IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, v. SOUTHEASTERN OKLAHOMA STATE UNIVERSITY; and THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA, Defendants.	)	Case No. CIV-15-324-C

DEFENDANTS SOUTHEASTERN OKLAHOMA STATE UNIVERSITY AND THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S MOTION TO DISMISS PLAINTIFF/INTERVENOR'S COMPLAINT IN PART AND BRIEF IN SUPPORT

COME NOW Defendants, Southeastern Oklahoma State University ("SEOSU"), and The Regional University System of Oklahoma ("RUSO"), (collectively "University Defendants" or "the State"), and pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) move this Court for an order dismissing Plaintiff/Intervenor's Complaint [Doc. No. 24] in part.

STATEMENT OF THE CASE

Intervenor failed to take advantage of the academic and professional opportunities offered to her by the University Defendants in her pursuit of a tenured position at SEOSU. Instead, Intervenor ignored the academic and professional advice she received from University leadership, pushed forward with her application for tenure before it was ready, and ultimately failed to attain tenure as a result. Rather than taking responsibility for her cavalier approach to an important and detail-oriented process, Intervenor filed grievances, complaints and the present lawsuit. Now the

State is called upon to defend claims by a disgruntled former employee who recklessly casts aspersions on the University Defendants and their employees. Although the University Defendants elect to answer (rather than seek dismissal of) certain counts set forth by the Plaintiff and by the Intervenor, the University Defendants presently seek dismissal of Count One of Intervenor's Complaint. As set forth more fully below, Count One of Intervenor's Complaint should be dismissed with prejudice.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) empowers a court to dismiss a complaint for "lack of jurisdiction over the subject matter." A Rule 12(b)(1) motion to dismiss "must be determined from the allegations of fact in the complaint, without regard to mere conclusory allegations of jurisdiction." *Groundhog v. Keller*, 442 F.2d 674, 677 (10th Cir. 1971). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *See Basso v. Utah Power and Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974); *Eagle Air Med Corp. v. Martin*, No. 08-CV-00532LT, 2009 WL 651800 (D. Colo. Mar. 12, 2009) *aff'd*, 377 F. App'x 823 (10th Cir. 2010).

Federal Rule of Civil Procedure (12)(b)(6) empowers a court to dismiss a complaint for failure to state claims upon which relief may be granted. Motions to dismiss are properly granted when a complaint provides no more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In deciding a 12(b)(6) motion a court must accept all the well-pleaded allegations of the complaint as true, and must construe the allegations in the light most favorable to the claimant. *Id.*; *Alvarado v. KOBTV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007). But the complaint must contain enough

"facts to state a claim to relief that is plausible on its face" and those factual allegations "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 570 (citations omitted). Thus, "in analyzing the sufficiency of the [Intervenor's] complaint, the court need accept as true only the [Intervenor's] well-pleaded factual contentions, not h[er] conclusory allegations." *Hall v. Bellmon*, 935 F.2d 1106, 1109-10 (10th Cir. 1991).

ARGUMENT AND AUTHORITY

I. INTERVENOR'S COMPLAINT LACKS SUFFICIENT SUPPORTING FACTUAL AVERMENTS TO MAINTAIN THE TITLE VII HOSTILE WORK ENVIRONMENT CLAIM.

Intervenor's Complaint fails to state a hostile work environment claim. "The words 'hostile work environment' are not talismanic, for they are but a legal conclusion; it is the alleged facts supporting those words, construed liberally, which are the proper focus at the motion to dismiss stage." *Moya v. Schollenbarger*, 465 F.3d 444, 457 (10th Cir.2006) (citation omitted). In order to set forth a prima facie case of hostile work environment sexual harassment, Intervenor must show "(1) that she was discriminated against because of her sex; and (2) that the discrimination was sufficiently severe or pervasive such that it altered the terms or conditions of her employment and created an abusive working environment." *Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1134 (10th Cir. 2005). This requires a plaintiff to show that "the environment was both objectively and subjectively hostile or abusive." *Davis v. U.S. Postal Serv.*, 142 F.3d 1334, 1341 (10th Cir. 1998).[1]

However, "Title VII does not establish a general civility code for the workplace," and given that "[w]orkplaces are not always harmonious locales, [] even incidents that would

[1] The Tenth Circuit Court of Appeals has explicitly held that "transsexuals are not a protected class under Title VII . . . ." *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1220 (10th Cir. 2007).

