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Retaliation in EEO

This is the first edition in the series, which aims to educate the workforce on a number of Equal Employment Opportunity (EEO) topics.

Summary:

Federal antidiscrimination employment laws depend on the willingness of employees and applicants to address discrimination without fear of punishment. Individuals rely on the statutory prohibitions against retaliation, also known as "reprisal," when they raise concerns to the Department about an alleged issue of concern to equal employment opportunity (EEO), provide information as a witness in an antidiscrimination investigation, assert their right to a reasonable accommodation, or file an EEO complaint. This cable outlines what retaliation is and how to mitigate it.

Key Points:

- Retaliation against those who participate in the EEO process or against those who oppose unlawful discriminatory practices constitutes unlawful discrimination and can further discourage employees who may be reluctant to speak out on employment matters related to discrimination. All employees must feel comfortable to exercise their rights to raise issues formally and informally, including outside of their supervisory structure.
- Each of the following EEO laws prohibit retaliation and related conduct: Title VII of the Civil Rights Act of 1964 (as amended), the Age Discrimination in

Employment Act, the Rehabilitation Act (as amended), the Equal Pay Act, and the Genetic Information Nondiscrimination Act. In addition to EEO laws, there are Department policies and procedures in place to prevent and address retaliation. When those policies are violated, employees have an avenue for redress in the EEO process.

- Leadership is crucial in communicating workplace policies and procedures and in modeling the behavior you expect from others. The importance of a workplace free from retaliation must be communicated at all levels. Secretary Blinken has made his commitment to this issue clear. See [S/OCR's SharePoint site](#) for the Secretary's policy statements.
- The Notification and Federal Employee Antidiscrimination and Retaliation Act ([No FEAR Act](#)) of 2002 is a law that seeks to discourage federal managers and supervisors from engaging in unlawful discrimination and retaliation. Federal employees are required to take [No FEAR Act training](#) every two years.

What is Retaliation in the EEO Context?

On August 29, 2016, the Equal Employment Opportunity Commission ([EEOC](#)) [issued enforcement guidance](#) on retaliation and related issues. According to the EEOC, retaliation occurs when an employer takes an adverse action (employment action that may deter a reasonable person from engaging in EEO activity) because an applicant or employee asserts rights protected by Equal Employment Opportunity (EEO) laws. Asserting EEO rights is called "protected activity." Protected activity can take many forms and includes participation in the EEO process and expressing opposition to discriminatory practices. Additionally, a management official may engage in per se reprisal by taking action that would dissuade employees from engaging in protected activity. This can include derogatory statements about the EEO process or an employee who is participating in the EEO process or revealing to others that an employee is engaged in EEO activity.

In FY19-20, retaliation complaints for the Department were among the top three bases for EEO complaints, in addition to sex and disability. Reprisal was alleged in 46.2% of formal complaints. According to the EEOC, retaliation is the most frequently alleged basis of discrimination in the federal sector and accounts for about half of the findings of discrimination in federal sector cases.

Examples of retaliation:

A few sample cases provided by the EEOC, from across the federal government, provide instructive illustrations of retaliatory behavior:

Example 1: In one case, an employee who had filed several unsuccessful EEO complaints, subsequently sought promotions within the organization. The employee learned that their manager had placed information about the previous EEO proceedings in their personnel file and communicated that the employee had filed several complaints when contacted for reference checks. The EEOC found that the statements made during the reference checks were retaliatory and that the EEO information placed in the employee's personnel file was unnecessary and hindered their promotional opportunities.

Example 2: Similarly, another case involved an employee who claimed that they were discriminated against during the promotional interview process. Two of the three interview panelists were managers involved in current or previous EEO complaints by the employee and one of the panelists attempted to influence the selection process by asking a question that paralleled a previous conflict between the panelist and the employee. A witness reported that they had heard the manager make the statement, "I don't get mad, I get even" in reference to employees who make discrimination claims. EEOC found that the selection process was tainted by retaliatory conduct and ordered the agency to promote the employee.

Example 3: In another example, the EEOC found that management was openly hostile towards an employee's protected EEO activity. Specifically, the employee's manager

described the employee's discrimination allegations as "unprofessional," and their higher-level manager found them "highly offensive" and "bad for morale." During the subsequent EEO proceeding, coworkers revealed an overall feeling of distrust and concern about the employee after their initial complaint. The EEOC noted that the first-level manager saw this growing tension but failed to ensure that coworkers understood and respected the employee's right to file a complaint.

Who is Legally Protected from Retaliation?

All U.S. citizen employees and non-U.S. citizens working within the territorial boundaries of the U.S. for the Department are legally protected against retaliation under EEO laws (see 29 CFR §§ 1614.103(b) and 1614.103(d)). This includes applicants, current employees (full-time, part-time, probationary, seasonal, and temporary), former employees, and personal services contractors (note: [third party contractors may qualify as "employees" under 29 CFR 1614 et seq in some circumstances](#)). For example, a supervisor cannot refuse to hire an applicant because of his or her EEO complaint against a prior employer or give a negative job reference because a former employee made an EEO complaint. To locate and contact an EEO Counselor, please email: SOCRCounselorChannel@state.gov. Although non-U.S. citizens employed overseas are not covered by EEO laws (see 29 CFR 1614.103(d)), as a matter of Department policy, the Department prohibits retaliation against any employee. Also, local laws may provide additional protections for LE Staff against retaliation. LE Staff may contact the EEO Liaison(s) at their Post, if available. LE Staff may also contact SOCRCounselorChannel@state.gov.

