



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington Field Office**

1400 L Street, N.W., Suite 200  
Washington, D.C. 20005  
(202) 275-7377  
TTY (202) 275-7518  
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**M E M O R A N D U M**

**TO:** Dana Hutter, Acting Director, Washington Field Office (WFO)

**FROM:** Silvio G. Fernandez, Deputy Director, WFO  
Steve Shih, Supervisory Administrative Judge, WFO  
A. Tonya Odom, Supervisory Administrative Judge, WFO  
David Gonzalez, State and Local Coordinator, WFO

**RE:** Assessment Program for Hearings Units

**DATE:** March 25, 2004

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The attached documents detail the procedures we will follow in implementing the Assessment Program you have envisioned for WFO. This Program will enable an Assessment Team (i.e., Silvio and David) to assess cases early on for quick processing. We are prepared to commence this project immediately in order to work towards the goals of the office.

Specifically, cases will be assessed as falling into three categories: Green (traditional processing); Yellow (summary judgment); and Red (dismissal).

For Red cases, notices of proposed dismissal will be issued, and the cases will be assigned to an AJ. The parties will not be granted discovery in these cases.

For Yellow cases, Notices of Proposed Summary Judgment will be issued – requiring consecutive responses from the parties (Agency motion followed by Complainant’s response to the Agency’s motion), not concurrent responses – and the cases will be assigned to an AJ for adoption of the agency response if appropriate. In accordance with your instruction, the parties will not be granted discovery in these cases.

Green cases will be assigned to an AJ and referred to a clerk for the issuance of an acknowledgment order.

We will distribute this memo to the Administrative Judges in the Hearings Units so they are fully informed. Administrative Judges will be asked to process Red and Yellow cases within 15 days of the expiration of the deadline for the parties to respond to issued Notices. Per your instruction, AJs may deny parties’ objections or requests concerning the lack of discovery in Yellow cases. (See Sample Order, Attachment 6). No discovery is required, of course, where a complaint is assessed as Red since such claims do not meet the minimum threshold procedural requirements for litigation.

## HEARINGS UNITS ASSESSMENT PROCEDURES

### **Initial Assessment**

The Assessment Team will review newly-docketed and unassigned cases, and will divide them into three categories:

“Red” cases: claims are appropriate for procedural dismissal under 29 C.F.R. § 1614.107 because they fail to satisfy threshold procedural requirements.

“Yellow” cases: claims appear appropriate for resolution through a summary judgment decision because there are no genuine issues of material fact.

“Green” cases: all cases that do not fall under categories B or C.

**Procedure for Red Cases** – standards are set forth in the Procedural Dismissal Checklist (*see* Attachment 3)

1. In a Red case, the Assessment Team will:
  - (a) prepare a *Notice of Proposed Dismissal* (*see* Attachment 1) for the signature of a Supervisory Administrative Judge (SAJ);
  - (b) save a copy of the file to a central directory on the shared drive at S:/Hearings/Assessment Program/;
  - (c) enter an Assessment Form (Attachment 5) into the work file

No discovery will be authorized.

2. An SAJ will assign the case to an Administrative Judge (“AJ”) and enter the assignment code for the AJ and the “Unit 4” code into IMS.
3. The SAJ will sign the Notice.
4. A Clerk will sign the certificate of service on the Notice, issue the Notice (by fax or e-mail as much as possible and alternatively by mail), and place a copy in the file.
5. The Clerk will then deliver the case to the assigned AJ.
6. After the deadline expires for the parties to respond to the Notice, the AJ will issue a dismissal order with a notice of appeal rights (Attachment 7), if appropriate, within 15 days. Alternatively, the AJ will inform their SAJ whether a different course of action should be considered.

