

# UNITED STATES BANKRUPTCY COURT DISTRICT OF VERMONT

## EMPLOYMENT DISPUTE RESOLUTION PLAN GUIDANCE AND PROCEDURES

On March 10, 2012 the United States Bankruptcy Court, District of Vermont (the court) enacted an employment dispute resolution plan adopting the Model Employment Dispute Resolution Plan passed by the Judicial Conference with one modification.<sup>1</sup> The court modified Chapter II § 1 to add the term sexual orientation, to read as follows:

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), disability, and sexual orientation 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.

The following guidance and procedures are set out to provide clarification and instruction on how the Model Employment Dispute Resolution Plan (Model EDR Plan) will be administered by this court.

### **Definitions:**

The term “chief judge” as referred to in the Model EDR Plan is the chief judge of the United States Bankruptcy Court, District of Vermont.

The term “unit executive” as referred to in the Model EDR Plan is the clerk of court for the United States Bankruptcy Court, District of Vermont.

The words “chapter” and “section” or “§” as appear below refer to those used in the Model EDR Plan.

**The four stages of the resolution process under the Model EDR Plan are as listed below. It is mandatory that the first stage be counseling. Should any of the parties wish to move beyond the counseling stage it is mandatory that they proceed in accordance with the sequence shown below:**

1. Counseling stage - During the 30-day counseling period the Employment Dispute Resolution (EDR) coordinator discusses the circumstances of the alleged violation with the employee and informs the employee of his or her rights and responsibilities under the Model EDR Plan. The EDR coordinator functions as a neutral, independent party who helps the employee to (a) understand how the court’s EDR Plan works, (b) clarify facts and issues, and (c) seek early, informal resolution of the conflict. When the 30 day counseling period concludes, the EDR coordinator shall notify the employee in writing that the counseling has ended, and that the employee has the right to file a written request for mediation.

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<sup>1</sup> The document titled Model Employment Dispute Resolution Plan passed by the Judicial Conference carries no identification as to its author or issue date and so to clearly identify the plan that this court replicates it is the document titled Model Employment Dispute Resolution Plan that was attached to a memorandum from Judge George Singal to all United States Judges dated March 25, 2010 stating that the plan was adopted by the Judicial Conference of the United States on March 16, 2010.

2. Mediation stage – Mediation is conducted by a mediator, who is a third-party neutral skilled in enhancing resolution.

The employee must request mediation within 15 days after receiving written notice of the conclusion of the counseling period. The primary goal of mediation is to assist the parties to reach a lasting resolution of the issues or problems raised during counseling. Within one day of the mediation's conclusion the EDR coordinator shall (a) send written notice to the employee, the employee's representative (if any), and the employing office, stating that the mediation has concluded, and (b) notify the employee that he or she has the right to file a formal complaint and that the deadline for filing a complaint is 15 days after receipt of that notice.

The employee's failure to pursue mediation will preclude further processing of the employee's claim(s) under the court's EDR Plan. If the employee requests mediation, she or he **MUST** attend at least one mediation session. After the mediation session, the employee may proceed to file a formal complaint if he or she is unwilling to pursue further mediation efforts.

3. Formal complaint and hearing stage – All hearings are before the chief judge of the Bankruptcy Court, that judge's designee, or if it is an allegation of judicial misconduct, then before a judicial officer appointed by the circuit.

The hearing is a fact-finding procedure to determine if a violation under the Model EDR Plan has occurred and if so to determine an appropriate remedy. The parties have the right to representation, to present evidence, and to cross-examine adverse witnesses. The period between the filing of the complaint through the commencement of hearing can be no longer than 60 days and the period between conclusion of the hearing and issuance of a decision cannot exceed 30 days.

4. Review of the hearing decision stage – This will proceed according to the circuit judicial council's procedures further addressed at the section in this document titled Chapter IX, Section 10 Complaint and hearing.

### **Confidentiality under the Model EDR Plan:**

In Chapter IX, Section 4 and throughout the Model EDR Plan it is stated that "information about allegations filed under this Plan shall be shared on a need-to-know basis. Records relating to the violations under this Plan shall be kept confidential on the same basis." The decision as to who "needs to know" will be made by the chief judge on a case by case basis, upon written request with each such request outlining the basis for the request and the specific information requested. A request for the release of information relating to the EDR process must specify why it is essential that the information be disclosed and must set forth exigent circumstances, e.g., a criminal investigation, or concerns for the safety of self or others.

