11.2 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 this Consolidated Plan have been violated, and who seeks relief under this Consolidated Plan, must file a request for counseling with the Court's EDR Coordinator in accordance with Section 11.8.2 of this Chapter.

11.3 Alleged Violation by Judge

Any employee alleging that a judge violated any rights granted under this Consolidated Plan may file an EDR claim in accordance with this Consolidated Plan. In such an instance, however, all the claims procedures of this Chapter shall be performed by the circuit council, either by member 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, the Consolidated 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.

11.4 Confidentiality

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

11.5 General provisions and protections

11.5.1 Prohibition against retaliation. Claimants under this Consolidated 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 EDR coordinator, mediator, witness, representative, or co-worker, is also entitled to freedom from retaliation.

11.5.2 Prohibition against naming individual respondents. No individual shall be named as a respondent in the complaint. Instead, the respondent shall be the employing office which would be responsible for redressing, correcting or abating the violation(s) alleged in the complaint.

11.5.3 Right to representation. The right to be represented by a person of his or her choice, if such person is available and consents to be a representative, is available to an individual who:

- (a) invokes the dispute resolution procedures of this Consolidated Plan;
- (b) is alleged to have violated rights which are protected under this Consolidated Plan; or
- (c) is the unit executive in charge of the employing office which would be responsible for redressing, correcting or abating the violation(s) alleged in the complaint.

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 court employee-representative's appointing officer. If the appointing officer is involved in the dispute, then the determination shall be made by the Chief Judge of the Court of Appeals.

11.5.4 Case preparation. To the extent feasible, an individual who is involved in the dispute resolution procedures of this Consolidated 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, as determined by the court employee's appointing officer.

11.5.5 Notice. Although only the employing office is named as a respondent pursuant to the procedures under this Consolidated Plan, every individual alleged to be involved in a violation of the provisions of this Consolidated Plan has the right to have reasonable notice of the charges and an opportunity to respond to the allegations, except as otherwise provided for in the confidentiality provisions of the counseling stage as outlined in Section 11.8.3(c).

11.5.6 Extensions of time. The Chief Judge of the Court of Appeals, or other presiding judicial officer, may extend any of the deadlines set forth in this Consolidated Plan for good cause.

11.5.7 Dismissal of Claim. On his or her own initiative or at the request of any party, the chief 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 Consolidated 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.

11.5.8 Records. At the conclusion of any formal or informal dispute resolution proceedings under this Consolidated Plan, all papers, files, and reports will be filed with the Court's primary EDR Coordinator. No papers, files or reports relating to a dispute or complaint will be filed in any employee's personnel folder, except as necessary to implement a personnel action.

11.6 Designation and Duties of the Employment Dispute Resolution (EDR) Coordinators

The Chief Judge of the U.S. Court of Appeals for the Third Circuit shall designate two EDR Coordinators for purposes of counseling, each from a different unit of the Court, under this Consolidated Plan. For purposes of counseling only (see 11.6.3 below), the duties of the primary EDR Coordinator will be performed by the secondary EDR Coordinator if the primary EDR Coordinator is disqualified from performing duties under Section 11.7, or is otherwise unavailable.

The duties of the Court's EDR Coordinators will include the following:

11.6.1 Information. The primary EDR Coordinator will provide information to the Court and to court employees regarding the rights and protections afforded under this Consolidated Plan.

11.6.2 Administration. The primary 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 Consolidated Plan.

11.6.3 Counseling. One of the Court's two EDR Coordinators will coordinate the counseling of individuals in the initial stages of the complaint process, in accordance with this section generally and specifically with Section 10.8 of this Consolidated Plan.

11.6.4 Statistics. As outlined in Chapter 13, the primary EDR Coordinator will collect, analyze and consolidate statistical data and other information pertaining to the

implementation, under this Consolidated Plan, of the Court's employment dispute resolution process and the Court's equal employment opportunity objectives.

