

Fiscal Year (FY) 2022 No FEAR Act Report



U.S. Department of State

Office of Civil Rights

Report to Congress on

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

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EXECUTIVE SUMMARY

The purpose of the “Notification and Federal Employee Antidiscrimination 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 antidiscrimination 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; complaints filed in federal court; cases involving whistleblower retaliation; and the number of employees disciplined as a result of discrimination (including harassment) and/or retaliation. The U.S. Department of State’s (the “Department” or “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 and Inclusion as well as on Equal Employment Opportunity (EEO) and Harassment.
- The Department has discrimination/harassment, retaliation, and disciplinary action policies.

- The Department takes various measures to inform employees about their rights under antidiscrimination 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 2022 with reprisal as the most commonly alleged basis of discrimination and non-sexual harassment as the most commonly alleged harm.
- There was a decrease in discrimination and whistleblower related grievances filed FY 2022 and all such grievances filed were from members of the Foreign Service.
- There was a significant increase in federal court cases filed that are still pending, which may be reflected in upcoming fiscal years' data.

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

- There were two findings of discrimination this fiscal year. Both were issued internally as Final Agency Decisions, which demonstrates the Department's commitment to addressing violations of EEO antidiscrimination laws.

- The Department has increased transparency by posting the full No FEAR Act Report for FY 2021 on its public website and sharing the results of the inaugural diversity, equity, inclusion, and accessibility (DEIA) climate survey.
- Out of the proposals for disciplinary action based on discrimination, harassment and/or retaliation, the Department issued five (5) discipline decisions, and one employee voluntarily separated before a decision was issued. The Department notes that the expanded use of telework may be affecting the way misconduct occurs and will closely monitor the implications of a hybrid workforce on trends related to harassment and discrimination.

BACKGROUND

The mission of the U.S. Department of State is to protect and promote U.S. security, prosperity, and democratic values and shape an international environment in which all Americans can thrive.

The success of the Department's mission is dependent on the unified efforts of its workforce. The Department 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 use protected administrative processes, engage in open discussions, and adhere to the highest standards of conduct. The Department remains committed to the prevention and

remediation of discrimination, including harassment, and proactively promotes the rights of all employees, former employees, and applicants to be protected under antidiscrimination and whistleblower protection laws.¹

There are various avenues of redress within the Department for employees who believe they are experiencing discrimination or retaliation, 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 the matter to the Office of Inspector General (OIG).

Applicable Laws

This report contains data pertaining to the EEO antidiscrimination laws. These laws include the Equal Pay Act of 1963, as amended; 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 Pregnancy Discrimination Act of 1978; and the Genetic Information Nondiscrimination Act of 2008.

Additionally, included data also pertains to other antidiscrimination laws, including Executive Order 13152 (entitled “Further Amendment to Executive Order 11478, Equal Employment Opportunity in Federal Government” which covers, in relevant part, marital status discrimination) and the Civil Service

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

Reform Act of 1978, as amended which covers, in relevant part, political affiliation discrimination.

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

Applicable Policies

The Department's EEO Retaliation/Reprisal Policy,² 3 FAM 1550, prohibits retaliation or reprisal against any employee or applicant for employment because of their prior EEO protected activity. This policy ensures that all employees and applicants can freely exercise their rights to participate in the EEO process under all applicable EEO antidiscrimination laws, regulations, and provisions as well as to reasonably oppose, in good faith, any discriminatory employment policy or practice.

The Department's sexual and discriminatory harassment policies, 3 FAM 1525 and 3 FAM 1526,³ define harassment as a misconduct issue, outline the Department's responsibilities for addressing such harassment, and

² Appendix 3. EEO Retaliation/Reprisal Policy

³ Appendices 4. Sexual Harassment Policy (3 FAM 1525) and 5. Discriminatory Harassment Policy (3 FAM 1526)

provide clarity on the rights and responsibilities of employees who believe they were/are being subjected to such harassment.

The Foreign and Civil Service disciplinary policies, 3 FAM 4300 and 3 FAM 4500,⁴ outline the expectations of the Department and the potential consequences when these expectations are not met. These policies include a non-exhaustive list of potential disciplinary offenses and penalties, ranging from Letters of Reprimand to removal/separation from the Service. The list stipulates, for example, that harassing, threatening, or taking reprisal action against an employee as a result of or in anticipation 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 whistleblowing. Employees, applicants, and former employees are notified of their rights and responsibilities related to discrimination and whistleblower retaliation in various ways. Information pertaining to the EEO process, grievances, and whistleblower complaints can be found on the Department's internal and external websites. The Department posts quarterly statistical data

⁴ Appendices 6. Civil Service Disciplinary Action Policy (3 FAM 4500) and 7. Foreign Service Disciplinary Action Policy (3 FAM 4300)

pertaining to formal EEO complaints filed.⁵ Additional information about rights, administrative processes, and remedies is disseminated in various ways, including notices to the entire Department.