objectively give rise to bruised or wounded feelings will not on that account satisfy the severe or pervasive standard. Some rolling with the punches is a fact of workplace life." *Morris v. City of Colo. Springs*, 666 F.3d 654, 663-64 (10th Cir. 2012) (citations and internal marks omitted). In other words, the law is "not a federal guarantee of refinement and sophistication in the workplace," *id.* at 668 (citation omitted), and "not all workplace conduct that may be described as harassment affects a term, condition, or privilege of employment within the meaning of Title VII," *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). A "few isolated incidents" of "sporadic" offensive behavior, as opposed to "a steady barrage of opprobrious" harassment, is not enough to make out a hostile work environment claim, *id.* at 665-66 (quoting *Chavez v. New Mexico*, 397 F.3d 826, 832 (10th Cir. 2005)), unless those few events amount to such extreme behavior as physical or sexual assault, *id.* at 666-68.

Intervenor's Complaint fails to allege sufficient facts to show that any harassment based on sex (which, in any event, did not occur) was so severe or pervasive such that it altered the terms or conditions of her employment and created a hostile working environment. Aside from the denial of tenure, Intervenor's Complaint alleges without specificity (as to either date or person) three instances of supposed harassment: (1) she was once told not to wear certain types of clothing by "an employee" of the University [Doc. No. 24, ¶ 64]; (2) she was told by "an employee" [Doc. No. 24, ¶¶ 45-47] and/or "a Southeastern administrator" [Doc. No. 24, ¶ 51] which restroom she should use; and (3) the University's health insurance company did not cover certain procedures.[2] Apart

[2] Even if the allegations are true, those actions do not constitute sexual harassment by Defendants. For example, with regard to the health insurance plan, there is no allegation that any specific exclusions or limitations were requested or controlled by the University Defendants. There is no allegation that any limitations were aimed at Intervenor or any particular groups of employees or were so pervasive as to create a hostile work environment. And just like Intervenor's failure to complain about any restroom or wardrobe limitations for roughly four years, there is no allegation that any complaints of any kind were raised about the health insurance plan.

from her own conclusory statements about a "campaign of harassment," these few allegations of comments regarding her bathroom or wardrobe designations and her health insurance plan, spread out over the span of four years, do not objectively have the requisite frequency or severity of conditions to raise a claim of hostile work environment. *See Morris*, 666 F.3d at 666, 669 (few "isolated incidents" of verbal harassment and throwing biological waste at employee does not make out a hostile work environment claim, and collecting cases); *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1365-66 (10th Cir. 1997) ("five separate incidents of allegedly sexually-oriented, offensive comments either directed to [the plaintiff] or made in her presence in a sixteen month period" were not sufficiently pervasive to support a hostile work environment claim); *cf. Witt v. Roadway Exp.*, 136 F.3d 1424, 1428-29, 1432 (10th Cir. 1998) (two incidents over two years where employee was called a "n****r," including "F*** that n****r, he don't have no rights" in response the employee's complaint, did not constitute a hostile work environment).

Not only do her allegations fail to meet the objective requirements of her claim, she also fails to allege subjective hostility, as it does not appear that Intervenor's Complaint alleges that she ever actually objected (verbally or in writing) to the alleged directions regarding restroom usage or her wardrobe or to the content of her health insurance plan, over a timespan of "nearly four years," [Doc. No. 24, ¶ 53]. *See Morris*, 666 F.3d at 669 (failure to complain of incident for several days and continuing to work for employer for three months suggests incident not subjectively severe).

Even assuming the alleged actions are true and do not constitute Defendant's employees' good-faith efforts to adjust to a relatively new cultural development, and are instead viewed in the light most favorable to Intervenor, these allegations do not constitute a sufficiently severe or pervasive set of abuses such that they objectively and subjectively altered the terms or conditions

of Intervenor's employment and created an abusive working environment. The meager factual support set forth in Intervenor's Complaint does not provide a plausible basis for Intervenor's legal conclusions, and should be dismissed.

II. INTERVENOR FAILED TO EXHAUST ADMINISTRATIVE REMEDIES AS TO ANY "HOSTILE WORK ENVIRONMENT" CLAIM, AND ANY SUCH CLAIM WOULD NOW BE UNTIMELY.