Preventing Retaliation

As noted in [21 STATE 24180](#), while it may be difficult not to take an allegation of discrimination personally, managers and/or employees named in the complaint must scrupulously manage their reactions and their conduct in these situations. Managers must fairly assign work and equally distribute any promotion-enhancing opportunities,

establish, and continually communicate expectations, give consistent and timely feedback, hold employees to their work requirements, manage poor performance and misconduct, always question their actions to determine whether or not they mitigated bias when making decisions, and maintain documentation of such efforts. Employees are entitled to utilize the EEO process, and supervisors are expected to continue managing employees without retaliating against anyone who has initiated an EEO complaint. For assistance on avoiding EEO-related retaliation, please refer to [18 STATE 64292](#) and [18 STATE 40386](#), or reach out to Erica Hall, Chief of Intake and Resolution at halle1@state.gov.

Locally Employed (LE) Staff are also protected from EEO related retaliation

The Department prohibits EEO-related retaliation against all employees, including LE Staff. Supervisors at all levels, both U.S. Direct Hires (USDH) and Locally Employed (LE) Supervisors, should refrain from any retaliatory behavior. As noted in the examples throughout, retaliation may be reflected in conversations, Employee Performance Reports (EPRs), perception of an employee's work ethic, and distribution of meaningful assignments. For example, if an LE Staff member starts getting insignificant projects, is intentionally kept out of important meetings, and not copied on emails by the LE Staff supervisor because of the complainant's protected activity, this would constitute retaliation. These examples of retaliation are not uncommon and can often go unnoticed due to the subtle nature of the slights by the LE Staff supervisor and fear of reprisal on the part of the local employee. Managers and supervisors must not engage in retaliatory behavior and should work to ensure transparency and protection of their staff from discrimination and retaliation.

Prohibitions on retaliation

Reprisal is against Department policy per 3 FAM 4540, 3 FAM 4370, and 3 FAM 7720 and may result in disciplinary action for the individual who engaged in the inappropriate

conduct. Supervisors and employees are also reminded that 3 FAM 1550 prohibits retaliation or reprisal for EEO protected activity, including, but not limited to:

- Filing a complaint;
- Talking to an official connected to the EEO process;
- Reporting harassment or appearing as a witness in a complaint;
- Voicing opposition to discriminatory practices; and
- Requesting a reasonable accommodation.

Convergence of Corridor Reputation and Retaliation

The Department's use of "corridor reputation," informal observations by one employee on another employee's interpersonal and communication skills, integrity, and professionalism, is not formalized in any written guidance or in the Department's Foreign Affairs Manual. One's corridor reputation may also include negative attributes and has a high degree of subjectivity based on an employee's perceived "likeability." Employees at every stage in their career are constantly reminded of this.

Retaliation can manifest itself in the context of "corridor reputation." For example, an employee who has reported discrimination may start getting excluded from workplace and social activities, be disadvantaged in the selection process for an onward assignment, be passed over for promotion-enhancing "stretch" opportunities that would highlight for promotion panels their ability to do work at higher grade levels, or purposefully have their work schedule or work commitments suddenly changed. Individuals who retaliate against others can instill fear of reprisal through their actions, this is known as the "chilling effect" the EEOC seeks to protect against. Such behavior can have a negative effect on others who may wish to report mistreatment or harassment. **It is important not to discuss an employee's EEO activity in the context of a job, a reference, or even in gossip. If an employee's EEO activity**

comes up during a discussion of their corridor reputation, do not engage, and refocus the conversation on the employee's performance, work ethic, and impact within the organization. Inappropriately disclosing or discussing someone's protected activity may result in a finding of discrimination, even if the initial allegation is unproven.

Clear Lines of Communication

Consistent messaging from the top of the organization and across Offices and Bureaus is critical to proactively prevent retaliation. The [Secretary's Statement on EEO and Harassment](#) clearly states that retaliation against any employee is strictly prohibited. Leadership at all levels of the Department should continue to send an unequivocal message horizontally and vertically that discrimination and retaliation is illegal and won't be tolerated. If discrimination or harassment has been reported, whether within the office chain of command or to S/OCR, senior leadership should still seek to address the concerns and proactively protect the employees involved from any potential activity that could constitute reprisal. Managers should proactively seek to address the issues and prevent any potential for retaliation. The laws enforced by the Department per guidance from the EEOC protect employees from being punished, treated differently, or harassed at work because they or someone they closely associate with participated in protected EEO activity. S/OCR would like to assure those who fear retaliation that they have avenues for redress.

13 FAM 301.2-1 - No FEAR Act Training

To meet the requirements of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (P.L. 107-174), also known as the "No FEAR Act," Department of State Foreign Service employees, Civil Service employees (including EFMs on a family member appointment), and U.S. citizen LE Staff are required to complete training every two years on the laws prohibiting discrimination and retaliation in the workplace and the rights and remedies applicable to employees. The required No

FEAR Act training course (PT401) is available online through FSI. An ALDAC (Ref H) was recently released, and S/OCR has engaged HROs and Executive Directors on increasing the Department's compliance to at least 50% by September 30, 2022. Supervisors and Managers should engage with their EX-office (if domestic) and their MGT/HRO (if overseas) on increasing compliance for their teams. EX and MGT/HRO staff may reach out to socr_direct@state.gov for information on increasing compliance in their Bureau/Mission.

To file an EEO complaint, report harassment, and read the Secretary's Statements on Diversity and Inclusion, EEO, and Harassment, please use see [S/OCR's SharePoint site](#). If you believe you have been subjected to retaliation based on protected activity, you have the right to initiate an EEO complaint. To do so, please contact S/OCR or an EEO Counselor within 45 calendar days of the alleged retaliation in order to preserve your rights in the formal process. EEO Counselors may not turn away anyone who is seeking their services.