11.7 General disqualification provision

A party may seek the disqualification of a judicial officer, employee or other individual who has had prior involvement in a dispute, to the extent that the person could not be unbiased about the complaint, by making a written request to the Chief Judge of the Court of Appeals. Such written request shall contain facts regarding why the individual should be disqualified. If the Chief Judge determines that the individual should be disqualified, then the Chief Judge will designate another individual to handle the matter. If the Chief Judge is named as being involved in a dispute, the active court of appeals judge next in precedence, who is not unavailable or disqualified to serve, will decide the disqualification request.

11.8 Counseling

11.8.1 Initiating a proceeding with a formal request for counseling. An employee who believes that his or her rights under this Consolidated Plan have been violated must first request counseling.

11.8.2 Form and manner of requests. Requests for counseling:

- (a) are to be submitted to one of the Court's EDR Coordinators;
- (b) must be made in writing and contain all the violations asserted by the claimant;
- (c) must be made within 30 days of the alleged violation or within 30 days of the time the employee becomes aware of the alleged violation; and
- (d) must be signed.

11.8.3 Procedures

- (a) **Who may serve as counselor.** The counseling shall be conducted by the Court's primary EDR Coordinator unless the primary EDR Coordinator is disqualified from serving as counselor under Section 11.7, or is otherwise unavailable. If the primary EDR Coordinator is unavailable, the Court's secondary EDR Coordinator will perform the counseling function. However, if the complaining employee is employed by the same court unit as the primary EDR Coordinator, the complaining employee may request that counseling be conducted by the secondary EDR Coordinator, if the secondary EDR Coordinator is not disqualified from serving under Section

11.7 and is not otherwise unavailable. If the dispute involves an alleged violation of this Consolidated Plan by a judicial officer, the person who conducts the counseling shall be a judicial officer designated by the Chief Judge.

- (b) **Purposes of counseling.** The purposes of counseling shall be:
- (1) to discuss the employee's concerns and elicit information regarding the matter which the employee believes constitutes a violation;
 - (2) to advise the employee of his or her rights and responsibilities and the procedures of the Court applicable to the employment dispute resolution process;
 - (3) to evaluate the matter; and
 - (4) to assist the employee in achieving an early resolution of the matter, if possible.
- (c) **Confidentiality.** Unless waived by the employee, the court or employing officer shall protect the confidentiality of allegations filed under this Consolidated Plan to the extent possible. However, information about allegations filed under this Consolidated Plan shall be shared on a need-to-know basis. Records relating to violations under this Consolidated Plan shall be kept confidential on the same basis.
- (d) **Form of settlement.** The counseling EDR Coordinator shall reduce to writing any settlement achieved during the counseling process and secure the signatures of the employee, and the member of the employing office who is authorized to enter into settlement on the employing office's behalf.

11.8.4 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.

11.8.5 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 a request for mediation with the primary EDR Coordinator, in accordance with Section 11.9 of this Consolidated Plan.

11.9 Mediation

11.9.1 Request for mediation. Within 15 days after receipt by the employee of the notice of the conclusion of the counseling period, the employee may file with the primary EDR Coordinator a request for mediation. The request must be made in writing and must make a short and plain statement of the claim(s) presented, the underlying facts and the relief or remedy sought. The request must be signed. Only claims raised in mediation may be raised in a subsequent complaint filed under Section 11.10. Failure to pursue mediation will preclude further processing of the employee's claim under any other provisions of this Consolidated Plan.

11.9.2 Procedures.

- (a) **Designation of a mediator.** As soon as possible after receiving the request for mediation, the primary EDR Coordinator shall designate a mediator and provide written notice of such designation.
- (b) **Who may serve as mediator.** Any person with the skills to assist in resolving disputes, except a person who is one of the Court's EDR Coordinators, may serve as a mediator under this Consolidated Plan. If the complaint alleges that a judicial officer has violated the rights protected by this Consolidated Plan, the mediator shall be a judicial officer designated by the Chief Judge of the Court of Appeals.
- (c) **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.
- (d) **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 prepare for the proceeding or 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. In addition, in the event the employee files a complaint pursuant to Section 11.10, the hearing officer shall have access to the request for mediation as set forth in Section 11.9.1.

