No. 99-1939

In the Supreme Court of the United States

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

LUKE AIR FORCE BASE, ARIZONA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a union has a statutory right to be represented at a mediation session between a federal government agency and a bargaining unit employee concerning that employee's discrimination complaint, which was filed pursuant to the Equal Employment Opportunity Commission procedures on a subject expressly omitted from the collective bargaining agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is unreported. The decision and order of the Federal Labor Relations Authority (Pet. App. C1-C29) is reported at 54 F.L.R.A. 716.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1999. A petition for rehearing was denied on March 14, 2000 (Pet. App. B1). The petition for a writ of certiorari was filed on June 5, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The relevant portions of the Equal Employment Opportunity Commission's regulations, 29 C.F.R. Pt. 1614, are reproduced in App. 1a-8a, *infra*. The relevant portions of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135 (1994 & Supp. IV 1998) are reproduced in Pet. App. D1-D7.

STATEMENT

1. This case concerns whether a union's statutory right to attend any formal discussion between a federal agency employer and a bargaining unit employee concerning any grievance includes a right to attend mediation of an employee's discrimination complaint filed pursuant to procedures established by the Equal Employment Opportunity Commission (EEOC). Resolution of that issue requires consideration of two federal statutory schemes.

a. The 1972 amendments to Title VII of the Civil Rights Act of 1964 extended the coverage of that Act to include the employment practices of the federal government.[1] Litigation is a necessary component of that enforcement scheme. Congress also intended to achieve its statutory goal of eliminating discrimination through the process of voluntary conciliation and settlement of claims of discrimination so that litigation could be avoided. In 1978, the President transferred authority for enforcing and administering the provisions of the Civil Rights Act of 1964 in the federal sector from the Civil Service Commission to the EEOC, citing the EEOC's "considerable expertise in the field of employment discrimination." See Reorg. Plan No. 1

[1] Pub. L. No. 92-261, § 11, 86 Stat. 111.

of 1978, 43 Fed. Reg. 19,807 (1978), *reprinted in* 42 U.S.C. 2000e-4 (1994 & Supp. IV 1998), *and in* 92 Stat. 3781.

Under the federal government Equal Employment Opportunity (EEO) program, agencies are responsible for investigating complaints filed against them by their employees. See 29 C.F.R. 1614.108(a). The EEOC regulations encourage settlement of EEO cases. See, *e.g.*, 29 C.F.R. 1614.108(b) (providing, in pertinent part, that "[a]gencies are encouraged to incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints"); 29 C.F.R. 1614.603 (providing that "[e]ach agency shall make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout, the administrative processing of complaints, including the pre-complaint counseling stage"). See generally 29 C.F.R. Pt. 1614.

EEOC regulations also address the effect of a collective bargaining agreement on the processing of discrimination complaints, both when the agreement permits such complaints to be raised in a negotiated grievance procedure, and when it does not. When a collective bargaining agreement permits allegations of discrimination to be raised in the grievance procedure, a person filing a complaint or grievance "must elect to raise the matter under either part 1614 [*i.e.*, the EEOC process] or the negotiated grievance procedure, but not both." 29 C.F.R. 1614.301(a). But "[w]hen a person is not covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under [EEOC regulations, 29 C.F.R. Pt. 1614]." 29 C.F.R. 1614.301(b).

Within the Department of Defense, the EEO complaint investigation function is performed by its Office of Complaint Investigation (OCI), which is part of its Civilian Personnel Management Service. Pet. App. C2. In addition to investigating EEO complaints, OCI investigators use mediation to assist the parties in resolving cases. The OCI is within the Department of Defense, and is independent from, and not under the control of, the United States Air Force.

b. The Federal Service Labor-Management Relations Statute (Labor Statute), Pub. L. No. 95-454, Tit. VII, 92 Stat. 1191, codified as Title VII of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 7101 *et seq.*, governs collective bargaining in the federal sector. The Labor Statute requires that any collective bargaining agreement covered by the statute must contain a grievance procedure to address specified employee complaints. 5 U.S.C. 7121(a)(1). However, the parties can exclude any subject from the coverage of the collective bargaining agreement. 5 U.S.C. 7121(a)(2). Section 7114(a)(2)(A) provides that a union shall be given the opportunity to be represented at any "formal discussion" between representatives of the agency and any employees in the bargaining unit concerning "any grievance or any personnel policy or practices or other general condition of employment." 5 U.S.C. 7114(a)(2)(A). This case concerns whether the term "any grievance" includes an EEO complaint that is expressly excluded from the collective bargaining agreement and for which a statutory procedure exists under the auspices of the EEOC.