Mandatory trainings are provided to the workforce domestically, overseas, and virtually. Supervisors and managers are required to complete the *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 *Preventing Harassment at State* training biennially and the *No FEAR Act* training biennially.

The Department's No FEAR Act Training course provides information about the avenues of recourse available to employees who suspect they are the victims of 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

⁵ Appendices 9. No FEAR/Retaliation Website notification and 10. Agency Data Pursuant to No FEAR Act FY 2022

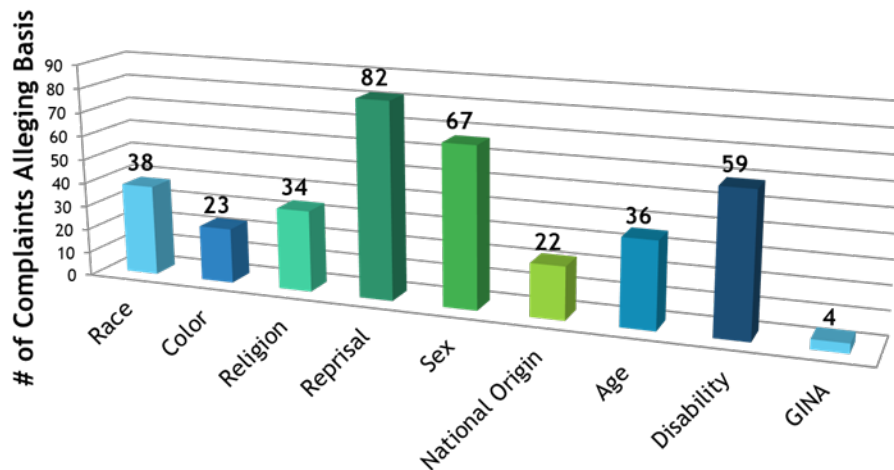
⁶ Appendix 8. No FEAR Act Training Course Description

DATA, ANALYSIS OF TRENDS, AND CAUSAL ANALYSIS

EEO Complaints

The Office of Civil Rights processed 169 new formal complaints of discrimination in FY 2022. Of those complaints, all filers were unique. There was a slight increase in the number of complaints filed in FY 2022 from the previous two years.⁷ There were several notable trends pertaining to the EEO complaint data. The three highest alleged bases included: reprisal was alleged in 49% of formal complaints, sex was alleged in 40% of formal complaints, and disability was alleged in 35% of formal complaints.

Figure 1: Number of Complaints Alleged by Basis

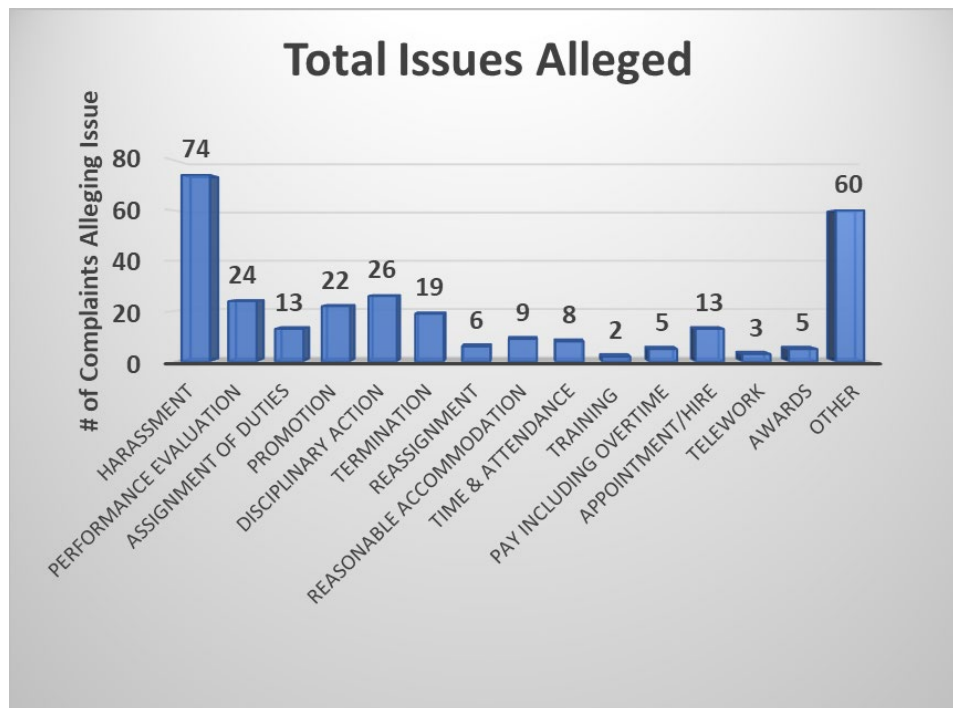


⁷ Appendix 10. Agency Data Pursuant to No FEAR Act FY 2022

Table Version of Figure 1

Basis	Number of Allegations
Race	38
Color	23
Religion	34
Reprisal	82
Sex	67
National Origin	22
Age	36
Disability	59
Genetic Information	4

Non-sexual harassment was the most frequently alleged harm accounting for 44% of formal complaints.

