

Fiscal Year (FY) 2023 No FEAR Act Report



U.S. Department of State

Report to Congress on Annual
Report Under the Notification and Federal Employee
Antidiscrimination and Retaliation Act of 2002

UNCLASSIFIED

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EXECUTIVE SUMMARY

The purpose of the “Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002” (No FEAR Act), is to reduce the incidence of workplace discrimination within the federal government by making agencies and departments more accountable for violations of anti-discrimination and whistleblower protection laws. The No FEAR Act requires that federal agencies submit an annual report no later than 180 days after the end of each fiscal year.

The annual No FEAR Act report includes information pertaining to formal complaints filed with the Department at the administrative level; cases filed in federal court; complaints involving whistleblower retaliation; and the number of employees disciplined because of discrimination (including harassment) and/or retaliation. The U.S. Department of State’s (the “Department” or the “Agency”) public website contains statistical data that is updated on a quarterly basis in accordance with the No FEAR Act.

Key takeaways pertaining to the prevention of discrimination and retaliation:

- The Secretary of State releases annual statements on Diversity/Inclusion and Discrimination/Harassment.
- The Department has anti-discrimination/anti-harassment, anti-retaliation, and disciplinary action policies.
- The Department takes various measures to inform employees about

their rights under anti-discrimination and whistleblower protection laws, including mandating trainings on those topics.

Key takeaways pertaining to the processing of complaints of discrimination and retaliation:

- There was a slight rise in formal EEO complaints in FY 2023 with disability as the most alleged basis of discrimination and non-sexual harassment as the most alleged issue.
- There was an increase in EEO- and whistleblower-related grievances filed this fiscal year and, of these, seven were from Foreign Service employees and two were from Civil Service employees.

Key takeaways pertaining to the Department's commitment to accountability for violations of anti-discrimination and whistleblower laws:

- There were three findings of discrimination this fiscal year. The S/OCR Director issued one of them as a Final Agency Decision, which demonstrates the Department's commitment to address violations of civil rights laws. The other two were from the Equal Employment Opportunity Commission (EEOC), one from an Administrative Judge (AJ) and one from their appeals office.
- The Department posts our full No FEAR Act Report on our public website.
- There were recommendations for consideration of disciplinary action

stemming from the three findings of discrimination under the EEO process.

- Independent of the EEO process, the Department took disciplinary action against seven employees for engaging in harassing behavior in violation of our anti-harassment policy and against one management official for failing to report harassing behavior. The Department also proposed disciplinary action against two other employees for engaging in harassing behavior in violation of our anti-harassment policy, but the individuals resigned or retired before decisions were made.
- The Department has had a goal over the last three fiscal years to increase No FEAR Act training compliance, and through registration changes and automatic email reminders, enrollment skyrocketed. In FY 2021, 25% of the Department was in compliance with mandatory No FEAR Act training; in FY 2023, that number was 80%. The Department recognizes that this is a priority and will continue to work to keep momentum.

BACKGROUND

The mission of the U.S. Department of State is to advance the interests of the American people, their safety and economic prosperity, by leading America's foreign policy through diplomacy, advocacy, and assistance. The Department's vision is to promote and demonstrate democratic values and advance a free, peaceful, and prosperous world for the benefit of the American people.

The success of the Department's mission is dependent on the unified efforts

of its workforce. The Department of State is deeply committed to maintaining a workplace in which everyone is given an equal opportunity to succeed and contribute and everyone is treated with equal respect and dignity. The Department encourages employees to utilize protected administrative processes, engage in open discussions, and adhere to the highest standard of conduct. The Department remains committed to the prevention and elimination of discrimination, including harassment, and proactively promotes the rights of all employees, former employees, and applicants to be protected under the anti-discrimination and whistleblower protection laws.¹

There are various avenues of redress within the Department for employees who believe they are experiencing discrimination or retaliation (either for EEO protected activity or making a protected disclosure), including the EEO administrative process overseen by the Office of Civil Rights (S/OCR), the grievance process overseen by the Grievance Staff (GTM/G), and reporting protected disclosures to the Office of Inspector General (OIG).

Applicable Laws

This report contains data pertaining to Title VII of the Civil Rights Act of 1964, as amended; the Rehabilitation Act of 1973, as amended; the Age Discrimination in Employment Act of 1967, as amended; the Genetic Information Nondiscrimination Act of 2008; and the Pregnant Workers

¹ Appendices 1. Secretary's Policy Statement on Diversity and Inclusion and 2. Secretary's Policy Statement on EEO and Harassment

Fairness Act of 2022.