All files related to complaints will be separately maintained by the hearing officer with appropriate security precautions to ensure confidentiality. During the counseling and mediation stages the EDR coordinator will be responsible for maintaining the confidentiality of the files.

An employee who breaches the duty of confidentiality related to claims or proceedings under this Plan (as set out below) is subject to disciplinary action under the disciplinary procedures of the U.S. Bankruptcy Court, District of Vermont (USBC-VT).

The procedure for protecting confidentiality during the different stages of the EDR process is as follows:

*Counseling Stage* - Once the employee makes the written request for counseling the EDR coordinator and the chief judge shall protect the confidentiality of the allegations unless waived by the person making the allegations. A formal written request must be made to the chief judge to have the information contained

in the allegations shared. The chief judge will inform the EDR coordinator of the outcome or disposition of the request made during the counseling stage.

*Mediation Stage* - The request for mediation is made in writing to the EDR coordinator who will promptly provide it to the clerk of court and chief judge. All persons involved in the mediation process are prohibited from disclosing any information or records obtained through, or prepared for, the mediation process. The only exception is that parties to the proceeding may disclose information or records as necessary for preparation or presentation of their position to the mediator, on notice to all parties at least 3 business days prior to the mediation. All persons involved in the mediation process are expected to uphold the confidentiality of the allegations, the identity of the persons involved, and the status of the process.

*Complaint and Hearing Stage* - The EDR Coordinator will deliver the complaint, marked “confidential”, to the hearing officer. The hearing officer will determine the form of notice for the hearing. The hearing will be a closed hearing and will be kept confidential by the hearing officer. Information under consideration must not be disclosed by any employee, witness or by any person who records or transcribes the testimony. The final decision of the chief judge will be issued in writing to the parties and is not to be circulated or published beyond the parties. All parties, and aggrieved individuals, shall have the right to request that the hearing officer be given written notification of any actions taken as a result of the decision. The record of the hearing will be maintained, and kept confidential, by the EDR coordinator.

*Record of final decisions* - When final action has been taken on a complaint and it is no longer subject to review, final decisions under this Plan may only be made available to the public in accordance with procedures established by the Second Circuit Judicial Council (set out below). Documents other than the final decision will only be released pursuant to a determination by the hearing officer, and only upon application, on notice to all parties to the dispute resolution proceedings, and upon such terms as the hearing officer deems to be warranted.

### **Clarification of the terms “claim” and “complaint”:**

As defined in the Model EDR Plan the term “claim” means the filing of a request for counseling as set forth in Chapter IX, Section 8 which may be further pursued by the filing of a request for mediation and a request for hearing. During the counseling and mediation stages the allegations are referred to as a claim.

If the claim is not resolved by the conclusion of the mediation process, the employee may file a complaint to pursue further relief with respect to his or her allegations. A complaint must be filed within 15 days of receiving notice of the close of the mediation period. Claims that were not presented in writing during the mediation process (Chapter IX, Section 9A) may not be pursued through a complaint under the EDR Plan.

### **Resolution of claim during the counseling or mediation stages:**

The EDR coordinator shall reduce to writing any resolution of claim achieved during the counseling stage and secure the signatures of the employee, his or her representative, if any, and the member of the employing office who is authorized to enter into a settlement on the behalf of the employing office.

If the resolution occurs during the mediation process, the person acting as the mediator will be responsible for preparing the settlement agreement and securing the signatures of the employee, his or her representative (if any), and the person authorized to enter into a settlement on behalf of the employing office.

### **The procedure for filing a complaint:**

The complaint shall be made in writing to the EDR coordinator who will deliver the complaint to the Chief Judge of the Bankruptcy Court by the next business day. The complaint may be delivered in person or electronically (in a scanned PDF document). The Chief Judge of the Bankruptcy Court will serve as the hearing officer in all hearings related to the complaint (with the exception of disqualification or recusal as outlined in Chapter IX, Section 7).

The complaint shall identify the complainant and all involved parties and individuals, and identify the respondent as the court or “employing office” – not by individual name.

The complaint may not raise any claims that were not presented in writing during the mediation stage.

### **Clarification of Chapter VIII – Reports of wrongful conduct:**

Filing a report of wrongful conduct is not the same as initiating a claim under the EDR Plan. If an employee of this court observes wrongful conduct toward another employee, he/she is encouraged to report it to the court’s EDR coordinator, the chief judge, the clerk of court, the human resources manager, or his/her supervisor as soon as possible. The person receiving the report has a duty to notify the EDR coordinator as soon as possible. It is then the EDR coordinator’s responsibility to inform the chief judge and clerk of court of the report to ensure that the allegations are appropriately investigated.