11.9.2 Procedures. *(continued)*

- (e) **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, and the member of the employing office who is authorized to enter into settlement on the employing office's behalf.

11.9.3 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 by the primary EDR Coordinator. The employee is required to attend at least one mediation session before he or she may proceed to file a request for hearing.

11.9.4 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 primary 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 11.10.

11.10 Complaint, response, review and hearing

11.10.1 Complaint. Not later than 15 days after receiving notice of the end of the mediation period, an employee may file a complaint with the primary EDR Coordinator, who will transmit the original to the Chief Judge of the Court of Appeals. The complaint shall be in writing, shall identify the complainant and all involved parties and individuals, and shall set forth a short and plain statement of the complainant's claim and the relief or remedy being sought. Claims not previously raised in mediation cannot be raised in the complaint. The complaint must be signed.

11.10.2 Response. Upon receipt of a copy of the complaint, both the respondent, as defined in 11.5.2, and the individual alleged to have violated rights protected under this Consolidated Plan shall have 15 days to respond to the allegations contained therein, in writing, to the Chief Judge. No individual shall be named as a respondent in the complaint.

11.10.3 Review of pleadings.

- (a) **Reviewing official.** The complaint and any other documents shall be reviewed by the Chief Judge of the Court of Appeals. In the event the Chief Judge is disqualified under Section 11.7, the reviewing official shall

be the active Court of Appeals judge next in precedence who is not disqualified to serve. If the Chief Judge is unavailable, the reviewing official shall be a judicial officer designated by the Chief Judge (or by the appropriate reviewing official if the Chief Judge is disqualified). In the case of a complaint alleging that an Article III judge has violated rights protected by this Consolidated Plan, the judge may elect to have a hearing conducted by a judge of another court, as designated by the Third Circuit Judicial Council EDR/EEO Appeal Committee.

- (b) **Review procedures.** After notice to the complainant and an opportunity to respond, the reviewing official may dismiss in writing any complaint that is found:
- (1) to be frivolous;
 - (2) to be unduly repetitive of a previous complaint;
 - (3) to fail to state a claim upon which relief may be granted; or
 - (4) to make a claim or claims that were not advanced in mediation.

11.10.4 **Hearing procedures.**

- (a) **Hearing officer.** If the reviewing official does not dismiss the complaint under the preceding subsection, the reviewing official, 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.
- (b) **Specific provisions.** The hearing officer may provide for such discovery and investigation as necessary. In general, the hearing 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:
- (1) **Timing for Hearing.** The hearing shall be commenced no later than 60 days after the filing of the complaint.
 - (2) **Notice Requirements.** All parties, including but not limited to the complainant, the unit executive of the office against which the complaint has been filed and any individual alleged to have violated rights protected by this Consolidated Plan must receive reasonable written notice of the hearing. Where the complaint is filed against a judge or other judicial officer, the Chief Judge of the Court of Appeals will receive notice.

- (3) **Proceedings.** At the hearing, the complainant, the unit executive of the office against which the complaint has been filed and the individual alleged to have violated rights protected by this Consolidated Plan will have the rights to representation, to present evidence on his or her behalf, and to cross-examine adverse witnesses.
- (4) **Record.** A verbatim record of the hearing must be kept and shall be the sole official record of the proceeding.
- (5) **Basis for Decision.** In reaching his or her decision, the hearing officer shall be guided by judicial and administrative decisions under the laws related to Chapters 2 through 7 of this Consolidated Plan and by decisions of the Third Circuit Judicial Council under Section 11.11.
- (6) **Remedies.** Remedies may be provided in accordance with Section 11.12 where the hearing officer finds that the complainant has established by a preponderance of the evidence that a substantive right protected by this Consolidated Plan has been violated.
- (7) **Timing & Distribution of Decision.** The final decision of the hearing officer must be issued in writing not later than 30 days after the conclusion of the hearing.
- (8) **Notice of Action.** All parties or any aggrieved individual shall have the right to written notice of any action taken as a result of a hearing. The hearing officer will provide a list of the parties who should receive such notice and a written notice of any action taken to the primary EDR Coordinator for distribution.
- (9) **Malicious Filing.** A finding by the hearing officer that a complaint has been filed maliciously will constitute grounds for adverse action.