This report also contains data pertaining to the Whistleblower Protection Act of 1989 and the Whistleblower Protection Enhancement Act of 2012. These whistleblower laws provide the right for all covered federal employees to make whistleblower disclosures and ensure that employees are protected from whistleblower retaliation.

Applicable Policies

The Department's EEO Retaliation/Reprisal Policy,² 2 FAM 1550, prohibits retaliation or reprisal against any employee or applicant for employment based on their prior participation in the EEO process or opposition to illegal discrimination. This policy ensures that all employees and applicants can freely exercise their rights to participate in the EEO process under all applicable laws.

The Department's anti-harassment policy, 3 FAM 1520,³ defines harassment as a policy matter, outlines the Department's responsibilities for addressing harassment, and provides clarity on the rights and responsibilities of employees who believe they were/are being subjected to harassment.

² Appendix 3. EEO Retaliation/Reprisal Policy

³ Appendices 4. Anti-Harassment Program Policy (3 FAM 1520)

The Civil and Foreign Service Disciplinary Action policies, 3 FAM 4500 and 3 FAM 4300,⁴ outline the expectations of the Department and the repercussions when these expectations are not met. These policies include a list of potential disciplinary offenses and penalties, ranging from Letters of Reprimand to removal from service. Retaliatory action against an employee because of a grievance, appeal, complaint, or other exercise of rights may lead to disciplinary action.

Notification of Rights and Responsibilities

Preventative measures are the Department's first line of defense in ensuring a workplace that is free of discrimination and retaliation for complaining about discrimination and for whistleblowing. Employees, applicants, and former employees are notified of their rights and responsibilities related to discrimination and whistleblower retaliation in many ways. Information pertaining to the EEO process, grievances, and protected disclosures can be found on the Department's internal and external websites. The Department posts quarterly statistical data pertaining to formal EEO complaints filed.⁵ Additional information about rights, administrative processes and remedies is disseminated in many ways, including cables and notices to the entire Department.

⁴ Appendices 5. Civil Service Disciplinary Action Policy (3 FAM 4500) and 6. Foreign Service Disciplinary Action Policy (3 FAM 4300)

⁵ Appendix 8. Agency Data Pursuant to No FEAR Act FY 2023

Mandatory trainings are provided to the workforce domestically, overseas, and through the Foreign Service Institute's distance learning courses. Supervisors and managers are required to complete EEO and Diversity Awareness training. All new direct-hire employees are required to complete orientation training, which includes an EEO component. All employees are required to complete the Preventing Harassment at State and the No FEAR Act trainings biennially.

The Department's No FEAR Act Training course provides information about what avenues of recourse are available to employees who suspect they are the victims of illegal discrimination or retaliation. Course objectives include identifying the purpose of the No FEAR Act, recognizing what types of discrimination and retaliation federal employees are protected from, explaining what types of behavior should be reported, and determining the various authorities, inside and outside the Department, that should receive reports of such behavior for potential resolution and remedy.⁶

DATA, ANALYSIS OF TRENDS, and CAUSAL ANALYSIS

EEO Complaint Data

S/OCR processed 223 new formal complaints of discrimination in FY 2023. Of those complaints, there were no repeat filers. There was a slight increase in the number of complaints filed in FY 2023 from the previous two years.⁷

⁶ Appendix 7. No FEAR Act Training Course Description

⁷ Appendix 8. Agency Data Pursuant to No FEAR Act FY 2023

There were several notable trends pertaining to the EEO complaint data. The three highest alleged bases were: disability, alleged in 44% of formal complaints; reprisal (37%); and race (34%). The significant increase in disability-based complaints (from 59 in FY 2022 to 98 in FY 2023) is likely attributed to the transition from a high teleworking posture to increased onsite presence. This may also be a factor in the overall increase of EEO complaints.

*Please note that for Tables 1 and 2, the sum of complaints will exceed the total number of complaints filed since most complaints contain multiple allegations.