Figure 2: Number of Complaints by Harm**Table Version of Figure 2**

Harm	Number of Allegations
Harassment	74
Performance Evaluation	24
Assignment of Duties	13
Promotion	22
Disciplinary Action	26
Termination	19
Reassignment	6
Reasonable Accommodation	9
Time and Attendance	8
Training	2

Pay (including overtime)	5
Appointment/Hire	13
Telework	3
Awards	5
Other	60

Although religion was not one of the three highest bases in complaints, the Department received a significant increase in complaints for failure to accommodate a sincerely held religious belief, which is attributed to the increase in accommodation requests in response to the COVID-19 vaccine mandate. This may also be a factor in the overall increase of EEO complaints.

All EEO complaints are processed in accordance with 29 CFR § 1614. The Department issued 30 procedural dismissals and accepted 139 formal complaints for further processing. There were 87 EEO investigations completed in FY 2022, 79 of which were timely completed. Agencies are required to complete EEO investigations within 180 days, absent amendment and extension by the complainant, with a total not to exceed 360 days.

The Equal Employment Opportunity Commission (EEOC) issued 29 merit-based decisions on formal complaints that were pending before an Administrative Judge (note that due to EEOC backlog, not all of these decisions are from complaints initiated in FY 2022). None of those decisions found discrimination or retaliation. The Department issued 49 Final Agency Decisions (FADs) on the merits of formal complaints. Two FADs found

discrimination occurred.

In a finding of discrimination issued on June 6, 2022, the S/OCR Director determined that the Agency failed to provide a reasonable accommodation for the complainant's disability. Relief ordered as a result of the discrimination included providing the complainant with an appropriate reasonable accommodation and an investigation into the complainant's entitlement to compensatory damages. Other measures of accountability included posting a notice of discrimination, training for management officials, and a review of reasonable accommodation policy within the facility where the discrimination occurred.

In a finding of discrimination issued on September 15, 2022, the S/OCR Director determined that the Agency engaged in *per se* reprisal when a manager made a remark to the Complainant to dissuade them from participating in the EEO process, which constituted a chilling effect on EEO protected activity. Relief ordered included an investigation into the complainant's entitlement to compensatory damages. Other measures of accountability included posting a notice of discrimination, training for the responsible management official and referring the responsible management official to the Conduct, Suitability and Discipline division in the Bureau of Global Talent Management for consideration of disciplinary action.

Over the past five years, there have been no significant changes in the number of findings of discrimination. With reprisal being the most frequently filed basis for multiple fiscal years, it is not surprising that reprisal

is the most common basis for findings of discrimination. The same can be deduced when analyzing the number of disability-based complaints and findings of failure to accommodate.

Grievances

Foreign and Civil Service employees may file a grievance, which, for Foreign Service employees, includes an allegation of discrimination or connection to whistleblower activity. Civil Service employees must pursue any EEO complaints through S/OCR and non-EEO discrimination / whistleblower retaliation through the U.S. Office of Special Counsel. The Foreign Service grievances raising EEO matters are processed separately from EEO complaints filed with S/OCR. GTM/G processed six Foreign Service grievances alleging discrimination in FY 2022. Given the relatively few grievances raising EEO matters filed with GTM/G each year, it is difficult to discern any meaningful trends. GTM/G processed half of the total amount of grievances raising EEO matters in FY 2022 from the previous fiscal year. The number of EEO grievances filed this fiscal year were the lowest since 2018, when four such grievances were filed.

In the data collected from 2018 to the present fiscal year, the bases identified varied. Of the six Foreign Service grievances filed in FY 2022, there were two allegations of sex discrimination, three allegations of national origin discrimination, three allegations of race discrimination, two allegations of retaliation, one allegation of sexual orientation discrimination, one allegation of color discrimination, and one allegation of age

discrimination (noting that a single grievance can allege discrimination on multiple bases). Two grievances referenced whistleblower retaliation.

Issues raised included: involuntary/constructive curtailment, denial of an award, inaccurate evaluation, security clearance revocation, and various acts of retaliation and harassment. Three of these grievances remain under investigation and the other three have been denied and are pending appeal.

Federal Court Litigation

In FY 2022, there were 16 complaints filed in federal court, alleging discrimination and/or retaliation. Two out of the 16 cases were dismissed, and 14 cases remain in litigation. The Department received a significant increase in federal complaints filed in FY 2022. This was the highest reported cases filed in the past five fiscal years.