2. Tillie Cano, a member of the bargaining unit of employees at respondent Luke Air Force Base (Luke AFB), Arizona, filed two formal EEO complaints pursuant to 29 C.F.R. Pt. 1614, alleging that she had been

retaliated against for having filed a previous EEO complaint against her former supervisor. Pet. App. A2. She did not file any complaints of discrimination pursuant to the collective bargaining agreement or the grievance procedure therein. The applicable collective bargaining agreement between the union and Luke AFB explicitly excluded claims of discrimination from the grievance procedure. *Id.* at A3.[2]

The Department of Defense OCI conducted an investigation of Cano's EEO complaints. The OCI investigator sent Cano a memorandum informing her that OCI would be conducting an on-site investigation of the EEO complaints beginning on the afternoon of January 18, 1995. The memorandum stated that there would be a mediation conference and if mediation failed, a formal investigation would follow immediately thereafter. Subsequently, Cano designated Paul King, the president of the union, as her personal representative for this meeting. Pet. App. C2.

On January 18, 1995, Cano, King, and the OCI investigator met with representatives of respondent as scheduled. Pet. App. C2. King attended as Cano's personal representative and not as a representative of the union.[3] King left the meeting before it ended. After he left, Cano and the OCI investigator continued their discussion and agreed to resume the meeting the next day. *Id.* at C3. The next afternoon, January 19, 1995

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[2] C.A. E.R. 11 ("Section B 1. Excluded from coverage under this grievance procedure are matters concerning: * * * f. Equal Employment Opportunity complaints involving an allegation of discrimination.").

[3] Section 1614.605(a) provides that "[a]t any stage in the processing of a complaint, including the counseling stage § 1614.105, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice."

(January 19th meeting), the OCI investigator and Cano met to continue their discussion of the EEO complaints. Neither Cano nor management advised King or the union of that meeting, at which the parties agreed to a settlement of the EEO complaints and signed an agreement to that effect. *Ibid.* The settlement agreement provided that Cano's reassignment would not affect other positions in the work unit. C.A. E.R. 17-18. Cano also wrote in the agreement that "I elect to sign this agreement without the presence of my representative." *Id.* at 18.

3. In May and October, 1995, the union filed unfair labor practice charges alleging that respondent violated the Labor Statute by failing to give the union the opportunity to be represented at the January 19th meeting at which Cano and respondent mediated and settled her EEO complaints. Pet. App. A2. After a hearing, the ALJ held that respondent failed to comply with Section 7114 of the Labor Statute because it did not give the union notice and an opportunity to be represented at the January 19th meeting. *Ibid.* The ALJ distinguished the Ninth Circuit's decision in *IRS, Fresno Service Center* v. *FLRA*, 706 F.2d 1019 (1983) (*IRS, Fresno*), on the ground that *IRS, Fresno* addressed only informal EEO complaints, not formal complaints such as those in this case. Pet. App. C4.

Respondent filed exceptions to the ALJ's decision with the FLRA. The FLRA concluded that the January 19th meeting on the EEO complaints was a "formal discussion" within the meaning of Section 7114(a)(2)(A) of the Labor Statute and that respondent violated Section 7116(a)(1) and (8) of the Labor Statute by failing to provide the union with notice and an opportunity to be represented at that session. Pet. App. C10. The FLRA, like the ALJ, distinguished *IRS,*

Fresno, *id.* at C19, and instead adopted the reasoning of the District of Columbia Circuit in *National Treasury Employees Union* v. *FLRA*, 774 F.2d 1181 (1985) (*NTEU*). That case held that a "grievance" within the meaning of Section 7114(a)(2)(A) can encompass a dispute subject to resolution under a statute other than the Labor Statute. *NTEU* involved a statutory procedure of the Merit System Protection Board for employee discipline. *Ibid.* Drawing an analogy between the MSPB procedures at issue there and the EEO procedures at issue here, the FLRA concluded that the formal EEO complaint constituted a "grievance" within the meaning of Section 7114(a)(2)(A). Pet. App. C21. The FLRA also rejected respondent's assertion that the term "grievance" in Section 7114 does not include those matters excluded by the parties from their own negotiated grievance procedure, such as the EEO complaint at issue here. The FLRA determined that the statutory definition of a grievance is not dependent on the scope of a negotiated grievance procedure. *Ibid.* The FLRA also determined that the presence of a union representative at the January 19th meeting on the EEO complaints would not conflict with EEOC regulations. Pet. App. C23-C25.