Intervenor failed to exhaust her administrative remedies as to any "hostile work environment" claim. Intervenor does not allege that she filed an EEOC charge of "hostile work environment,"[3] nor does she allege that she filed such a charge with any relevant State agency.

An elementary requirement for suit under Title VII is that, before bringing an action against an employer for an unlawful employment practice, an employee must file a complaint with the Equal Employment Opportunity Commission ("EEOC") within 180 days after the unlawful practice occurred. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002) (citing 42 U.S.C. § 2000e-5(e)). At minimum, this requires "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of," and "each discrete act of discrimination (such as termination, failure to promote, denial of transfer, or refusal to hire)" must "be described in and the subject of a timely filed charge." *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1166 (10th Cir. 2007) (citations omitted). "If the employee does not submit a timely EEOC charge, he or she may not proceed to court." *Id.* at 1163.

[3] Correspondence from the U.S. Department of Education (attached hereto as Exhibit 1) confirms that Intervenor's complaint was for employment discrimination based on race and sex when SEOSU decided not to grant Intervenor tenure, not for "hostile work environment." Defendants request this Court take judicial notice of Exhibit 1, but not convert this Motion to Dismiss into one for Summary Judgment. *See Jenkins v. Educ. Credit mgmt. Corp.*, 212 Fed. App'x 729, 732-33 (10th Cir. 2007) ("[I]t is appropriate, particularly in the exhaustion context, for a district court to consider evidence beyond the pleadings in resolving a challenge to subject-matter jurisdiction."); *Sizova v. NIST*, 282 F.3d 1320, 1324 (10th Cir. 2002); *Martinez v. City & County of Denver*, 2010 WL 1380529 at *1 (D. Colo. Mar. 31, 2010) (taking judicial notice of discrimination charges filed with the EEOC on a motion to dismiss).

Intervenor's Complaint conclusorily alleges that she filed "a timely charge" on September 9, 2010 with the U.S. Department of Education, purportedly then forwarded to the EEOC, alleging that she was subjected to "sex discrimination" when SEOSU denied Intervenor's tenure application. [Doc. No. 24, ¶ 6]. Intervenor then alleges she supplemented her charge on July 12, 2011 to allege sex discrimination and retaliation. At no point does she ever allege that she included a charge of "hostile work environment" in her complaints to the EEOC. Because "[n]owhere in [her EEO claim] did Plaintiff allege that she was subject to a hostile work environment because of her gender," and because "Plaintiff has offered no argument or evidence demonstrating that she filed a separate EEO claim raising allegations of sexual harassment/hostile work environment based on gender, . . . it is clear that Plaintiff did not exhaust the required administrative remedies prior to filing the present action" and, "[c]onsequently, the Court lacks subject matter jurisdiction to consider that claim." *Gilpin v. Potter*, 2007 WL 1959284, *1 (W.D. Okla. July 2, 2007) (Cauthron, J.) (citing *Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1325 (10th Cir. 2002)); *see also Martinez v. Potter*, 347 F.3d 1208, 1210-11 (10th Cir. 2003). Accordingly, pursuant to Federal Rule of Civil Procedure 12(b)(1), Count One of Intervenor's complaint must be dismissed.[4]

The "procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts" and equitable doctrines such as tolling and estoppel are to be used sparingly. *Morgan*, 536 U.S. at 113-14. "[E]quitable tolling may be appropriate where plaintiff has been lulled into inaction by her past employer, state or federal agencies, or the courts

[4] Even if Intervenor's newly brought "hostile work environment" was somehow properly exhausted, Intervenor never alleges that she received the requisite Notice of Right to Sue from the EEOC on this charge, providing yet another independent reason for dismissal. 42 U.S.C. § 2000e-5(f)(1); *Rodriguez v. Wet Ink, LLC*, 603 F.3d 810, 812 (10th Cir. 2010) ("Both state and federal law require discrimination complainants to receive right-to-sue notice to file private civil actions.").

. . . is actively misled, or has in some extraordinary way been prevented from asserting his or her rights." *Martinez v. Orr*, 738 F.2d 1107, 1110 (10th Cir. 1984) (citations omitted). Here, there is no reason to excuse Intervenor's disregard for administrative requirements precedent to her bringing a claim for "hostile work environment." There is no suggestion that any party lulled Intervenor into inaction, or misled or prevented her from filing the requisite additional EEOC charges. In fact, there is every indication that the Intervenor was in the past, and is currently, actively engaged with Federal officials during the investigation, preparation, and coordination of the present lawsuit.