Merit Systems Protection Board (MSPB) Actions

The Merit Systems Protection Board (MSPB) is an independent, quasi-judicial Executive branch agency that serves as the guardian of federal merit systems. An MSPB decision is binding unless set aside to appeal in federal court. Complainants can file complaints with the MSPB alleging whistleblower retaliation and EEO related complaints. Two new cases involving whistleblower claims were filed before the MSPB in FY 2022. One of the cases was dismissed and the other is pending. There were two complaints filed with the MSPB alleging discrimination. Both EEO-related complaints were dismissed.

Disciplinary Action

The Department takes seriously accountability for conduct and performance issues. Misconduct, including discrimination, harassment, and retaliation, is not tolerated and individuals who engage in such misconduct are held accountable. The data included in this report includes the number of individuals the Agency disciplined and the types of discipline administered for violations of Department policies and expectations for conduct, including to adhere to the antidiscrimination and whistleblower laws.

In FY 2022, the Department issued five decisions imposing discipline involving discriminatory behavior and/or retaliation. Four of those decisions involved sexual, and one non-sexual, harassment, and all were issued pursuant to the Department's anti-harassment policies. In addition, one employee voluntarily separated after receiving a disciplinary proposal but before a decision was issued. Importantly, disciplinary decisions do not directly correlate to the number of discriminatory behavior and/or retaliation referrals received during the covered period.

Corrective actions included: one Letter of Admonishment, one Letter of Reprimand, three suspensions ranging from one to six days, and one suspension (as previously noted) of 30 days or more.

Additionally, the Department conducted an analysis showing that harassment and/or bullying was the most common reason for taking corrective action between 2017 and 2021 (16% of approximately 750 corrective actions). The Department is committed to accountability and

promoting a workplace free from harassment and discrimination.

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. In FY 2022, the Department reimbursed the Judgment Fund in two cases for a total of \$142,000. This is the first reimbursement in the past five fiscal years.

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

PRACTICAL KNOWLEDGE GAINED THROUGH EXPERIENCE

The Department has applied valuable practical knowledge gained during the reporting period, to improve both its civil rights programs and its compliance with related laws. The Department has increased transparency by routinely:

- 1) sharing data on discipline and findings of discrimination with employees;
- 2) adding the annual No FEAR Act Report to the Department's the public website; and
- 3) sharing the results of the inaugural diversity, equity, inclusion, and

accessibility (DEIA) climate survey.

The results of the DEIA climate survey stated that 44% of respondents believe they experienced discrimination, bullying, and/or harassment within the last 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. Additionally, reprisal has consistently remained the highest EEO basis at the Department for at least five years. This is a trend that has been identified across federal agencies. The Department may need to take additional action to deter and hold accountable managers who retaliate. The Department has consistently reported on the number of employees that have completed the No FEAR Act training. Although the goal was to increase the No FEAR Act training compliance, enrollment decreased in FY 2022. There was a roll-out of revised No FEAR Act training in FY 2021, which may have temporarily increased enrollment due to higher visibility and interest in the updated training. The Department recognizes that this is a priority and the impediments to enrollment must be identified and addressed. While additional analysis is being conducted, strategies for increasing enrollment are being finalized for implementation.

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

Action Plan

1. Increase No FEAR Act Training Compliance

No FEAR Act training compliance remains a priority for Department leadership. Department leadership should explore including the No FEAR Act training on the Department's mandatory training dashboard.

2. Address Gaps in Accountability Measures

The Department has recognized an immediate need to address employee loss of faith in accountability mechanisms. The Department is taking steps to address these gaps, to include completing the congressional notification process with the intent of establishing an Office of Harassment and Bullying Intervention.

3. Address Retaliation Concerns

Since the fear of retaliation has been reported as a barrier to employees exercising their rights under antidiscrimination 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.

The Department continues to promote and encourage the resolution of issues at the lowest level. The offices with equity in civil rights programs and whistleblower laws will continue to work together in an effort to promote compliance. 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 benefits over time.

APPENDICES

1. [Secretary's Policy Statement on Diversity and Inclusion](#)
2. Secretary's Policy Statement on EEO and Harassment
3. [EEO Retaliation/Reprisal Policy](#)
4. [Sexual Harassment Policy](#)
5. [Discriminatory Harassment Policy](#)
6. [Civil Service Disciplinary Action Policy](#)
7. [Foreign Service Disciplinary Action Policy](#)
8. [No FEAR Act Training Course Description](#)
9. [No FEAR/Retaliation Website Notification](#)
10. [Agency Data Pursuant to No FEAR Act FY 2022](#)
11. [No FEAR Act of 2022](#)