4. In an unpublished opinion, the court of appeals reversed the FLRA. Pet. App. A1-A3. The court concluded that the FLRA acted arbitrarily and capriciously in deciding that respondent violated Section 7114 of the Labor Statute. *Id.* at A3. Applying *IRS, Fresno*, the court held that Cano's complaints were not "grievances" within the meaning of Section 7114(a)(2) of the Labor Statute because they were "brought pursuant to EEOC procedures, which are 'discrete and separate from the grievance process to which 5 U.S.C.

[§] * * * 7114 [is] directed.'" *Ibid.* (quoting *IRS, Fresno*, 706 F.2d at 1024). Moreover, the court noted that the fact that the collective bargaining agreement "explicitly excludes discrimination claims from the grievance procedure also suggests that these are not 'grievances.'" *Ibid.* Thus, the court determined that, because the January 19th meeting did not concern a "grievance" within the meaning of Section 7114, the union had no right of representation at the meeting. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. a. Complaints brought pursuant to EEO procedures are not "grievances" within the meaning of Section 7114(a)(2)(A). See Pet. App. A3. Although 5 U.S.C. 7103(a)(9) defines a "grievance" as "any complaint * * * by an employee concerning any matter relating to the employment of the employee," that definition does not extend to EEO complaints. Section 7121(d) provides that "[a]n aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title [the EEO provisions that apply anti-discrimination statutes to federal employment] which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both." 5 U.S.C. 7121(d). Thus, if the collective bargaining agreement includes a provision for the resolution of EEO grievances, the employee may choose whether to use the bargained-for procedures (complete with union representation) or the EEOC procedures

(which do not provide for union representation). But where, as here, the collective bargaining agreement does not provide a procedure for the resolution of EEO complaints, the employee may only use the statutory procedures provided for by 5 U.S.C. 2302 (1994 & Supp. IV 1998).

b. The legislative history behind Section 7103(a)(9) provides direct support for that reading:

> Subsection (a)(9) of Section 7103 defines "grievance" to mean any complaint by any agency, labor organization, or employee concerning: (1) any matter relating to the employment of such person with an agency; or (2) the effect or interpretation, or claim of breach, of a collective bargaining agreement; or (3) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment. It should be noted that, although this subsection is virtually all-inclusive in defining "grievance[,"] *section 7121 excludes certain grievances from being processed under a negotiated grievance procedure, thereby limiting the net effect of the term*.

H.R. Rep. No. 1403, 95th Cong., 2d Sess. 40 (1978) (emphasis added). Thus, the meaning of the term "grievance" under Section 7103(a)(9) is limited by the exclusion of certain subjects—such as EEO complaints—that are excluded from the grievance procedures pursuant to Section 7121(d).

c. In *IRS, Fresno*, the Ninth Circuit explained the rationale for why EEO matters are not part of the regulatory scheme addressed by the Labor Statute:

> [T]he EEOC procedures involved in this case are not controlled by 5 U.S.C. § 7114(a)(2)(A) because they are discrete and separate from the grievance

> process to which 5 U.S.C. §§ 7103 and 7114 are directed.
>
> The union is granted representation rights under 5 U.S.C. § 7114 because of its status as exclusive bargaining representative. As exclusive representative, the union has responsibility for administering the collective bargaining agreement and has an obvious interest in being present when a dispute governed by the grievance procedure it negotiated is discussed or resolved. However, *the EEOC procedure is unrelated to and separate from the contractual grievance process.* * * * [The EEO] meeting did not involve any aspect of the collective bargaining agreement or representation of [the employee's] contractual rights.