## Procedure for Yellow Cases

### Standard for Summary Judgment

The EEOC's regulations on summary judgment are patterned after Rule 56 of the Federal Rules of Civil Procedure, which provides that a moving party is entitled to summary judgment if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. There is no genuine issue of material fact where the relevant evidence in the record, taken as a whole, indicates that a reasonable factfinder could not return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

In order to withstand summary judgment, the non-moving party may not rest upon mere allegations or denials. *Anderson*, 477 U.S. at 248. The non-moving party must show that there is sufficient material evidence supporting the claimed factual dispute to require a factfinder to resolve the parties' differing versions of the truth at trial. *Id.* at 248-49. Where the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Id.* at 249-50. Where the factual context renders the non-moving party's position implausible, that party must come forward with strong persuasive evidence to defeat summary judgment. *Matsushita*, 475 U.S. at 587.

In determining whether summary judgment is appropriate, the judge must be guided by the substantive evidentiary standards governing the elements and burdens of proof. *Anderson*, 477 U.S. at 252. A moving party can show that it is entitled to judgment as a matter of law where the non-moving party fails to establish a genuine issue of fact on an element essential to that party's case, and on which that party bears the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). For example, a claim would be summary judgeable where a complainant fails to produce any evidence creating even a genuine issue of material fact with regard to a *prima facie* case or on pretext.

1. In a Yellow case, the Assessment Team will:
  - (a) prepare a Notice of Intent to Issue Decision without Hearing (Attachment 2) for the signature of a Supervisory Administrative Judge (SAJ);
  - (b) save a copy of the file to a central directory on the S:/ drive; and
  - (c) enter an Assessment Form into the work file.

No discovery will be authorized.

2. An SAJ will assign the case to an Administrative Judge ("AJ") and enter the assignment code for the AJ and the "Unit 5" designation into IMS.
3. The SAJ will sign the Notice.
4. A Clerk will sign the certificate of service on the Notice and issue the Notice (by fax or e-mail as much as possible and alternatively by mail).
5. The Clerk will then deliver the case to the assigned AJ.
6. After the deadline expires for the parties to respond to the Notice, the AJ will issue an order (Attachment 8) – adopting the agency's motion if appropriate – within 15 days or inform their SAJ whether a different course of action should be considered.

### **Procedure for Green Cases**

1. The Assessment Team will designate as Green all cases that are not appropriately designated Red or Yellow.
2. For Green cases, the Assessment Team enter into the work file an assessment form with a brief explanation as to why the case may not be appropriate for summary judgment (e.g., credibility assessment required to resolve dispute between selecting official and Complainant as to whether selecting official made discriminatory comments during the interview).
3. An SAJ will assign the Green cases to an AJ in IMS along with the "Unit 6" code and refer the cases to a Clerk for the issuance of ack orders.

**ATTACHMENT 1**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
WASHINGTON FIELD OFFICE  
1400 L Street, N.W., Suite 200  
Washington, D.C. 20005

_____	)	
_____	)	
Complainant,	)	EEOC No. 100-2004-_____X
	)	
v.	)	
	)	
_____	)	Agency No. _____
Agency.	)	
_____	)	

**NOTICE OF PROPOSED DISMISSAL**

Upon consideration of the claims accepted by the Agency in the above-captioned complaint<sup>1</sup>, it is hereby

**ORDERED**, that the complaint is ASSIGNED to Administrative Judge \_\_\_\_\_; and it is further

**ORDERED**, that the parties are hereby notified that the complaint may be DISMISSED, [Choose one of the following:]

pursuant to 29 C.F.R. § 107(a)(1) (2003) because the complaint fails to state an actionable claim (Complainant does not appear to have suffered a harm with regard to a term, condition, or benefit protected under EEO statutes); and it is further

pursuant to 29 C.F.R. § 107(a)(1) (2003) because the complaint states the same claim that is pending before or has been decided by the Agency or EEOC; and it is further

pursuant to 29 C.F.R. § 107(a)(2) (2003) because the complaint is untimely (Complainant failed to contact an EEO counselor within 45 days of the alleged discriminatory action); and it is further

pursuant to 29 C.F.R. § 107(a)(2) (2003) because the complaint is untimely (Complainant failed to file the complaint within 15 days of the notice of right to file a complaint); and it is further

pursuant to 29 C.F.R. § 107(a)(3) (2003) because a civil action is pending before a United States District Court on the same claims involved; and it is further