Table 1: Number of Complaints by Basis

| Basis | Complaints* |
|---------------------|-------------|
| Disability | 98 |
| Reprisal | 82 |
| Sex | 77 |
| Race | 75 |
| Age | 66 |
| Color | 30 |
| National Origin | 24 |
| Religion | 13 |
| Genetic Information | 0 |

Non-sexual harassment, that is, harassment that occurs because of an EEO basis but is not sexual in nature, was the most frequently alleged issue accounting for 46% of formal complaints. Terms and conditions of employment were alleged as an issue in 37% of formal complaints, and evaluations and promotions tied at 13% of formal complaints. However, there was a large increase in disability reasonable accommodations complaints (from 9 in FY 2022 to 21 in FY 2023).

Table 2: Number of Complaints by Issue

| Issue | Complaints* |
|-------------------------------------|--------------------|
| Harassment/hostile work environment | 102 |
| Terms/conditions of employment | 82 |
| Evaluations | 28 |
| Promotions | 28 |
| Disability Accommodation | 21 |
| Termination | 17 |
| Appointment/Hire | 15 |
| Reassignment Directed/Denied | 12 |
| Telework | 9 |
| Time and Attendance | 4 |
| Training | 4 |
| Awards | 4 |
| Pay | 3 |
| Religious Accommodation | 2 |
| Medical Exam | 2 |

All EEO complaints are processed in accordance with 29 CFR 1614. The Department issued 33 procedural dismissals and accepted 190 formal complaints for further processing. There were 116 EEO investigations completed in FY 2023, 100 of which were timely. Absent valid extensions, agencies are generally required to complete EEO investigations within 180 days.

The Department issued 62 Final Agency Decisions (FAD) on the merits of formal complaints. One FAD found discrimination had occurred. That finding of discrimination was issued on February 14, 2023. The S/OCR Director determined that the Agency did not select the Complainant for a position because of sex and age. The Director ordered back pay because of the discrimination. Other corrective actions included posting a notice of discrimination, training for management officials, and a review of the position selection policies and procedures.

The EEOC's appeals office issued four merit-based decisions. One of those decisions found discrimination. That finding of discrimination was issued on May 15, 2023. The EEOC determined that the Department was liable for engaging in discrimination when an individual was subjected to a hostile work environment that culminated in their termination because of disability and/or reprisal. Relief ordered because of the discrimination included expunging derogatory records and compensatory damages. Other corrective actions included posting a notice of discrimination, training for management officials, and consideration of discipline for the involved management officials.

The EEOC issued 27 merit-based decisions on formal complaints that were pending before an AJ. One of those decisions found discrimination. That finding of discrimination was issued on June 1, 2023. The EEOC AJ determined that the Department was liable for engaging in discrimination when an employee was not selected for a position because of race, national origin, and sex. Relief ordered because of the discrimination included retroactively placing the Complainant into the position sought, including back pay and benefits from when placement should have occurred, and compensatory damages. Other corrective actions included posting a notice of discrimination, training for management officials, consideration of discipline for the involved management officials, and payment of attorneys' fees.

Over the past five years, there have been no significant changes in the number of findings of discrimination.

Grievance Data

Civil Service employees are not permitted to file EEO or whistleblower grievances with the Grievance Staff (GTM/G). Despite this, two CS employees filed grievances that were subsequently dismissed for lack of jurisdiction.

Foreign Service employees, however, may file a grievance that includes an EEO basis or whistleblower retaliation. These cases are processed separately and exclusively from the EEO complaints process. GTM/G processed nine EEO related grievances in FY 2023.

Given the relatively few cases tied to an EEO basis that are filed with GTM/G each year, it is difficult to discern any meaningful trends. GTM/G processed two more EEO-related grievances as compared with FY 2022.

Of the nine grievances filed in FY 2023, three were dismissed on procedural grounds, and two were based on sex and one was based on race. The remaining three grievances were based on a mix of race/color, sex, national origin, and age.

Of the six grievances GTM/G did not dismiss, there were three allegations based on performance evaluation (one of which included a non-promotion claim), two about compensation (awards), one about discipline. Among these grievances, one alleged an EEO-based hostile work environment, EEO-based retaliation, and a whistleblower retaliation claim.

MSPB Appeals

The Merit Systems Protection Board (MSPB) is an independent, quasi-judicial agency in the Executive branch that serves as the guardian of federal merit systems. A decision of MSPB is binding unless set aside on appeal to federal court.