706 F.2d at 1024-1025 (emphasis added). The court further explained that the "union's interest in the statutory EEOC procedure is not the same as its interest in the contractual grievance process." *Id.* at 1025. Although the union has "duties and obligations" under the collective bargaining agreement, "it has no such institutional role in the EEOC process." *Ibid.* Thus, the court concluded that "there is no reason [the union] should have the same rights in the EEOC procedure as it does in the contractual grievance process" and held that the EEO discrimination claim was not a "grievance" within the meaning of 5 U.S.C. 7114(a)(2)(A). 706 F.2d at 1025.

That reasoning finds further support in the purposes underlying the collective-bargaining process established in the Labor Statute. After a labor union has been elected by a majority to represent a bargaining unit of federal employees, it is "accorded exclusive recognition" giving it the right "to act for, and negoti-

ate collective bargaining agreements covering, all employees in the unit." 5 U.S.C. 7114(a)(1). As the employees' exclusive representative, the union enters into negotiations and reaches a collective bargaining agreement with the employer. A central feature of the collective bargaining agreement will be its grievance resolution procedures. 5 U.S.C. 7121 (1994 & Supp. IV 1998). For those matters that labor and management agree to cover in their collective bargaining agreement, the contractual grievance procedures "shall be the exclusive administrative procedures for resolving grievances." 5 U.S.C. 7121(a)(1).

As 5 U.S.C. 7121(d) makes clear, however, Congress regarded certain statutory rights enjoyed by federal employees as so important that they cannot be negotiated away by the exclusive bargaining representative. The collective bargaining agreement is prohibited by law from giving the union exclusive powers with respect to allegations of unlawful discrimination. Even if the agreement authorizes the employee to pursue the matter through the contractual grievance process, the option to complain through the EEO procedures will still remain. 5 U.S.C. 7121(d). Those are "two different and distinct mechanisms." *IRS, Fresno*, 706 F.2d at 1025. But once the employee selects the statutory procedure—or the collective bargaining agreement itself omits any procedure for addressing EEO complaints—the provisions of the Labor Statute are not applicable. Cf. *California Nat'l Guard* v. *FLRA*, 697 F.2d 874, 879 (9th Cir. 1983).

d. Petitioner argues (Pet. 19), however, that the Labor Statute provides a "broad definition" of "grievance" that encompasses complaints processed through means other than the negotiated grievance procedure, including the EEO procedures. Petitioner mistakenly

presumes that Congress intended Section 7114(a)(2)(A) to modify the exclusive scheme created by Title VII and the EEOC's accompanying regulations for individual claims of discrimination in employment. If Congress had wanted to amend the scheme created by Title VII and the EEOC's accompanying regulations—under which employees may choose their own representative pursuant to 29 C.F.R. 1614.605(a)—by according unions an independent right to attend often confidential proceedings, it would have done so directly. See, *e.g.*, *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979) ("[S]ilence [in legislative history] * * * while contemplating an important and controversial change in existing law is unlikely.").

2. Contrary to petitioner's assertion (Pet. 11-13), there is no conflict in the circuits on this issue. The court of appeals' decisions cited by petitioner concern proceedings involving a different statutory scheme—Merit Systems Protection Board (MSPB) proceedings—and not EEO proceedings. Only the Ninth Circuit has directly confronted the issue of whether the union's right of representation applies to EEO proceedings. In both this case and *IRS, Fresno*, the court held that it did not.

Nevertheless, petitioner suggests that a conflict exists between the Ninth Circuit and both the Tenth and D.C. Circuits "on the issue of whether a union's right to representation during an agency's formal discussion with an employee applies to discussions regarding claims filed pursuant to alternative statutory procedures." Pet. 10. Petitioner contends that "the circuit conflict cannot be reconciled by reasoning that [the decision below] and *IRS, Fresno* * * * involved discrimination complaints under the auspices of the EEOC and those at issue in the other cases involved

MSPB appeals." *Id.* at 13 n.5. Both *NTEU* and *Department of Veterans Affairs* v. *FLRA*, 3 F.3d 1386 (10th Cir. 1993), held that the term "grievance" in Section 7114(a)(2)(A) includes complaints filed pursuant to MSPB procedures. Perhaps the clearest sign that petitioner is mistaken in asserting a conflict is that the Ninth Circuit itself has also agreed with the D.C. and Tenth Circuits that the union's right of representation applies to discussions regarding claims filed pursuant to MSPB procedures. *Department of Veterans Affairs Med. Ctr.* v. *FLRA*, 16 F.3d 1526 (9th Cir. 1994) (*Veterans Affairs*).

