

Fiscal Year (FY) 2021 No FEAR Act Report

**U.S. Department of State
Office of Civil Rights**

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

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EXECUTIVE SUMMARY

Pursuant to Section 203 of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (“No FEAR Act”), Public Law 107-174, the Department is required to submit an annual No FEAR Act report including: formal complaints filed at the administrative level; cases filed in federal court; complaints involving whistleblower retaliation; the number of employees disciplined as a result of discrimination (including harassment) and/or retaliation for whistleblowing; the amount of money required to be reimbursed by the agency under section 201 of the Act in connection with the cases; the final year-end statistical data; the policies the agency implemented related to appropriate disciplinary actions against a federal employee who discriminated against or committed a prohibited personnel practice against any individual; an analysis of the data collected with respect to trends and causality with any supporting recommendations.

A summary of the No FEAR Act Report data and findings are as follows. There were 121 formal equal employment opportunity (EEO) complaints filed in FY 2021. The number of formal EEO complaints initiated declined for the second year in a row, down from 203 complaints in FY 2019 and 130 complaints in FY 2020. The Department’s decrease of complaints pertaining to No FEAR statistics is consistent with other federal agencies. In FY 2021, there were 12 grievances filed that were tied to an EEO basis. Four of those grievances alleged disability discrimination, three alleged gender discrimination, and two alleged race discrimination and retaliation. Sexual orientation, color, and national origin were also cited as an EEO basis in these grievances.

Three new cases involving whistleblower claims were filed before the Merit System Protection Board (MSPB) in FY 2021. Two of these cases were dismissed. One remains in mediation. In FY 2021, five Federal Court complaints and four MSPB complaints were filed alleging discrimination, harassment, and/or retaliation. Five of the nine cases were dismissed and four remain in litigation. Two Federal cases were settled in FY 2021. There was no reimbursement to the Judgment Fund for court judgments and compromise settlements of lawsuits against the government nor budget adjustment in FY 2021.

The Department's discipline program promotes the efficiency of the Service and upholds accountability throughout the Department by addressing employee misconduct in a fair, timely, and equitable manner. The process is designed to correct deficiencies in employee conduct and help employees be successful in their jobs. In FY 2021, 25 cases involving discrimination (including harassment), and/or retaliation resulted in disciplinary and/or corrective action. Actions included 15 Letters of Admonishment, two Letters of Reprimand, five suspensions ranging from one to six days, and three alternative agreements for corrective action.

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 agency remains committed to the prevention and elimination of discrimination (including harassment) and has sought to uphold the highest standards of a model federal agency. The Department proactively promotes the rights of all employees, former employees and applicants to be protected under antidiscrimination and whistleblower laws.

Applicable Laws

The "Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002" (No FEAR Act), Public Law 107-174, was enacted to reduce incidences of workplace discrimination within the federal government by holding agencies and departments accountable for violations of anti-discrimination and whistleblower protection laws.

This report contains data pertaining to Title VII of the Civil Rights Act of 1964, as amended; and 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 Pregnancy Discrimination Act of 1978.

The Whistleblower Protection Act of 1989 and the Whistleblower Protection Enhancement Act of 2012 provide the right for all covered Federal employees to make whistleblower disclosures and ensure that employees are protected from whistleblower retaliation. [Tab 2.11 - Department Whistleblower Appreciation Day Department Notice]

Applicable Policies

Administrative complaint processes and Civil Rights programs are outlined in the Foreign Affairs Manual. The Department's EEO Retaliation/Reprisal Policy prohibits retaliation or reprisal against any employee or applicant for employment because of their prior EEO protected activity 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 civil rights and equal opportunity laws, regulations, and provisions. [Tab 2.4 - EEO Retaliation Policy]

The Department's sexual and discriminatory harassment policies define harassment, outline the Department's responsibilities for addressing harassment and provide clarity on the rights and responsibilities of employees who believe they were/are being subjected to harassment. The policies inform individuals with mandatory reporting authority that they must report knowledge of workplace harassment directly to the Anti-Harassment Program. Both policies iterate that the Department will take necessary steps to protect from retaliation those employees who report incidents of harassment. All employees are required to complete the Department's Preventing Harassment at State training bi-annually. [Tab 2.6 and 2.7 - Discriminatory and Sexual Harassment Policies, respectively.]

The Civil and Foreign Service Disciplinary policies describe the expectations of the Department and outline the repercussions when these expectations are not met. These policies include an exemplar list of potential disciplinary offenses and penalties, ranging from Letters of Reprimand to removal from service. Retaliatory 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. [Tab 2.8 and 2.9 - Civil Service and Foreign Service Disciplinary Action Policies, respectively.]