Employees found to have engaged in wrongful conduct may be subject to disciplinary action. Employees who have been the subject of wrongful conduct may have an EDR claim. Retaliation against any employee making a report of wrongful conduct is prohibited and is a basis for disciplinary action.

### **Chapter IX – Dispute Resolution Procedures - Section 5, General provisions and protections -** (identified by reference to the Plan lettering of subsections)

#### *B. Right to representation –*

Both the claimant and the head of the court unit involved in proceedings under the Model EDR Plan are entitled to representation in the EDR process. The head of the court unit will engage legal representation which may be funded from the local budget (to the extent possible). If the head of the court unit has questions regarding the use of local funds for this purpose, relative to the local budget, he or she will rely upon guidance from the Office of General Counsel.

A court employee may accept the responsibility of representing another employee if it will not unduly interfere with his or her court duties or constitute a conflict of interest, as determined by the representative's appointing officer. Employees who choose to hire someone to represent them will be personally responsible for the costs incurred for their representation in the EDR process.

#### *C. Case preparation –*

To the extent feasible, every individual invoking the dispute resolution procedures of the EDR Plan may use up to 16 hours 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. The head of the court unit will also be granted up to 16 hours of official time for the same purpose, on the same terms. Any person using work time to prepare his or her case under the EDR plan must keep time records, and may be required to present them.

#### *D. Extensions of time -*

Upon written request, the chief judge may extend any deadline as set forth in the EDR Plan process for good cause. The request may be made to the chief judge directly or through the EDR coordinator and must set forth the length of extension sought and the circumstances that warrant the extension. The written request should be served on the other party and whenever possible agreed upon and filed jointly. The chief judge will notify the parties of the ruling on the request(s) through the EDR coordinator.

#### *E. Dismissal of claim (Note: A request for dismissal of a complaint will be handled in the same manner) -*

Requests for the dismissal of a claim must be made in writing and given to the chief judge directly or through the EDR coordinator. The request for dismissal must set forth the grounds on which the party is seeking to have the claim dismissed and be served on the other party. The claimant will have five days to file a response with the chief judge after delivery of notice of the request to dismiss. The chief judge may, at his or her discretion, hold a hearing. The claim process will be stayed until the request for dismissal is decided. If a claim or complaint is dismissed, the claimant is authorized to seek review of the decision from the Second Circuit Judicial Council, in the same manner as one seeks review from a hearing decision.

Where the hearing officer has decided there are grounds to dismiss a complaint *sua sponte*, the hearing officer will give notice, through the EDR coordinator to all parties, of the proposed dismissal, the reason for the proposed dismissal, and the deadline to respond to the notice that the court is considering dismissal of the complaint.

#### **Chapter IX – Dispute Resolution Procedures - Section 7, General disqualification provision -**

Any person seeking disqualification or recusal of an EDR coordinator, mediator, or hearing officer shall submit a written motion to the chief judge setting forth the reason for the requested disqualification or recusal. Disqualification or recusal of the EDR coordinator, mediator, chief judge, or hearing officer are not warranted solely because the court is named as the responding party or because said individual is acquainted with the parties.

In determining whether disqualification or recusal is warranted, the chief judge shall consider the factors, circumstances, and considerations set forth in 28 U.S.C. § 455. If the chief judge determines that disqualification or recusal is warranted, the chief judge will designate another individual to act as the EDR coordinator, mediator, or hearing officer (in the latter case, the hearing officer shall request a chief judge of another bankruptcy court to serve as the hearing officer). The decision of the chief judge on recusal or disqualification will be final.

If the court unit executive is the alleged violator of an EDR Plan provision, the chief judge may direct an individual other than the court unit executive to be responsible for overseeing the representation of the employing office.

If the dispute alleges violation by a judge, the EDR coordinator will ask the circuit court to appoint a judicial official to serve as a mediator during the mediation stage and if a hearing will be held, the EDR coordinator will ask the circuit court to appoint another judge to serve as hearing officer at the hearing stage.

The chief judge may disqualify him or herself from participating in any proceeding under the EDR Plan if the chief judge, in his or her discretion, concludes that circumstances warrant disqualification.