The issue of whether the union's right to be represented at a formal discussion of a grievance applies to MSPB procedures presents significantly different considerations from whether the union has the right to be represented at EEO proceedings. Only the Ninth and D.C. Circuits have considered the relationship between these two issues, and both have concluded that the union's rights as to EEO proceedings warrant separate analysis. The Ninth Circuit described the question concerning the union's right to be represented at MSPB proceedings and EEO proceedings as "entirely different." *Veterans Affairs*, 16 F.3d at 1534. In dictum the D.C. Circuit noted in *NTEU* that "Title VII * * * provides that the right of an aggrieved employee to complete relief takes priority over the general interests of the bargaining unit. * * * Similarly, a *direct* conflict between the rights of an exclusive representative under § 7114(a)(2)(A) and the *rights* of an employee victim of discrimination should also presumably be resolved in favor of the latter." 774 F.2d at 1189 n.12.

The MSPB and its procedures were enacted pursuant to the same Act of Congress that contains the Labor

Statute and its Section 7114—the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. In contrast, the EEO procedures at issue in this case are mandated under an entirely separate law, Title VII of the Civil Rights Act of 1964. The MSPB's origins in the CSRA, the same statute in which Congress recognized the right of federal employees to bargain collectively, reflects the substantial relation between the concerns that Congress intended both measures to address: reforming the federal civil service. That same nexus, however, does not exist between the purposes of the Labor Statute and EEO procedures, which were established pursuant to Title VII to eradicate discrimination.

3. Petitioner further contends that the Ninth Circuit's recognition in *Veterans Affairs* that the union's right might apply to non-negotiated procedures represents an "intra-circuit split." Pet. 10, 12-13. Even were that holding to constitute an intra-circuit conflict—and for the foregoing reasons it does not—such a conflict would be properly resolved by the Ninth Circuit itself and not by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, petitioner's characterization is incorrect because the *Veterans Affairs* court expressly distinguished *IRS, Fresno*, and the decision below is consistent with *Veterans Affairs*. In *Veterans Affairs*, the court held that telephone interviews of union members who were potential witnesses at a MSPB hearing were formal discussions of grievances covered by Section 7114(a)(2)(A). 16 F.3d at 1528-1529. The court, however, specifically distinguished EEO proceedings from those before the MSPB, and reaffirmed its holding in *IRS, Fresno*. The court in *Veterans Affairs* noted that *IRS, Fresno* concerned whether the "protections of the [Labor] Statute

apply to proceedings conducted by the EEOC." *Id.* at 1534. The *Veterans Affairs* court determined that "they do not" because "an employee's rights as to EEOC proceedings are established by the EEO statute and accompanying regulations." *Ibid.* The issue in this case, therefore, is not whether a union's right to representation applies to discussions regarding claims filed pursuant to a procedure other than the negotiated procedure, but more specifically, whether the union's right under the Labor Statute to be represented at "any formal discussion" concerning "any grievance" applies to the procedures that Congress and the EEOC established for EEO complaints.

4. Petitioner further argues that resolution of individual discrimination complaints affects the "entire bargaining unit" and that "unions have an established interest in how allegations of discrimination are dealt with and resolved." Pet. 19. The union's interest in the outcome of EEO proceedings, however, is limited. Moreover, the settlement agreement in this case included a provision stating that the appellant's reassignment would not have an impact on other positions in the workplace. C.A. E.R. 17-18. Although there was no effect on the bargaining unit as to this particular settlement, if there had been, the agency would have been obliged to bargain with the union over the impact of a settlement agreement to the extent that it affected the bargaining unit. See 5 U.S.C. 7106(b)(2) and (3).

The issue of whether the union's right under the Labor Statute applies to EEO proceedings is also affected by the EEO confidentiality safeguards. The EEOC has never adopted a rule allowing for the union's presence at mediations and, indeed, has adopted a

practice to the contrary.[4] Moreover, in contrast to MSPB hearings that are presumptively "open to the public" (5 C.F.R. 1201.52), EEO hearings are "closed to the public" (29 C.F.R. 1614.109(c)). Although the identity of the complainant may be public, discrimination complaints present issues under the Privacy Act of 1974, 5 U.S.C. 552a (1994 & Supp. IV 1998), and other concerns[5] that require the agency to keep the substance of the actual complaint and the investigation confidential.[6]