No FEAR Act Training

Preventative measures are the Department's first line of defense in ensuring a workplace that is free of discrimination and retaliation for whistleblowing. Mandatory trainings are provided to the workforce domestically, overseas and through the Foreign Service Institute's distance learning courses.

The Department's No FEAR Act Training course provides information about the EEO process, the Department's Anti-Harassment Program, whistleblowing, and retaliation protections. The training was revamped in FY 2021 and is more relevant, concise, and informative. All federal employees are required to complete the No FEAR Act training biennially. Students learn about the No FEAR Act and the avenues of recourse available to employees who suspect they are the victims of illegal discrimination or retaliation. Managers who supervise Personal Service Contractors (PSCs) are strongly encouraged to provide PSCs with an

opportunity to take the distance learning training. In FY 2022, the Department will explore requiring PSCs to take this training. [Tab 2.10 - No FEAR Act Training Course Description]

Over the course of the preceding five years, enrollment remained below 6,000 employees per year. However, in FY 2021, the Department recorded the highest enrollment in the No FEAR Act training, surpassing 7,000 employees. The increase was due in part to the Office of Civil Rights' outreach to bureaus that had higher completion rates and circulating best practices to bureaus with lower rates. Promising practices included requiring Civil Service employees to be completely up to date on their mandatory training in order to receive a 5/5 on their performance evaluation and greater information sharing between HR and supervisors. The Department will continue to examine ways to increase compliance with the No FEAR Act training requirement.

DATA

Disciplinary Action

The Department takes accountability for conduct and performance issues very seriously. Misconduct, including discrimination (including harassment) and/or retaliation, is not tolerated and individuals who engage in misconduct are held accountable. Conduct, Suitability, and Discipline (GTM/ER/CSD) develops, implements, and administers conduct and discipline policies for the Department's Foreign and Civil Service, advising leadership on specific cases and supporting disciplinary actions by authorized management officials.

In FY 2021, 25 cases involving allegations of discrimination (including harassment), and/or retaliation resulted in disciplinary and/or corrective action. In addition, three proposals for discipline were issued for employees who then resigned or retired before a decision was issued. Actions included 15 Letters of Admonishment, two Letters of Reprimand, five suspensions ranging from one to six days, and three alternative to discipline agreements.

Three of the cases included in this total were previously reported but reported in this fiscal year as well because a grievance decision was issued; in one case the discipline was sustained, in another discipline was mitigated, and in the third, an administrative action was ordered in lieu of discipline. It is also important to note that decisions do not directly correlate to the number of discrimination (including harassment) and/or retaliation referrals received during the covered period.

Whistleblower Retaliation Complaints

The Department's Office of Inspector General has the mandate to receive and investigate complaints or information from employees concerning possible violations of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety. Federal law prohibits agencies from retaliating against employees who have made such a complaint or disclosed information to an Inspector General, their supervisors or the Office of Special Counsel.

Whistleblower protections extend to Foreign and Civil Service employees, as well as employees of Department contractors, grantees, subcontractors, and subgrantees, and personal services contractors. The Department safeguards these protections through provisions in the Foreign Affairs Manual, which prohibit supervisors and other Department officials from retaliating against an employee for the disclosure of wrongdoing.

The Department is committed to ensuring that all employees are aware of and understand prohibited personnel practices and whistleblower protections. The Department distributes informative materials to employees and contractors advising on their rights to file a whistleblower complaint. On July 30, 2021, the Department celebrated Whistleblower Appreciation Day by acknowledging the important role that whistleblowers play in promoting accountability, good governance, and the rule of law.

[Tab 2.11 - Department Whistleblower Appreciation Day Department Notice]

Three new cases involving whistleblower claims were filed before the Merit System Protection Board (MSPB) in FY 2021. Two of these cases were dismissed and one remains in mediation.

Grievances

The Grievance Staff investigates grievances and prepares recommendations, in the form of decision letters and settlement agreements, for the resolution of grievances submitted under the Foreign Service Grievance System and the Civil Service Administrative Grievance System and the American Federation of Government Employees (AFGE) Local 1534 negotiated grievance procedure. The Staff reviews grievances that may include complaints with an EEO nexus, retaliation, and whistleblower protections.