\_\_\_\_\_

<sup>1</sup>See Agency Letter of Acceptance in the Report of Investigation.

pursuant to 29 C.F.R. § 107(a)(3) (2003) because the claims have been decided already by a U.S. District Court in which complainant was a party; and it is further

pursuant to 29 C.F.R. § 107(a)(4) (2003) because complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination; and it is further

pursuant to 29 C.F.R. § 107(a)(4) (2003) because complainant has raised the matter in an appeal to the Merit Systems Protection Board with an election to pursue the non-EEO process; and it is further

pursuant to 29 C.F.R. § 107(a)(4) (2003) because complainant has elected to raise a matter which is appealable to the Merit Systems Protection Board with an election to pursue the EEO process, which requires the Agency to issue a Final Agency Decision; and it is further

pursuant to 29 C.F.R. § 107(a)(5) (2003) because the claims are moot; and it is further

pursuant to 29 C.F.R. § 107(a)(5) (2003) because the claims allege a proposal to take a personnel action; and it is further

pursuant to 29 C.F.R. § 107(a)(8) (2003) because the complaint alleges dissatisfaction with the processing of a previously filed complaint; and it is further

**ORDERED**, that the parties respond to this Notice stating their positions on the appropriateness of dismissal. The parties' submissions shall be typed, double-spaced, using font size of at least 12, and shall not exceed 10 pages. **The parties' responses must be addressed to the Administrative Judge assigned to this complaint and received by this office by 5 p.m. no later than 10 days upon receipt of the Notice.** The parties are not authorized to file additional submissions (e.g., reply to opposing party's submission). Requests for extensions will not be granted absent extraordinary circumstances, and must be requested of the Administrative Judge in writing after the requesting party has determined whether the opposing party has an objection. Requests shall also include a draft order for the signature of the administrative judge, granting the extension requested, with the address of the opposing party listed.

Date: March \_\_\_\_, 2004

\_\_\_\_\_  
STEPHEN T. SHIH/A. TONYA ODOM  
Supervisory Administrative Judge

**CERTIFICATE OF SERVICE**

For timeliness purposes, it shall be presumed that the parties received the foregoing Notice within five (5) calendar days after the date it was sent *via* first class mail or immediately upon e-mail delivery or confirmation of receipt by facsimile. I certify that, on the date of this Notice, the Notice was sent to the following:

By facsimile to:

By first class mail, postage pre-paid to:

By e-mail to:

---

KIMBERLY BYRD  
Legal Clerk

**ATTACHMENT 2**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
WASHINGTON FIELD OFFICE  
1400 L Street, N.W., Suite 200  
Washington, D.C. 20005

_____	)	
_____	)	
Complainant,	)	EEOC No. 100-2004-_____X
	)	
v.	)	
	)	
_____	)	Agency No. _____
Agency.	)	
_____	)	

**NOTICE OF INTENT TO ISSUE DECISION WITHOUT A HEARING**

The parties are notified that the above-captioned complaint has been assigned to Administrative Judge \_\_\_\_\_. The claim(s) raised in the complaint(s) at issue are set forth in the Agency's Letter of Acceptance, contained in the Report of Investigation (ROI). After a review of the record, it has been determined that there may be no material facts in dispute, and that it may therefore be appropriate, pursuant to 29 C.F.R. § 1614.109(g)(3), to issue a decision in favor of the Agency without holding a hearing because **[Choose one of the following:]**

Complainant has not produced evidence showing the existence of a genuine issue of material fact in support of a *prima facie* case (e.g., either showing that similarly situated employees outside of the protected class were treated more favorably or otherwise creating an inference of discrimination).

the Agency has articulated a legitimate, non-discriminatory reason for its action(s), and Complainant has produced no evidence showing the existence of a genuine issue of material fact as to whether the Agency's reason was pretextual.

Based on a review of the record, including Complainant's affidavit addressing the claim(s) at issue, it appears that the ROI correctly sets forth the material facts and that the material facts are not in dispute.