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[4] The EEOC recently issued a final rule, effective November 9, 1999, revising the EEOC's federal sector complaint processing regulations found at 29 C.F.R. Pt. 1614. The rule states, in pertinent part, that "[a]gencies will be required to establish or make available an [Alternate Dispute Resolution (ADR)] program. The ADR program must be available during both the precomplaint process and the formal complaint process." 64 Fed. Reg. 37,644 (1999). The EEOC further stated that, "[t]he Commission's intention in requiring an ADR program is that agencies establish informal processes to resolve claims. Thus any activity conducted in connection with an agency ADR program during the EEO process would not be a formal discussion within the meaning of the Civil Service Reform Act." *Id.* at 37,645.

[5] Discrimination complaints often involve very sensitive issues such as disabilities or sexual harassment. The law is sensitive to the need for confidentiality in this area. See 42 U.S.C. 2000e-5(b), 2000e-8(e). A requirement that the union be represented at mediations or hearings concerning such complaints may chill those proceedings. Even though the union's interest may not actually conflict with the employee's interest in such cases, just the presence of the union might be sufficient to make an employee hesitate to file or pursue valid, but sensitive, EEO complaints.

[6] The FLRA's position in this case is thus somewhat inconsistent with its prior acknowledgment that "both Congress and the courts have recognized the privacy interests of employees who file discrimination complaints." *Federal Aviation Admin., N.Y., TRACON*, 51 F.L.R.A. 115, 121 (1995) (*TRACON*). In *TRACON*,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2000

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the FLRA noted that although EEOC regulations concerning discrimination involving Federal agencies do not contain express confidentiality provisions, "'Congress' concern . . . that . . . confidentiality is important in achieving voluntary compliance with the goals of Title VII' has been found relevant in the Federal sector." *Id.* at 120-121 (quoting *IRS, Fresno*, 706 F.2d at 1024).

APPENDIX

1. 29 C.F.R. 1614.108 [as of July 1, 1999] states as follows:

§ 1614.108 Investigation of complaints.

(a) The investigation of complaints shall be conducted by the agency against which the complaint has been filed.

(b) In accordance with instructions contained in Commission Management Directives, the agency shall develop a complete and impartial factual record upon which to make findings on the matters raised by the written complaint. Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences or any other fact-finding methods that efficiently and thoroughly address the matters at issue. Agencies are encouraged to incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints.

(c) The procedures in paragraphs (c) (1) through (3) of this section apply to the investigation of complaints:

(1) The complainant, the agency, and any employee of a Federal agency shall produce such documentary and testimonial evidence as the investigator deems necessary.

(2) Investigators are authorized to administer oaths. Statements of witnesses shall be made under oath or

affirmation or, alternatively, by written statement under penalty of perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the investigator may note in the investigative record that the decisionmaker should, or the Commission on appeal may, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as it deems appropriate.

(d) Any investigation will be conducted by investigators with appropriate security clearances. The Commission will, upon request, supply the agency with the name of an investigator with appropriate security clearances.

(e) The agency shall complete its investigation within 180 days of the date of filing of an individual complaint or within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal pursuant to § 1614.107. By written agreement within those time periods, the complainant and the respondent agency may voluntarily extend the time period for not more than an additional 90 days. The agency may unilaterally extend the time period or any period of extension for not more than 30 days where it must sanitize a complaint file that may contain information classified pursuant to Exec. Order No. 12356, or successor orders, as secret in the interest of national defense or foreign policy, provided the investigating agency notifies the parties of the extension.

(f) Within 180 days from the filing of the complaint, within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal, or within any period of extension provided for in paragraph (e) of this section, the agency shall notify the complainant that the investigation has been completed, shall provide the complainant with a copy of the investigative file, and shall notify the complainant that, within 30 days of receipt of the investigative file, the complainant has the right to request a hearing before an administrative judge or may receive an immediate final decision pursuant to § 1614.110 from the agency with which the complaint was filed. In the absence of the required notice, the complainant may request a hearing at any time after 180 days has elapsed from the filing of the complaint.

2. 29 C.F.R. 1614.109(c) [as of July 1, 1999] states in relevant part:

§ 1614.109 Hearings.