These attempts to sandbag employers and the EEOC are contrary to the important policy considerations behind the Congressionally-mandated exhaustion requirements. "[R]equiring exhaustion of administrative remedies serves to put an employer on notice of a violation prior to the commencement of judicial proceedings," which also "facilitate[s] internal resolution of the issue rather than promoting costly and time-consuming litigation." *Martinez*, 347 F.3d at 1211. Congress desired that even a dysfunctional employment situation have the possibility of being corrected by the employer so as to allow all parties to proceed with a healthy working relationship and without resorting to litigation. After "nearly four years" of allegedly restricted restroom access and allegedly inadequate health insurance, and an indeterminate number of years of alleged wardrobe restriction while employed at SEOSU, Intervenor failed to file a charge of "hostile work environment," thereby eliminating the possibility of amicable resolution and frustrating the Congressional plan.

Nor could any failure to exhaust possibly be cured in this case. Today, after nearly four years since she worked at SEOSU [Doc. No. 24, ¶ 119], and *eight* years since the allegedly discriminatory practices occurred, she has still not filed a charge with the EEOC as to a "hostile

work environment" claim. Her time to file any such charge with the EEOC (180 days) has long ago passed, and Count One of the Intervenor's Complaint must be dismissed.

III. THE DOCTRINE OF LACHES BARS INTERVENOR'S COMPLAINT

"Laches consists of two elements, inexcusable delay in instituting suit and prejudice resulting to the defendant from such delay." *Alexander v. Phillips Petroleum Co.*, 130 F.2d 593, 605 (10th Cir. 1942). Based on Intervenor's Complaint, she began her gender transition in 2007 and alleges she was subjected to discrimination at SEOSU starting sometime soon thereafter, receiving her non-renewal in 2011. For most of that time, at least according to her Complaint, Intervenor made no complaints or objections, formally or informally, verbally or in writing, to the University Defendants regarding the way their employees treated her, or regarding her work environment at SEOSU. In 2010 she involved the Federal Government in her complaints against SEOSU. Notably, no complaints or objections are alleged to have been raised until *after* Intervenor failed to attain tenure. Even once that had happened, Plaintiff and Intervenor did not bring their lawsuits until nearly another four years had passed, seemingly without any real justification for the delay. Thus, there was significant delay by Intervenor both in raising her concerns and in filing of her lawsuit, especially with respect to her "hostile work environment" claim.

Intervenor's delay prejudices the University Defendants. As the Supreme Court has noted:

> When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the government service may be disturbed as little as possible and that two salaries shall not be paid for a single service.

U.S. ex rel. Arant v. Lane, 249 U.S. 367, 372 (1919). In that case, the plaintiff relator failed to bring his claims for explanation of termination and reinstatement for nearly two years. The Supreme

Court held that, because "the relator did nothing to effectively assert his claim for reinstatement to office for almost two years," and because "[s]uch a long delay must necessarily result in changes in the branch of the service to which he was attached and in such an accumulation of unearned salary," a "manifest inequity [] would result from reinstating him, render[ing] the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy." *Id.*

In the case at bar, Intervenor allegedly waited some four years to lodge grievances with her employer, after which Intervenor and the United States waited nearly four more years to bring their current suits. To order reinstatement (as sought by Intervenor) would be manifestly unjust. If Intervenor was aware of tortious conduct in 2007, she should have reported it then, and not be allowed to sit back for eight years in order to accumulate damages before making any complaint. Moreover, by waiting so long to bring her initial grievances/charges, and then compounding that delay by waiting so long to file her lawsuit, Intervenor has worked to prejudice the University Defendants by allowing the passage of time to potentially destroy or obfuscate evidence favorable to the University. As employees retire or otherwise separate from the University and as memories fade, it becomes more difficult each day, month, and year that passes to ensure the availability and reliability of evidence. *See Powell v. Zuckert*, 366 F.2d 634, 638 (D.C. Cir. 1966) (citation omitted). Some eight years after the initial mistreatment is alleged by Intervenor to have happened, the University is now forced to muster its defenses and is deprived of the ability address these concerns in a timely fashion that could have potentially averted litigation altogether. Intervenor should not be permitted to benefit from her intentionally dilatory conduct, and thus dismissal is appropriate.