Applicable Law

1. Legal Standards for Granting A Decision Without A Hearing

A decision without a hearing, also known as summary judgment, is appropriate if the record shows that there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. There is no genuine issue of material fact if, based on the relevant evidence in the record, taken as a whole, a reasonable fact finder could not find in favor of the opposing party. *Matsushita Elec. Indus. Co. v.*



*Zenith Radio*, 475 U.S. 574, 587 (1986). Material factual disputes include credibility disputes where two or more people have different versions of the relevant event, and the determination of that credibility dispute will affect the outcome of the case. In determining whether there are no disputed material facts, the Administrative Judge must draw all inferences from the record in the light most favorable to the party opposing summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Only disputes over facts that might affect the outcome of the case under the applicable substantive law, and not irrelevant and unnecessary factual disputes, will preclude summary judgment. *Id.*]

## 2. Opportunity for the Parties to Respond

The parties are hereby ORDERED to respond to this Notice as follows:

a. The Agency shall file a response (e.g., a motion for summary judgment) to this Notice, which shall be received by the Administrative Judge and by Complainant no later than 5:00 p.m., 15 days upon receipt of this Notice. In its response, the Agency shall set forth the claim(s) accepted by the Agency, a statement of the undisputed facts, the relevant regulations and case law, legal arguments, and any supporting evidence;

b. Complainant shall file a reply to the Agency's response, which shall be received by the Administrative Judge and by the Agency no later than 5:00 p.m., 15 days upon receipt of the Agency's response. In his/her response, Complainant shall set forth Complainant's position on summary judgment and provide any supporting evidence; and

c. The parties' submissions shall be typed, double-spaced with font size no smaller than 12, and shall not exceed 15 pages (not including attachments which shall be reasonable in length). The parties are not authorized to file additional submissions (e.g., reply to opposing party's submission). Requests for extensions will not be granted absent extraordinary circumstances, and must be requested of the Administrative Judge in writing after the requesting party has determined whether the opposing party has an objection. Requests shall also include a draft order for the signature of the administrative judge, granting the extension requested, with the address of the opposing party listed.

## 3. Content of the Parties' Responses

When opposing summary judgment, a party must respond with specific facts showing that there is a genuine dispute as to a material fact and that the other party is not entitled to judgment as a matter of law. *Anderson*, 477 U.S. at 250.

If a party opposes summary judgment, he/she may not rely on mere allegations, speculation, conclusory statements, or denials. The party should cite to specific evidence contained in the report of investigation which creates a factual dispute regarding a material issue in the case. If not already contained in the report of investigation, the party should also include any relevant documentary evidence or signed witness statements/affidavits or other supporting materials and provide a clear and specific statement of their relevance. Where information is compiled from agency records, provide a declaration from the person preparing the evidence as to the method used to prepare it.

**UNLESS A PARTY DEMONSTRATES THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT IN DISPUTE, NO HEARING WILL BE HELD IN THIS MATTER. THEREFORE, IF THE PARTY PLANS TO CALL WITNESSES TO TESTIFY IN SUPPORT OF CLAIMS OR DEFENSES, THE PARTY SHOULD OBTAIN WRITTEN STATEMENTS FROM THEM, AND SUBMIT THESE SIGNED STATEMENTS IN SUPPORT OF THE ARGUMENT AGAINST SUMMARY JUDGMENT.**

It is so ORDERED.

Date: March \_\_\_\_, 2004

\_\_\_\_\_  
STEPHEN T. SHIH/A. TONYA ODOM  
Supervisory Administrative Judge

**CERTIFICATE OF SERVICE**

For timeliness purposes, it shall be presumed that the parties received the foregoing Notice within five (5) calendar days after the date it was sent *via* first class mail or immediately upon e-mail delivery or confirmation of receipt by facsimile. I certify that, on the date of this Notice, the Notice was sent to the following:

By facsimile to:

By first class mail, postage pre-paid to:

By e-mail to:

\_\_\_\_\_  
KIMBERLY BYRD  
Legal Clerk

## ***ATTACHMENT 3***

### **PROCEDURAL DISMISSAL CHECKLIST**

**A claim may be procedurally dismissed for the following reasons:**

- Complaint fails to state an actionable claim.
  - Complaint states the same claim that is pending before or has been decided by the Agency or EEOC.
  - Complainant failed to contact an EEO counselor within 45 days of the alleged discriminatory action.
  - Complainant failed to file the complaint within 15 days of the notice of right to file a complaint.
  - A civil action is pending before a United States District Court on the same claims involved.
  - The claims have been decided already by a U.S. District Court in which complainant was a party.
  - Complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination.
  - Complainant has raised the matter in an appeal to the Merit Systems Protection Board with an election to pursue the non-EEO process or the issue is a matter appealable to the Merit Systems Protection Board.<sup>2</sup> This does not apply to certain agencies, including U.S. Postal Service and intelligence agencies such as FBI.
  - The claims are moot. A case is moot if: (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur; and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).
  - The claims allege a proposal to take a personnel action.
  - The complaint alleges dissatisfaction with the processing of a previously filed complaint
1. If dismissal may be appropriate for one or more reasons listed above, the reviewer will assess the case as a Red case and issue *Notice of Proposed Dismissal*.

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<sup>2</sup>MSPB-appealable actions include: removal except during probationary period; reduction in grade; reduction in force; suspension > 14 days; and denial of Within-Grade Increase.

2. The reviewer will save a copy of the *Notice* to the shared drive at S:/Hearings/Assessment Program/.
3. The reviewer will also complete an Assessment Form and enter it into the work file.
4. The reviewer will forward the case file to a SAJ.
5. The SAJ will assign the case with a "Unit 4" code and write the name of the assigned AJ on the *Notice*. The SAJ will then forward the case to a Clerk.
6. The Clerk will fax/mail the *Notice* and distribute the files to the assigned AJ.

## *ATTACHMENT 4*

### SUMMARY JUDGMENT CHECKLIST

1. Is there any evidence sufficient to establish a *prima facie* case?
  - (a) Is there evidence showing that similarly situated employees outside of Complainant's protected class(es) were treated more favorably, or in retaliation claims that a nexus exists between Complainant's prior EEO activity and the adverse action at issue (e.g., through proximity in time (3 months or closer))?
  - (b) Is there any other evidence that would create an inference of discrimination (e.g., discriminatory/retaliatory comments by the alleged discriminating official)?
  - (c) If so, does the evidence establish at least create a genuine issue of material fact (i.e., more than merely an unsupported allegation or where a credibility assessment is required)?

If the answer to (a), (b), (c) is "No," then the reviewer should assess the case as a "Yellow" case and issue *Notice of Intent to Issue a Decision without a Hearing*.

2. Does the Agency articulate a legitimate, nondiscriminatory reason for the challenged action? (The Agency's articulation usually may be found in an Agency official's affidavit or in a document (e.g., interview notes) that memorializes the Agency's reason for a decision.

If there is no Agency articulation, or if the articulation is not specific enough to afford Complainant an opportunity to demonstrate pretext (e.g., reason is vague or circular), the reviewer should assess the case as an "A" case and immediately forward the case file to an SAJ.

3. Is there any evidence relevant to pretext (i.e., any evidence that would indicate that the Agency's articulated reason is not the truth, but is a cover-up for discrimination)?

If so, does the evidence establish (a) or (b) by the preponderance of the evidence or does the evidence at least create a genuine issue of material fact (i.e., more than merely an unsupported allegation or where a credibility assessment is required)?

If the answer to both of the questions is "No," then the reviewer should assess the case as a Yellow case and issue *Notice of Intent to Issue a Decision without a Hearing*.

4. The reviewer will save a copy of the *Notice* to the shared drive at S:/Hearings/Assessment Program/.
5. The reviewer will also complete an Assessment Form and enter it into the work file.
6. The reviewer will forward the case file to a SAJ.
7. The SAJ will assign the case with a "Unit 5" code and write the name of the assigned AJ on the *Notice*. The SAJ will then forward the case to a Clerk.
8. The Clerk will fax/mail the *Notice* and distribute the files to the assigned AJ.