The Grievance Staff has placed easily accessible and user-friendly information regarding the grievance process on the Department's SharePoint sites. In addition, each agency decision includes a summary of the grievants' appeal rights. Moreover, information concerning the grievance process and grievants' rights are routinely included in Department Notices and cables apprising employees of the various avenues of redress available to them.

In FY 2021, there were 12 grievances (9 Foreign Service; 3 Civil Service) "tied to an EEO basis." Four of those grievances alleged disability discrimination, three alleged gender discrimination, and two alleged race discrimination and retaliation. Sexual orientation, color, and national origin were also cited as an EEO basis in these grievances. The Staff reviewed

three whistleblower grievances filed by the same grievant that were not connected to an EEO basis filed in FY 2021.

Discrimination Complaints

S/OCR manages the EEO administrative process for the Department. The Intake and Resolution section processes complaints of discrimination from U.S. citizen employees and applicants for employment on the following bases: race, color, national origin, religion, sex (which includes gender identity, sexual orientation, and pregnancy) age, mental and/or physical disability, protected genetic information, and reprisal for opposing illegal discrimination or participating in protected EEO activity.

There were 121 formal EEO complaints filed with S/OCR in FY 2021. Each complaint may allege multiple bases of discrimination. Counting each individual basis identified as a separate allegation, there were 96 allegations that included bases covered by Title VII of the Civil Rights Act of 1964, as amended; 52 allegations under Section 501 of the Rehabilitation Act of 1973, as amended; 26 allegations under the Age Discrimination in Employment Act of 1967; one allegation under the Genetic Information Nondiscrimination Act of 2008; and four allegations under the Pregnancy Discrimination Act of 1978.

Additionally, there were 62 allegations of reprisal under one of the aforementioned statutes. A detailed breakdown of the statistical data related to EEO complaints is posted to the Department's public website in accordance with the No FEAR Act. There were no findings of discrimination in FY 2021. [Tab 2.12 - Agency Equal Employment

Opportunity Data Pursuant to the No FEAR Act]

Federal Court Cases

In FY 2021, five Federal Court complaints and four MSPB complaints were filed alleging discrimination, harassment, and/or retaliation. Five of the nine cases were dismissed and four remain in litigation. Two Federal cases were settled in FY 2021.

Judgment Fund Reimbursement 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 was no reimbursement to the Judgment Fund nor budget adjustment in FY 2021.

I. ANALYSIS OF TRENDS, CAUSAL ANALYSIS, AND PRACTICAL KNOWLEDGE GAINED THROUGH EXPERIENCE

The No FEAR Act requires that agencies undertake “an examination of trends, causal analysis, practical knowledge gained through experience, and any actions planned or taken to improve complaint or civil rights programs of the agency.”

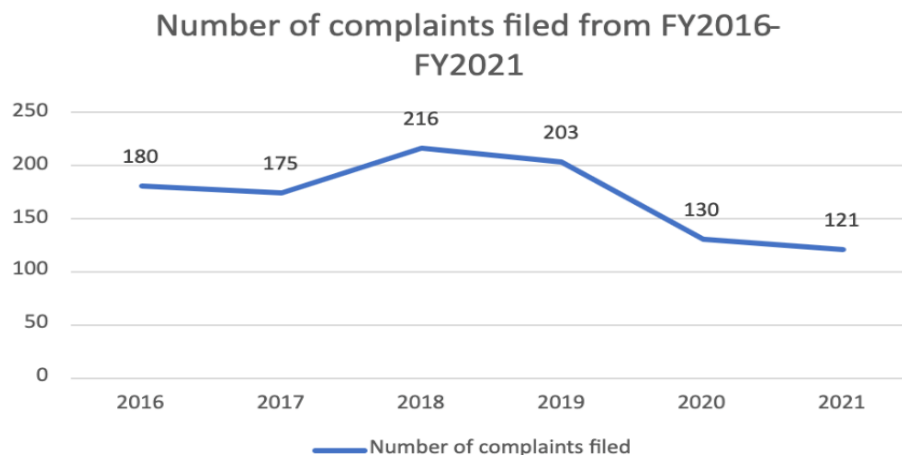
Trends

Based on administrative claims filed in accordance with 29 C.F.R. § 1614, there are several noteworthy trends. The number of formal EEO complaints initiated declined for the second year in a row, down from 203 complaints in FY 2019 and 130 complaints in FY 2020. This represents a 40 percent decrease in formal complaints initiated from FY 2019 through FY 2021.

Table 1: Complaints filed over last five fiscal years (FYs).

FY	Number of Complaints Filed
2016	180
2017	175
2018	216
2019	203
2020	130
2021	121

Chart for Table 1: Complaints filed over last five fiscal years.