Two new whistleblower retaliation complaints were filed before the MSPB in FY 2023. One case was dismissed, and one is pending outcome. Two pending appeals alleging discrimination and/or EEO retaliation with the MSPB were dismissed. In FY 2023, three new appeals were filed alleging

discrimination, and/or EEO retaliation. Two were dismissed, and one received an initial decision.

Federal Court Litigation

In FY 2023, no federal court complaints were filed alleging discrimination, and/or EEO retaliation. The Department received a significant increase in federal complaints filed in the last few fiscal years. With most federal cases still pending a decision, the Department will be better equipped to do analysis once the cases are adjudicated.

Disciplinary Action

The Department takes accountability for conduct and performance issues very seriously. Misconduct, including discrimination and retaliation, is not tolerated and individuals who engage in misconduct are held accountable. The data included in this report include the number of individuals the Agency disciplined, and the types of discipline administered, for violations of the employment discrimination and whistleblower protection laws.

In FY 2023, the Department's Anti-Harassment Program referred 19 substantiated cases of harassment to the Bureau of Global Talent Management's Office of Employee Relations' Conduct, Suitability, and Discipline division (GTM/ER/CSD) for consideration of discipline and made many more referrals to local management to address the issue at a lower level. In addition, eight referrals pursuant to disposition of an EEO complaint were referred for review for possible discipline.

The Department took corrective or disciplinary action in ten cases involving discrimination (including harassment) and/or retaliation during the reporting period. These included: two Letters of Admonishment, three Letters of Reprimand, and five suspensions ranging from one to six days. The Department also proposed disciplinary action against two other employees for engaging in harassing behavior in violation of our anti-harassment policy, but the individuals resigned or retired before decisions were made.

Some cases did not result in a decision of discipline, some cases were settled in lieu of discipline, some employees separated before the Department administered a discipline decision, and some decisions are being appealed.

Reimbursement of Judgment Fund and Budget Adjustments

The Judgment Fund pays court judgments and compromise settlements of lawsuits against the government if funds are not legally available to pay from the agency's own appropriations. However, agencies are required to reimburse the Judgment Fund in cases covered by the No FEAR Act. There were six reimbursements to the Judgment Fund in FY 2023 for a total of \$1,092,500.

The Department reports no adjustments to the budget related to the No FEAR Act.

PRACTICAL KNOWLEDGE GAINED THROUGH EXPERIENCE

The Department gained valuable practical knowledge during the reporting period that has been used to improve its civil rights programs to eliminate employment discrimination and retaliation and improve compliance with the anti-discrimination and whistleblower protection laws.

The Department has increased transparency by routinely sharing data on discipline and findings of discrimination, adding the annual No FEAR Act Report to the Department's public website, and sharing the results of the inaugural diversity, equity, inclusion, and accessibility (DEIA) climate survey. The results of the DEIA climate survey showed that 44% of respondents indicated they had experienced discrimination, bullying and/or harassment. Additionally, the survey indicated that most of the reported experiences occurred within the past five years.

The Department is committed to strengthening its accountability response measures. The results of the DEIA climate survey also showed that 28% of respondents noted a fear of retaliation. We are looking into whether there is more the Department can do to deter managers from taking retaliatory action against employees and further enhance accountability measures related to claims of retaliation.

The Department has had a goal over the last three fiscal years to increase No FEAR Act training compliance, and through registration changes and automatic email reminders, enrollment skyrocketed. In FY 2021, 25% of the Department was in compliance with mandatory No FEAR Act training; in FY

2023, that number was 80%. The Department recognizes that this is a priority and will continue to work to keep momentum.

The Department's action plan will address the areas for improvement identified by the data and analysis:

Planned Actions

1. Increase No FEAR Act Training Compliance

No FEAR Act training compliance remains a priority for Department leadership.

2. Accountability

The Department has recognized a need to address credibility gaps in accountability mechanisms for discrimination (including harassment) and retaliation. The Director General of the Foreign Service and Director of Global Talent is marking 2024 as the Year of Accountability, which will guide our efforts.

3. Retaliation

Since the fear of retaliation has been reported as a barrier to employees exercising their rights under anti-discrimination laws, the Department should strategize additional ways to increase awareness of the prohibitions against retaliation, the right for employees to

complain about retaliation, and consequences for individuals who engage in retaliation.

Accountability and integrity remain at the core of the Department's leadership and management principles. Education, access to administrative processes, and enforcement of policies that safeguard EEO and DEIA principles have an immediate positive impact that will continue to accrue residual benefits over time.