CONCLUSION

Count One of Intervenor's Complaint is fatally flawed, and should be dismissed with prejudice. Intervenor fails to allege proper and timely compliance with Title VII's exhaustion requirements, fails to establish this Court's jurisdiction over the putative hostile work environment claim, and fails to allege sufficient factual averments to state a claim in compliance with *Twombly* and *Iqbal*. For the reasons set forth above, Defendants pray this Court to dismiss Count One with prejudice, and for all such other relief as this Court deems appropriate.

Respectfully submitted,

/s/ Mithun Mansinghani
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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of May, 2015, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Allan Townsend Delora Kennebrew Meredith Burrell Shayna Bloom US Dept of Justice Civil Rights Division-DC 950 Pennsylvania Avenue NW Rm 49258 PHB Washington, DC 20530 Email: allan.townsend@usdoj.gov delora.kennebrew@usdoj.gov meredith.burrell@usdoj.gov *Attorneys for United States of America*	Brittany Novotny 401 N. Hudson Ave Oklahoma City, OK 73102 Email: brittany.novotny@gmail.com *Attorney for Intervenor Plaintiff*
Jillian Weiss Ezra Young Law Office of Jillian T. Weiss, P.C. P.O. Box 642 Tuxedo Park, NY 10987 Email: jtweiss@jtweisslaw.com eyoung@jtweisslaw.com *Attorney for Intervenor Plaintiff*	

/s/ Mithun Mansinghani
Mithun Mansinghani

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UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS - REGION VII

September 15, 2010

RECEIVED

SEP 17 2010

President's Office

Dr. Larry Minks, President
Southeastern Oklahoma State University
1405 North 4th Street
Durant, Oklahoma 75701

Re: OCR Docket # 07102099

Dear Dr. Minks:

On September 9, 2010, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received the above-referenced complaint against Southeastern Oklahoma State University (University), Durant, Oklahoma, solely alleging employment discrimination. The complainant alleges the College discriminated against her when it decided to not award her tenure.

Under certain circumstances, we are required to refer allegations of employment discrimination to the Equal Employment Opportunity Commission (EEOC). We will inform you within 30 days whether we will handle the complaint or whether we will refer it to the EEOC for further action.

OCR's determination regarding whether this complaint is complete or timely under OCR's case processing rules will be deferred until it has been determined whether OCR or the EEOC will investigate the complaint. If the EEOC investigates the complaint, the EEOC will consider the complaint to have been received on the date that OCR received it, unless the EEOC received an earlier complaint.

If you have any questions, please contact me at (816) 268-0571 or (877) 521-2172 (telecommunications device for the deaf), or by email at karl.menninger@ed.gov.

Sincerely,

Karl Menninger
Supervisory Attorney

Attachment I

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS – REGION VII

October 12, 2010

Dr. Larry Minks, President
Southeastern Oklahoma State University
1405 North 4th Street
Durant, Oklahoma 74701

Re: OCR Docket # 07102099

Dear Dr. Minks:

On September 7, 2010, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received the above-referenced complaint against Southeastern Oklahoma State University (University), Durant, Oklahoma, solely alleging employment discrimination. The complainant alleges the College discriminated against her on the bases of race and sex when it decided to not grant her tenure.

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments Act of 1972, which prohibit discrimination on the bases of race, color, or national origin, and sex, respectively, by recipients of Federal financial assistance. Although the University receives funds from the Department, government-wide regulations require us to refer this complaint to the EEOC. The EEOC may have authority to investigate this complaint under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the bases of race, color, national origin, sex, and religion. This referral also delegates to the EEOC our investigative authority under the applicable statutes and regulations enforced by OCR.

We are referring this complaint to the EEOC at the following address and numbers:

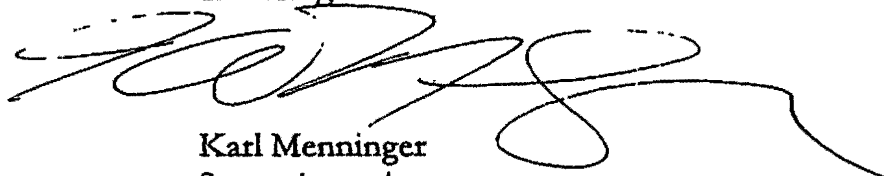
Equal Employment Opportunity Commission
St. Louis District Office
Robert A. Young Federal Building
1222 Spruce Street
Room 8.100
St. Louis, Missouri 63103

Phone: 1-800-669-4000
Fax: 314-539-7894
Website: www.eeoc.gov

The EEOC will consider the date of filing to be the date the complaint was filed with OCR unless an earlier complaint was filed with the EEOC. We are also notifying the complainant that this complaint has been referred to the EEOC.