## **Chapter IX – Dispute Resolution Procedures -Section 9, Mediation –**

The primary goal of mediation is to assist the parties in reaching a lasting resolution to the issues or problems raised during counseling. Generally, the mediator will first meet with the parties. Thereafter, the mediation may be conducted in joint meetings or separate meetings held between the mediator and each party. The decision to conduct joint or separate meetings is solely within the mediator's discretion, based on his or her judgment as to the most effective means of addressing the dispute and circumstances presented. Factors the mediator will consider include the nature of the issues, the emotional volatility of the issues, and the number of individuals involved. The mediator, as a neutral party, can view the dispute objectively, and assist the parties to explore resolution alternatives that they may not have considered on their own. If mediation continues and the matter is not resolved during the 30-day period, the mediator will inform the EDR coordinator that the mediation has concluded without resolution by providing the EDR coordinator with a mediation disposition report. The mediator is to keep record of any/all claims raised during the mediation phase. There is no provision in the Model EDR Plan for a mediator's report. At the conclusion of the mediation, the mediator is to keep all notes taken during the mediation session. If there is any question as to whether the matter is related to a claim raised in mediation, the hearing officer shall issue a written request for the mediator's records. The mediator is required to provide his or her records promptly upon receipt of such a request.

Upon receipt of the request for mediation services, the EDR coordinator will alert the chief judge and the clerk of court that the parties have decided to proceed to the next phase of the EDR process.

### *The procedure for designating a mediator –*

Whether a paid mediator may be engaged for any particular dispute is dependent on the court's budget and availability of funds for that purpose. Immediately upon receipt of the request for mediation, the EDR coordinator will inquire of the clerk of court as to the status of the court's budget, and if funds are available will request an allocation of funds for mediation services. Any person with the skills to assist in resolving disputes, except the court's EDR coordinator, may serve as a mediator under this Plan.

If court funding is available, the EDR coordinator will provide the parties with a list of three potential paid mediators. Within three days of receipt of the list, each of the parties shall strike one of the three mediators and rank the other two in order of choice and return the list with their choices so marked to the EDR coordinator along with dates in the next 30 days when he or she is not available for a mediation session. The EDR coordinator will arrange for the mediation services and inform the parties of the date, time and location.

If no court funding is available, the EDR coordinator will select a mediator from a government agency from within the circuit. The EDR coordinator will interview the proposed mediator to insure that he or she has no relationship with any party involved in the dispute that would constitute a conflict or impede the mediator's impartiality.

The mediation must be concluded within 30 days from the date the EDR coordinator receives the request for mediation, unless extended by the chief judge for cause shown.

Within two business days of the conclusion of the mediation period, if the parties have not resolved the matter, the EDR coordinator will provide the employee, the employee's representative (if any), and the employing office with written notice that the mediation period has concluded and that the employee has the right to file a complaint under Chapter IX, Section 10 of the Model EDR Plan within 15 days of receipt of said notice.

## **Chapter IX – Dispute Resolution Procedures - Section 10, Complaint and hearing –**

Not later than 15 days after receiving written notice of the end of the mediation period, the employee claiming a denial of rights granted under Chapters II through VII of the Model EDR Plan, may file a complaint. The EDR coordinator will work to facilitate a smooth processing of the formal complaint, but is neutral in the matter and may not actively participate in the investigation or hearing process, and may not give advice to any party to the dispute.

The complaint must be in writing, must identify the complainant and all involved parties, and must set forth a statement of the complainant's claim and the relief/remedy the complainant is seeking. Claims that were not presented in writing or documented during the mediation stage may **not** be pursued at the complaint stage. The hearing officer shall have access to the record of the claims raised in mediation, as well as the mediator's notes and the counselor's notes.

The respondent identified in the caption of the complaint and referred to in allegations is the responsible employing office - not an individual. The complainant shall deliver the signed written complaint to the EDR coordinator who, in turn, will provide it to the chief judge. The chief judge will determine whether any conflict exists that might impede her/his impartiality to serve as the hearing officer, and if so shall request the chief judge of another bankruptcy court to serve as the hearing officer for the dispute.

The chief judge or hearing officer will review the complaint and determine whether (a) the complaint should be dismissed on the grounds outlined in Chapter IX § 5 E, (b) a hearing needs to be held on the merits, or (c) she or he can make a decision on the merits of the complaint without a hearing because there are no material facts in dispute. The chief judge or hearing officer will notify the complainant and the head of the responsible employing office whether a hearing will be held, and if so, of the time, place and manner of conducting the hearing on the merits, by issuing a notice to them through the EDR coordinator.