11.11 Review of decision

A party or individual aggrieved by a final decision of the chief judge or presiding judicial officer, or by a summary dismissal of the complaint, may petition for review of that decision under procedures established by the Third Circuit Judicial Council. Any review will be conducted by a judicial officer(s), based on the record created by the hearing officer and shall be affirmed if supported by substantial evidence.

11.11.1 Judicial Council Review Procedures.

- (a) **Timing for petition to review.** A petition for review must be received by the hearing officer who issued the decision within 30 days of the date of the letter from the primary EDR Coordinator to the complainant transmitting the decision as issued under Section 11.10.4(b)(7).
- (b) **Form and content of petition to review.** The petition should be addressed to the hearing officer with a copy to the primary EDR Coordinator, beginning "I hereby petition the Judicial Council for review of the hearing officer's decision on my complaint filed under the U.S. Court of Appeals for the Third Circuit Consolidated Equal Employment Opportunity and Employee Dispute Resolution Plan." The petition should set forth a brief statement of the reasons why the petitioner believes that the hearing officer should not have dismissed the complaint or concluded the proceeding. It should not repeat the complaint; the complaint will be available to members of the Third Circuit Judicial Council EDR/EEO Appeal Committee considering the petition. The petition must be signed.
- (c) **EDR/EEO Appeal Committee.** The Third Circuit Judicial Council EDR/EEO Appeal Committee, on behalf of the Third Circuit Judicial Council, will review decisions of the hearing officer, when properly petitioned, pursuant to the provisions of Section 11.11.1, by a party or individual aggrieved by a final decision of the hearing officer or by a summary dismissal of the complaint. Any member of this Committee may be disqualified pursuant to Section 11.7, in which case the Chief Judge of the Court of Appeals will designate a replacement.
- (d) **Distribution of material for review.** The hearing officer will promptly send to each member of the EDR/EEO Appeal Committee of the Judicial Council, except for any member disqualified under Section 11.7, copies of:
 - (1) the complaint and any statement of facts;
 - (2) any response filed;

- (3) any record of information received by the hearing officer in connection with the hearing officer's consideration of the complaint;
 - (4) the hearing officer's order disposing of the complaint;
 - (5) any memorandum in support of the hearing officer's decision;
 - (6) the petition for review;
 - (7) the record of the proceeding made pursuant to Section 11.10.4(b)(4); and
 - (8) any other documents that appear to be relevant and material to the petition.
- (e) **Timing for decisions.** Within 60 days of receipt by the hearing officer of a proper petition for review of a decision or review of a summary dismissal of a complaint, the EEO/EDR Appeal Committee will review the decision or the basis for the summary dismissal and issue a written decision. The Chair of the EDR/EEO Appeals Committee may extend the period of review for an additional 30 days for cause.
- (f) **Finality.** Decisions of the EDR/EEO Appeal Committee on behalf of the Third Circuit Judicial Council are final and conclusive and shall not be judicially reviewable on appeal or otherwise.
- (g) **Procedures when petition for review is in improper form.** Upon receipt of a petition filed within the time allowed but not in proper form under these rules (including a document that is ambiguous about whether a petition for review is intended), the Chief Judge of the Court of Appeals will acknowledge receipt of the petition, call the petitioner's attention to the deficiencies, and give the petitioner the opportunity to correct the deficiencies within ten days. If the deficiencies are not corrected within the time allowed, the petition will be returned unfiled and the proceedings will be deemed to be concluded.

11.12 Remedies

11.12.1 Order for remedy. When judicial officers, acting pursuant to Section 11.10 or 10.11 of this Consolidated Plan, find that a substantive right protected by this Consolidated Plan has been violated, they may order a necessary and appropriate remedy. A remedy may be directed at correcting a past violation, prospectively ensuring compliance with the rights protected by this Consolidated Plan, or both. A remedy shall be tailored as closely as possible to the specific violation involved.