The enclosed document entitled *OCR Complaint Processing Procedures* contains additional information about OCR and the laws we enforce. If you have any questions, please contact the EEOC at the number shown above, or me at (816) 268-0571 (voice) or (877) 521-2172 (telecommunications device for the deaf), or by email at karl.menninger@ed.gov.

Sincerely,



Karl Menninger
Supervisory Attorney

Enclosure

OCR COMPLAINT PROCESSING PROCEDURES

LAWS ENFORCED BY OCR

OCR enforces the following laws:

- Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color or national origin;
- Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex;
- Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability;
- Age Discrimination Act of 1975, which prohibits discrimination on the basis of age;
- Title II of the Americans with Disabilities Act of 1990, which prohibits discrimination on the basis of disability;
- Boy Scouts of America Equal Access Act, part of the No Child Left Behind Act of 2001, which prohibits denial of access to or other discrimination against the Boy Scouts or other Title 36 U.S.C. youth groups in public elementary schools, public secondary schools, local education agencies, and state education agencies that have a designated open forum or limited public forum.

EVALUATION OF THE COMPLAINT

OCR evaluates each complaint that it receives in order to determine whether it can investigate the complaint. OCR makes this determination with respect to each allegation in the complaint. For example, OCR must determine whether OCR has legal authority to investigate the complaint; that is, whether the complaint alleges a violation of one or more of the laws OCR enforces. OCR must also determine whether the complaint is filed on time. Generally, a complaint must be filed with OCR within 180 calendar days of the last act that the complainant believes was discriminatory.[1] If the complaint is not filed on time, the complainant should provide the reason for the delay and request a waiver of this filing requirement. OCR will decide whether to grant the waiver. In addition, OCR will determine whether the complaint contains enough information about the alleged discrimination to proceed to investigation. If OCR needs more information in order to clarify the complaint, it will contact the complainant; the complainant has 20 calendar days within which to respond to OCR's request for information.

OCR will dismiss a complaint if OCR determines that:

- OCR does not have legal authority to investigate the complaint;
- The complaint fails to state a violation of one of the laws OCR enforces;

[1] Complaints that allege discrimination based on age are timely if filed with OCR within 180 calendar days of the date the complainant first knew about the alleged discrimination.

- The complaint was not filed timely and that a waiver will not be granted;
- The complaint is unclear or incomplete and the complainant does not provide the information that OCR requests within 20 calendar days of OCR's request;
- The allegations raised by the complaint have been resolved;
- The complaint has been investigated by another Federal, state, or local civil rights agency or through a recipient's internal grievance procedures, including due process proceedings, and the resolution meets OCR regulatory standards or, if still pending, OCR anticipates that there will be a comparable resolution process under comparable legal standards;
- The same allegations have been filed by the complainant against the same recipient in state or Federal court;
- The allegations are foreclosed by previous decisions of the Federal courts, the U.S. Secretary of Education, the U.S. Department of Education's Civil Rights Reviewing Authority, or OCR policy determinations.

OPENING THE COMPLAINT FOR INVESTIGATION

If OCR determines that it will investigate the complaint, it will issue letters of notification to the complainant and the recipient. Opening a complaint for investigation in no way implies that OCR has made a determination with regard to the merits of the complaint. During the investigation, OCR is a neutral fact-finder. OCR will collect and analyze relevant evidence from the complainant, the recipient, and other sources as appropriate. OCR will ensure that investigations are legally sufficient and are dispositive of the allegations raised in the complaint.

INVESTIGATION OF THE COMPLAINT

OCR may use a variety of fact-finding techniques in its investigation of a complaint. These techniques may include reviewing documentary evidence submitted by both parties, conducting interviews with the complainant, recipient's personnel, and other witnesses, and/or site visits. At the conclusion of its investigation, OCR will determine with regard to each allegation that:

- There is insufficient evidence to support a conclusion that the recipient failed to comply with the law, or
- A preponderance of the evidence supports a conclusion that the recipient failed to comply with the law.