The hearing must be commenced no later than 60 days after the filing of the complaint. At the initial hearing, the hearing officer will ascertain if the parties are ready to proceed on the merits or if a scheduling order directing discovery and further investigation is needed. The hearing officer will hold all hearings as expeditiously as possible, take all reasonable steps to preserve the confidentiality of the hearing, and ensure that a verbatim record of the hearing is kept.

At the hearing, the complainant has the burden of proving by a preponderance of the evidence that a substantive right protected by this court's EDR Plan has been violated.

At any hearing on the merits, the complainant-employee will have the right to representation, to present evidence on his or her behalf, and to cross examine witnesses. The employing office has the same rights. The hearing officer may also examine witnesses. The hearing officer will issue a final decision in writing and provide to the parties and the EDR coordinator not later than 30 days after the conclusion of the hearing. All parties, or any aggrieved individual, shall have the right to written notice of any action taken as a result of a hearing, and may request that the hearing officer also receive such written notice.

## **Chapter IX – Dispute Resolution Procedures - Section 11, Review of decision -**

Upon receipt of the final decision, or dismissal by the hearing officer, the EDR coordinator will immediately notify each party of the right to petition for review under the procedures established by the Second Circuit Judicial Council. The review will be based on the record created by the hearing officer.

## **Chapter IX – Dispute Resolution Procedures - Section 13, Record of final decisions -**

Final decisions under this court's Model EDR Plan shall be made available to the public in accordance with the procedures established by the Second Circuit Judicial Council in Petitions For Review of Final Decisions From the Court of Appeals, District and Bankruptcy Courts, Probation and Pretrial Services of Employee Dispute Resolution Complaints, Adopted December 14, 2011. See attached copy. The attached copy refers to a petition for review form, Appendix A. Appendix A is a form fillable document available from the EDR coordinator upon request.

**SECOND CIRCUIT JUDICIAL COUNCIL  
PETITIONS FOR REVIEW OF FINAL DECISIONS FROM THE COURT OF  
APPEALS, DISTRICT and BANKRUPTCY COURTS, PROBATION and PRETRIAL  
SERVICES OF EMPLOYEE DISPUTE RESOLUTION COMPLAINTS**

**Adopted:** December 14, 2011

**A. Preamble.** These rules are adopted under Section 11 of the Federal Judiciary Model Employment Dispute Resolution Plan (“Model EDR Plan”). The definitions contained in the Model EDR Plan are incorporated herein.

**B. Petitions for Review.** A party or individual aggrieved by a final decision of the chief district judge or presiding judicial officer, or by a summary dismissal of the complaint, may petition for review to the Second Circuit Judicial Council. A panel of no fewer than five members of the Judicial Council conducts the review. The review is based on the record created by the hearing officer. The panel must affirm the decision if supported by substantial evidence. The determination of the panel is not subject to further review.

**B.[sic] When to file; Form; Where to file.** A petition for review must be filed in the Office of the Circuit Executive within 30 days after entry of the final decision or summary dismissal. A claim that was not presented in the complaint may not be pursued in the petition for review. Petitioner shall utilize the petition for review form, Appendix A of the Plan.

**C. Response.** Within 21 days after the filing of the petition for review (or any later corrected petition for review), a response may be filed with the Office of the Circuit Executive, addressing only the specific claims raised in the petition.

**D. Receipt and Distribution of Petition and Response.** The Circuit Executive will acknowledge receipt of a timely petition or response, and send a copy to the opposing party.

**E. Untimely Filing.** The Circuit Executive must refuse to accept a petition or response that is received after the applicable deadline in (B) or (C).

**F. Timely Filing not in Proper Form.** If a timely petition or response is not in a form that would allow useful consideration by the Judicial Council, the Circuit Executive will advise the filer to correct the deficiencies within 14 days; otherwise the petition or response will be rejected.

**G. Notice of the Panel's Decision.** The Circuit Executive will promptly distribute a copy of the panel's decision to the petitioner, the respondent, and the hearing officer. The panel may also instruct the Circuit Executive to provide a copy to the Judicial Conference Committee on Judicial Conduct and Disability.

**H. Public Availability of the Panel's Decision.** When final action has been taken on a petition, all orders entered by the panel may be made public, without disclosure (however) of identifying information as to any party or individual, including the names of the complainant, the respondent, and the person alleged to have violated the complainant's rights.