

(c) If the Army or a Federal Court finds that discrimination existed at the time the applicant was considered for employment, but also finds clear and convincing evidence that the applicant would not have been hired even without discrimination, the Army will consider the applicant for any existing vacancy of the type and grade for which he or she was considered initially and is qualified, before considering other candidates. If the applicant is not selected, the reasons for nonselection are recorded and made a part of the complaint file. If there is no vacancy, the Army gives the applicant priority consideration for the next vacancy for which he or she is qualified. This will take precedence over other priorities.

**§ 588.53 Remedial action involving an employee.**

Upon a finding of discrimination, the Army will take remedial actions that may include one or more of the following:

(a) *Retroactive promotion.* A retroactive promotion or assignment with back pay to the position denied the employee or an equivalent position may be provided as a remedy unless the record contains clear and convincing evidence that the employee would not have been promoted or employed at a higher grade even without discrimination. The back pay liability may not accrue from a date earlier than 2 years before the date the discrimination complaint was filed; however, in no case will the back pay liability accrue from a date before the earliest date the complainant could have been promoted.

(b) *Priority consideration.* A first consideration action (in connection with an initial hire, reassignment, or promotion) before other applicants or candidates are considered.

(c) *Cancellation.* Cancellation of an unwarranted personnel action and restoration of the employee.

(d) *Deletion.* The deletion from Army records of any reference to, or any record of, an unwarranted disciplinary action.

(e) *Participation.* Full opportunity to participate in the benefit denied complainant (for example, training or preferential work assignments).

**§ 588.54 Award of attorney fees and/or costs.**

(a) In complaints of discrimination, the Army or a Federal Court may award the applicant or employee who is represented by an attorney reasonable attorney fees and/or costs as a part of the remedial relief under this regulation. Except as provided in § 588.55, Army decisions will make such awards only when a finding or admission of discrimination is made. The award of attorney fees and/or costs is not available in administrative cases of discrimination based on age.

(b) Attorney fees are paid only for services performed after a formal complaint has been filed under this regulation and after the complainant has notified the Army that he or she is represented by an attorney. However, the attorney may be compensated for a reasonable amount of time spent to make the decision to represent the complainant. Written submissions to the Army that are signed by the attorney shall be deemed to constitute notice of representation. Attorney fees are allowable only for services of members of the bar and law clerks, paralegals, or law students supervised by members of the bar. No award will be made for the services of any employee of the Federal Government. Attorney fees and/or costs are paid by the activity where the discrimination took place. Requests for attorney fees and/or costs will include all of the following:

(1) A statement of the number of hours spent in preparing and presenting the case. This must specify the dates that work was done on the case and detail the work performed. It must also describe the training and experience of each person who worked on the case and the number of hours spent by each.

(2) A sworn statement of the attorney's usual and customary hourly charge, and the usual fee for each person who worked on the case.

(3) A sworn statement explaining all of the following:

(i) Whether the fee for the case was fixed or contingent.

(ii) Whether the handling of the case prevented other employment.

(iii) The nature and length of the professional relationship with the client.