**ATTACHMENT 6**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
WASHINGTON FIELD OFFICE  
1400 L Street, N.W., Suite 200  
Washington, D.C. 20005

_____	)	
_____	)	
Complainant,	)	EEOC No. 100-2004-_____X
	)	
v.	)	
	)	
_____	)	Agency No. _____
Agency.	)	
_____	)	

**RULING ON COMPLAINANT'S [REQUEST FOR DISCOVERY/OBJECTION TO NSJ]**

Upon consideration of Complainant's [Motion Requesting Discovery/Objection to Administrative Judge's Notice of Intent to Issue Decision,] it is hereby

**ORDERED**, that Complainant's Motion is DENIED because the existing record is sufficient for the Administrative Judge to determine that there are no genuine issues of material fact and that a decision without a hearing may be appropriately issued.<sup>3</sup>

Date: March \_\_\_\_, 2004

\_\_\_\_\_  
[Assigned Administrative Judge]  
Administrative Judge

\_\_\_\_\_  
<sup>3</sup>See *Williams v. United States Postal Serv.*, EEOC Request No. 05931149 (May 26, 1994) (Commission upheld the issuance of a decision without a hearing where parties were not authorized to conduct discovery, noting that the AJ properly determined that based on the existing record, no genuine issue of material fact remained).

**CERTIFICATE OF SERVICE**

For timeliness purposes, it shall be presumed that the parties received the foregoing Ruling within five (5) calendar days after the date it was sent *via* first class mail or immediately upon e-mail delivery or confirmation of receipt by facsimile. I certify that, on the date of this Ruling, the Ruling was sent to the following:

By facsimile to:

By first class mail, postage pre-paid to:

By e-mail to:

---

KIMBERLY BYRD  
Legal Clerk



**ATTACHMENT 7**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
WASHINGTON FIELD OFFICE  
1400 L Street, N.W., Suite 200  
Washington, D.C. 20005

_____	)	
_____	)	
Complainant,	)	EEOC No. 100-2004-_____X
	)	
v.	)	
	)	
_____	)	Agency No. _____
Agency.	)	
_____	)	

**ORDER OF DISMISSAL**

Notice is hereby given that the above captioned case is DISMISSED, pursuant to 29 C.F.R. § 1614.107(\_\_\_\_)(\_\_\_\_) (2003), because \_\_\_\_\_. The Administrative Judge has attached a Notice of Appeal Rights and will send the hearing record to the Agency along with this Order.

This office will hold the report of investigation and the complaint file for sixty days, during which time the agency may arrange for their retrieval. If we do not hear from the agency within sixty days, we will destroy our copy of these materials.

It is so ORDERED.

Date: March , 2004

\_\_\_\_\_  
[Assigned Administrative Judge]  
Administrative Judge

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing Order within five (5) calendar days after the date it was sent via first class mail or immediately upon e-mail delivery or confirmation of receipt by facsimile. I certify that on the date of this Order, the Order was sent to the following:

By e-mail:

By first class mail, postage pre-paid:

By facsimile:

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KIMBERLY BYRD  
Legal Clerk

**ATTACHMENT 8**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
WASHINGTON FIELD OFFICE  
1400 L Street, N.W., Suite 200  
Washington, D.C. 20005

_____	)	
_____	)	
Complainant,	)	EEOC No. 100-2004-_____X
	)	
v.	)	
	)	
_____	)	Agency No. _____
Agency.	)	
_____	)	

**ORDER ENTERING JUDGMENT**

Upon consideration of the entire record, including the Agency's motion for summary judgment and Complainant's response to the Agency's motion, judgment is entered in favor of the Agency for the reasons stated in the Agency's motion. I find that the Agency's motion accurately states the undisputed facts and correctly applies the relevant law. Complainant has not produced any evidence to create a genuine issue of material fact, including the need for a credibility assessment. The relevant evidence in the record, taken as a whole, indicates that a reasonable factfinder could not return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

A Notice To The Parties explaining their appeal rights is attached. This office is also enclosing a copy of the hearing record for the agency and a copy of the transcript for complainant and/or his/her representative.