OCR's determination will be explained in a letter of findings sent to the complainant and recipient. Letters of findings issued by OCR address individual OCR cases. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

RESOLUTION OF THE COMPLAINT AFTER A DETERMINATION OF NONCOMPLIANCE

If OCR determines that a recipient failed to comply with one of the civil rights laws that OCR enforces, OCR will contact the recipient and will attempt to secure the recipient's willingness to negotiate a voluntary resolution agreement. If the recipient agrees to resolve the complaint, the recipient will negotiate and sign a written resolution agreement that describes the specific remedial actions that the recipient will undertake to address the area(s) of noncompliance identified by OCR. The terms of the resolution agreement, if fully performed, will remedy the identified violation(s) in compliance with applicable civil rights laws. OCR will monitor the recipient's implementation of the terms of the resolution agreement to verify that the remedial actions agreed to by the recipient have been implemented consistent with the terms of the agreement and that the area(s) of noncompliance identified were resolved consistent with applicable civil rights laws.

If the recipient refuses to negotiate a voluntary resolution agreement or does not immediately indicate its willingness to negotiate, OCR will inform the recipient that it has 30 days to indicate its willingness to engage in negotiations to voluntarily resolve identified areas of noncompliance, or OCR will issue a Letter of Finding to the parties providing a factual and legal basis for a finding noncompliance.

If, after the issuance of the Letter of Finding of noncompliance, the recipient continues to refuse to negotiate a resolution agreement with OCR, OCR will issue a Letter of Impending Enforcement Action and will again attempt to obtain voluntary compliance. If the recipient remains unwilling to negotiate an agreement, OCR will either initiate administrative enforcement proceedings to suspend, terminate, or refuse to grant or continue Federal financial assistance to the recipient, or will refer the case to the Department of Justice. OCR may also move immediately to defer any new or additional Federal financial assistance to the institution.

RESOLUTION OF THE COMPLAINT PRIOR TO THE CONCLUSION OF THE INVESTIGATION

Early Complaint Resolution (ECR):

Early Complaint Resolution allows the parties (the complainant and the institution which is the subject of the complaint) an opportunity to resolve the complaint allegations quickly; generally, soon after the complaint has been opened for investigation. If both parties are willing to try this approach, and if OCR determines that Early Complaint Resolution is appropriate, OCR will facilitate settlement discussions between the parties and work with the parties to help them understand the legal standards and possible remedies. To the extent possible, staff assigned by OCR to facilitate the Early Complaint Resolution process will not be the staff assigned to the investigation of the complaint. OCR does not approve, sign or endorse any agreement reached between the parties as a result of Early Complaint Resolution, and OCR does not monitor the agreement. However, if the recipient institution does not comply with the terms of the agreement, the

complainant may file another complaint with OCR within 180 days of the date of the original discrimination or within 60 days of the date the complainant learns of the failure to comply with the agreement, whichever date is later.

Resolution of the Complaint Prior To the Conclusion of an Investigation

A complaint may also be resolved before the conclusion of an investigation, if the recipient expresses an interest in resolving the complaint. If OCR determines that resolution of the complaint before the conclusion of an investigation is appropriate, OCR will attempt to negotiate an agreement with the recipient. OCR will notify the complainant of the recipient's request and will keep the complainant informed throughout all stages of the resolution process. The provisions of the resolution agreement that is reached must be aligned with the complaint allegations and the information obtained during the investigation, and must be consistent with applicable regulations. A resolution agreement reached before the conclusion of an investigation will be monitored by OCR.