(c) *Conduct of hearing.* Agencies shall provide for the attendance at a hearing of all employees approved as witnesses by an administrative judge. Attendance at hearings will be limited to persons determined by the administrative judge to have direct knowledge relating to the complaint. Hearings are part of the investigative process and are thus closed to the public. The administrative judge shall have the power to regulate the conduct of a hearing, limit the number of witnesses where testimony would be repetitious, and exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing. The administrative judge shall receive into evidence information or documents relevant to the complaint. Rules of evidence shall not be applied strictly, but the administrative judge shall exclude irrelevant or repetitious evidence. The administrative judge or the Commission may refer to the Disciplinary Committee of the appropriate Bar Association any attorney or, upon reasonable notice and an opportunity to be heard, suspend or disqualify from representing complainants or agencies in EEOC hearings any representative who refuses to follow the orders of an administrative judge, or who otherwise engages in improper conduct.

3. 29 C.F.R. 1614.301 [as of July 1, 1999] states as follows:

§ 1614.301 Relationship to negotiated grievance procedure.

(a) When a person is employed by an agency subject to 5 U.S.C. 7121(d) and is covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance proedure, a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect to raise the matter under either part 1614 or the negotiated grievance procedure, but not both. An election to proceed under this part is indicated only by the filing of a written complaint; use of the pre-complaint process as described in § 1614.105 does not constitute an election for purposes of this section. An aggrieved employee who files a complaint under this part may not thereafter file a grievance on the same matter. An election to proceed under a negotiated grievance procedure is indicated by the filing of a timely written grievance. An aggrieved employee who files a grievance with an agency whose negotiated agreement permits the acceptance of grievances which allege discrimination may not thereafter file a complaint on the same matter under this part 1614 irrespective of whether the agency has informed the individual of the need to elect or of whether the grievance has raised an issue of discrimination. Any such complaint filed after a grievance has been filed on the same matter shall be dismissed without prejudice to the complainant's right to proceed through the negotiated grievance procedure including the right to appeal to the Commission from a final decision as provided in subpart

D of this part. The dismissal of such a complaint shall advise the complainant of the obligation to raise discrimination in the grievance process and of the right to appeal the final grievance decision to the Commission.

(b) When a person is not covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under this part.

(c) When a person is employed by an agency not subject to 5 U.S.C 7121(d) and is covered by a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under this part, except that the time limits for processing the complaint contained in § 1614.106 and for appeal to the Commission contained in § 1614.402 may be held in abeyance during processing of a grievance covering the same matter as the complaint if the agency notifies the complainant in writing that the complaint will be held in abeyance pursuant to this section.

4. 29 C.F.R. 1614.603 [as of July 1, 1999] states as follows:

§ 1614.603 Voluntary settlement attempts.

Each agency shall make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout, the administrative processing of complaints, including the pre-complaint counseling stage. Any settlement reached shall be in

writing and signed by both parties and shall identify the claims resolved.

5. 29 C.F.R. 1614.605 [as of July 1, 1999] states as follows:

§ 1614.605 Representation and official time.

(a) At any stage in the processing of a complaint, including the counseling stage § 1614.105, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice.

(b) If the complainant is an employee of the agency, he or she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to agency and EEOC requests for information. If the complainant is an employee of the agency and he designates another employee of the agency as his or her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and respond to agency and EEOC requests for information. The agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer. The complainant and representative, if employed by the agency and otherzwise in a pay status, shall be on official time, regardless of their tour of duty, when their presence is authorized or required by the agency or the Commission during the investigation, informal adjustment, or hearing on the complaint.

(c) In cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission or the agency may, after giving the representative an opportunity to respond, disqualify the representative.

(d) Unless the complainant states otherwise in writing, after the agency has received written notice of the name, address and telephone number of a representative for the complainant, all official correspondence shall be with the representative with copies to the complainant. When the complainant designates an attorney as representative, service of documents and decisions on the complainant shall be made on the attorney and not on the complainant, and time frames for receipt of materials by the complainant shall be computed from the time of receipt by the attorney. The complainant must serve all official correspondence on the designated representative of the agency.

(e) The Complainant shall at all times be responsible for proceeding with the complaint whether or not he or she has designated a representative.

(f) Witnesses who are Federal employees, regardless of their tour of duty and regardless of whether they are employed by the respondent agency or some other Federal agency, shall be in a duty status when their presence is authorized or required by Commission or agency officials in connection with a complaint.