11.12.2 Available remedies. Remedies which may be provided to successful complainants under this Consolidated Plan include, but are not limited to:

- (a) placement of an employee in a position previously denied;
- (b) placement in a comparable alternative position;
- (c) reinstatement to a position from which previously removed;
- (d) prospective promotion to a position, consistent with Section 3.4;
- (e) priority consideration for a future promotion or position;
- (f) back pay and associated benefits, including attorneys' fees, where the statutory criteria of the Back Pay Act, 5 U.S.C. § 5596, are satisfied;
- (g) records modification and/or expungement;
- (h) "equitable" relief, such as temporary stays of adverse actions;
- (i) granting of family and medical leave;
- (j) accommodation of disabilities through the purchase of specialized equipment or the restructuring of duties and work hours or other appropriate means; and
- (k) appropriate action against a judicial officer or other individual found to have violated rights protected under this Consolidated Plan.

11.12.3 Unavailable remedies. Remedies which are not legally available include:

- (a) payment of attorneys' fees (except as authorized under the Back Pay Act);
- (b) compensatory damages; and
- (c) punitive damages.

11.12.4 Enforceability of Remedies.

- (a) Pursuant to 28 U.S.C. § 332(d)(1), decisions reached and remedies ordered by the Third Circuit Judicial Council through its EEO/EDR Appeal Committee will be binding on all judicial officers and employees within the Third Circuit.
- (b) A remedy ordered by a hearing officer under Section 11.10 or by the EDR/EEO Appeal Committee under Section 11.11 cannot be appealed through a court's adverse action appeal procedures.

**CHAPTER 12.
RECORD OF FINAL DECISIONS**

12.1 Written Decisions

Final written decisions under this Consolidated Plan shall be captioned as follows:

In the Matter of a Complaint Arising Under
The Consolidated Equal Employment Opportunity and
Employee Dispute Resolution Plan
of the U.S. Court of Appeals for the Third Circuit

v.

Case No. (Year-Number)

Name of Employing Office

Final decisions made under this Consolidated Plan will be available to the public free of charge upon written request addressed to the Court's primary EDR Coordinator. The primary EDR Coordinator will remove the individual names that appeared in such a decision before the decision is released to the public.

CHAPTER 13. REPORTS

13.1 EEO Evaluations

Each court unit will prepare a brief report for the primary EDR Coordinator describing its efforts to provide equal employment opportunities in the areas of recruitment, hiring, promotions and advancement.

13.1.1 Miscellaneous. This evaluation should include information on factors inhibiting achievement of EEO objectives such as no vacancies, minimal numbers of qualified applicants in the relevant labor market, and on all persons in the unit having received all relevant training. This report will also include a breakdown according to the race, sex, national origin, and disability of the court's personnel involved, on forms to be provided by the Administrative Office of the United States Courts. In compiling data for this report, each court unit shall recognize that all employees are privileged to decline disclosing the information required for its preparation. Under such circumstances, the response shall, if not otherwise known, be recorded as "unknown." The report will cover personnel actions occurring in the year ending September 30 and will be submitted to the primary EDR Coordinator by October 31 of each year.

13.2 EEO Statistics

The primary EDR Coordinator is responsible for collecting, analyzing and consolidating the statistical data and statements prepared by each court unit pursuant to the provisions of Section 13.1. The primary EDR Coordinator will then prepare an annual report for each fiscal year ending September 30 based on the statistical data and statements received from each court unit. The report will include completed tables, consolidating the information provided by each court unit. It will also 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, where indicated. Based upon this evaluation and report, the coordinator shall recommend any changes required to fully implement the goals of the Consolidated Plan.

This report will be submitted by the circuit to the Administrative Office of the United States Courts by February of each year.

13.3 EDR Evaluations

The primary EDR Coordinator will collect information on the Court's EDR process pursuant to Section 11.6.4 and report that information to the Third Circuit Judicial Council and the Administrative Office annually. Where indicated, the primary EDR Coordinator shall recommend appropriate changes in management practices and/or in the procedures of this plan to fully implement the goals of this plan.