This office will hold the report of investigation and the complaint file for sixty days, during which time the agency may arrange for their retrieval. If we do not hear from the agency within sixty days, we will destroy our copy of these materials.

It is so ORDERED.

Date: March , 2004

\_\_\_\_\_  
[Assigned Administrative Judge]  
Administrative Judge

## **NOTICE TO THE PARTIES**

### ***TO THE AGENCY:***

Within forty (40) days of receiving this decision and the hearing record, you are required to issue a final order notifying the complainant whether or not you will fully implement this decision. You should also send a copy of your final order to the Administrative Judge.

Your final order must contain a notice of the complainant's right to appeal to the Office of Federal Operations, the right to file a civil action in a federal district court, the name of the proper defendant in any such lawsuit, the right to request the appointment of counsel and waiver of court costs or fees, and the applicable time limits for such appeal or lawsuit. A copy of EEOC Form 573 (Notice of Appeal/Petition) must be attached to your final order.

If your final order does not fully implement this decision, you must simultaneously file an appeal with the Office of Federal Operations in accordance with 29 C.F.R. 1614.403, and append a copy of your appeal to your final order. *See* EEOC Management Directive 110, November 9, 1999, Appendix O. You must also comply with the Interim Relief regulation set forth at 29 C.F.R. § 1614.505.

### ***TO THE COMPLAINANT:***

You may file an appeal with the Commission's Office of Federal Operations when you receive a final order from the agency informing you whether the agency will or will not fully implement this decision. 29 C.F.R. § 1614.110(a). From the time you receive the agency's final order, you will have thirty (30) days to file an appeal. If the agency fails to issue a final order, you have the right to file your own appeal any time after the conclusion of the agency's (40) day period for issuing a final order. *See* EEO MD-110, 9-3. In either case, please attach a copy of this decision with your appeal.

Do not send your appeal to the Administrative Judge. Your appeal must be filed with the Office of Federal Operations at the address set forth below, and you must send a copy of your appeal to the agency at the same time that you file it with the Office of Federal Operations. In or attached to your appeal to the Office of Federal Operations, you must certify the date and method by which you sent a copy of your appeal to the agency.

### ***WHERE TO FILE AN APPEAL:***

All appeals to the Commission must be filed by mail, hand delivery or facsimile.

#### **BY MAIL:**

Director, Office of Federal Operations  
Equal Employment Opportunity Commission

P.O. Box 19848  
Washington, D.C. 20036

**BY PERSONAL DELIVERY:**

Director, Office of Federal Operations  
Equal Employment Opportunity Commission  
1801 L Street, NW  
Washington, D.C. 20507

**BY FACSIMILE:**

Number: (202) 663-7022

*Facsimile transmissions of more than ten (10) pages will not be accepted.*

**COMPLIANCE WITH AN AGENCY FINAL ACTION**

Pursuant to 29 C.F.R. § 1614.504, an agency's final action that has not been the subject of an appeal to the Commission or a civil action is binding on the agency. If the complainant believes that the agency has failed to comply with the terms of this decision, the complainant shall notify the agency's EEO Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance. The agency shall resolve the matter and respond to the complainant in writing. If the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination of whether the agency has complied with the terms of its final action. The complainant may file such an appeal 35 days after serving the agency with the allegations of non-compliance, but must file an appeal within 30 days of receiving the agency's determination. A copy of the appeal must be served on the agency, and the agency may submit a response to the Commission within 30 days of receiving the notice of appeal.

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing Order within five (5) calendar days after the date it was sent via first class mail or immediately upon e-mail delivery or confirmation of receipt by facsimile. I certify that on the date of this Order, the Order was sent to the following:

By e-mail:

By first class mail, postage pre-paid:

By facsimile:

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KIMBERLY BYRD  
Legal Clerk