REQUEST FOR RECONSIDERATION OR APPEAL OF OCR'S DETERMINATIONS

OCR is committed to a high quality resolution of every case. OCR affords an opportunity to the complainant to submit a request for reconsideration or an appeal of OCR determinations that are not in the complainant's favor. If the complainant disagrees with OCR's decision to dismiss or administratively close a complaint for any reason (e.g., jurisdiction, timeliness, other administrative reasons), he or she may send a written request for reconsideration to the Deputy Assistant Secretary for Enforcement within 60 days of the date of OCR's dismissal or administrative closure letter. If the complainant disagrees with an OCR decision finding insufficient evidence to support the complaint allegation(s) after investigation, he or she may send a written appeal to the Deputy Assistant Secretary for Enforcement within 60 days of the date of OCR's letter of finding(s). Requests for reconsideration and appeals should be sent to:

Deputy Assistant Secretary for Enforcement
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-1100

This review process provides an opportunity for complainants to bring information to OCR's attention that would change OCR's decision. For both requests for reconsideration and appeals, the complainant must explain why he or she believes the factual information was incomplete, the analysis of the facts was incorrect, and/or the appropriate legal standard was not applied, *and* how this would change OCR's determination in the case. Failure to do so may result in the denial of the request for reconsideration or appeal. The review process will not be a *de novo* review (i.e., OCR will not review the matter as if no previous decision had been rendered) of OCR's decision.

ADDITIONAL INFORMATION

Right to File a Separate Court Action

The complainant may have the right to file suit in Federal court, regardless of OCR's findings. OCR does not represent the complainant in case processing, so if the complainant wishes to file a court action, he or she must do so through his or her own attorney or on his or her own through the court's pro se clerk's office.

If a complainant alleges discrimination prohibited by the Age Discrimination Act of 1975, a civil action in Federal court can be filed only after the complainant has exhausted administrative remedies. Administrative remedies are exhausted when either of the following has occurred:

1) 180 days have elapsed since the complainant filed the complaint with OCR and OCR has made no finding; or
2) OCR issues a finding in favor of the recipient. If this occurs, OCR will promptly notify the complainant and will provide additional information about the right to file for injunctive relief.

Prohibition against Intimidation or Retaliation

An institution under the jurisdiction of the Department of Education may not intimidate, threaten, coerce, or retaliate against anyone who asserts a right protected by the civil rights laws that OCR enforces, or who cooperates in an investigation. Anyone who believes that he or she has been intimidated or retaliated against should file a complaint with OCR.

Investigatory Use of Personal Information

In order to investigate a complaint, OCR may need to collect and analyze personal information such as student records or employment records. No law requires anyone to give personal information to OCR and no formal sanctions will be imposed on complainants or other persons who do not cooperate in providing information during the complaint investigation or resolution process. However, if OCR is unable to obtain the information necessary to investigate a complaint, we may have to close the complaint.

The Privacy Act of 1974, 5 U.S.C. § 552a, and the Freedom of Information Act (FOIA), 5 U.S.C. § 552, govern the use of personal information that is submitted to all Federal agencies and their individual components, including OCR. The Privacy Act of 1974 protects individuals from the misuse of personal information held by the Federal government. It applies to records that are maintained by the government that are retrieved by the individual's name, social security number, or other personal identifier. It regulates the collection, maintenance, use and dissemination of certain personal information in the files of Federal agencies.

The information that OCR collects is analyzed by authorized personnel within the agency and will be used only for authorized civil rights compliance and enforcement activities. However, in order to investigate or resolve a complaint, OCR may need to reveal certain information to persons outside the agency to verify facts or gather additional information. Such details could include the age or physical condition of a complainant. Also, OCR may be required to reveal information requested under FOIA, which gives the public the right of access to records of Federal agencies. OCR will not release any information to any other agency or individual except in the one of the 11 instances defined in the Department's regulation at 34 C.F.R. § 5b.9(b).

OCR does not reveal the name or other identifying information about an individual unless it is necessary for completion of an investigation or for enforcement activities against an institution that violates the laws, or unless such information is required to be disclosed under the FOIA or the Privacy Act. OCR will keep the identity of complainants confidential except to the extent necessary to carry out the purposes of the civil rights laws, or unless disclosure is required under the FOIA, the Privacy Act or otherwise by law.

FOIA gives the public the right of access to records and files of Federal agencies. Individuals may obtain items from many categories of records of the Federal government, not just materials that apply to them personally. OCR must honor requests for records under FOIA, with some exceptions. Generally, OCR is not required to release documents during the case evaluation and investigation process or enforcement proceedings, if the release could affect the ability of OCR to do its job. 5 U.S.C. § 552(b)(7)(A). Also, a Federal agency may refuse a request for records if their release would result in an unwarranted invasion of privacy of an individual. 5 U.S.C. § 552(b)(6) and (7)(C). Also, a request for other records, such as medical records, may be denied where disclosure would be a clearly unwarranted invasion of privacy.