Reprisal remained the highest identified basis of discrimination, alleged in 51 percent of formal EEO complaints. The continued high number of reprisal allegations seems to be consistent across the federal government. A review of No FEAR statistics from other federal agencies reveals that reprisal is often the most frequently alleged basis of discrimination. Disability and sex were respectively the second and third most frequently filed bases of complaints, with disability complaints experiencing a notable increase. Disability was alleged in 43 percent of formal complaints in FY 2021 compared to 36 percent of formal complaints in FY 2020. Sex was alleged in 32 percent of formal complaints in FY 2021, compared to 37 percent of formal complaints in FY 2020. Please note that since complaints can allege more than one basis, these numbers will not total to 100%.

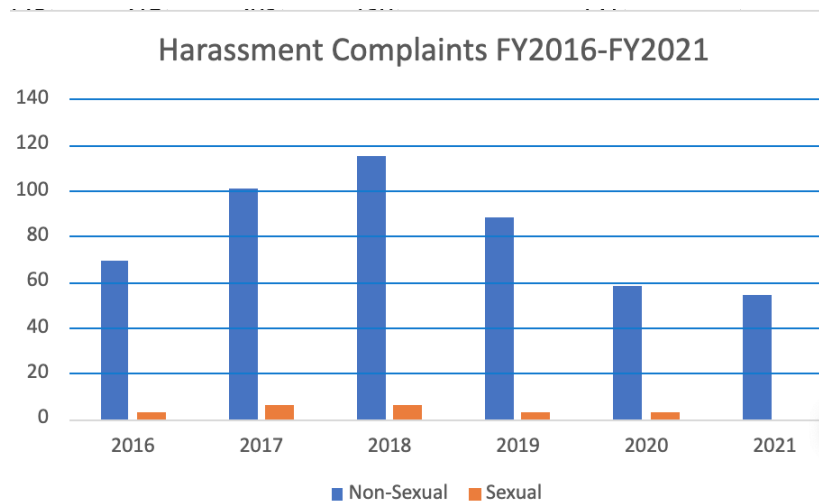
Table 2: Most frequent bases in complaints filed.

Basis	FY 2020	FY 2021
Retaliation	47%	51%
Disability	36%	43%
Sex	37%	32%

Harassment remained the highest identified issue, alleged in 45 percent of formal complaints. Promotions and performance evaluations were respectively the second and third most frequently identified issues. Promotions were alleged as an issue in 21 percent of formal complaints and performance evaluations were alleged as an issue in 14 percent of formal complaints. The ranking of issues raised in formal EEO complaints during FY 2021 were comparable as with FY 2020.

Table 3: Harassment complaints by type over time.

FY	Sexual Harassment	Non-sexual Harassment
2016	3	72
2017	6	103
2018	6	119
2019	3	89
2020	3	62
2021	0	56

Chart for Table 3: Harassment complaints by type over time.

Causal Analysis

A review of No FEAR statistics from other federal agencies reveals that many agencies experienced a similar drop in complaints during this same time period, indicating the cause for the Department's decrease in complaint activity is likely shared between agencies. We believe that the trend is due, at least in part, to fewer employees working in shared offices

and the additional workplace flexibilities, including telework, that have been available for employees since the start of the COVID-19 pandemic.

Additional factors contributing to the lower volume of formal EEO complaints include the Department's robust Pre-Complaint and Anti-Harassment Programs. The Department's Pre-Complaint Program consists of EEO counseling and Alternative Dispute Resolution (ADR). EEO Counselors and the ADR processes have continued to successfully resolve a variety of workplace issues prior to the need for employees to initiate formal EEO complaints. Since 2019, EEO Counselors have been trained on techniques relating to interest-based resolution, rather than position-based resolution. Research shows that focus on interests, rather than positions, is more likely to result in dispute resolution.

The Anti-Harassment Program provides an avenue for the Department to ensure that the work environment is free from harassment without the need for an employee to initiate a complaint. This includes connecting management with appropriate resources to take immediate corrective action, conducting inquiries into reports of harassment, and referring completed inquiries for disciplinary and appropriate management action.

Practical Knowledge

The Department gained practical knowledge from the analysis of the EEO Complaints from FY2021 and examination of trends and causation from the past five years. It is imperative that employees and contractors are aware of the administrative processes available to address concerns that arise. The revised mandatory No FEAR Act training has been well received,

however, enrollment should be consistent with the number of employees. This disparity must be addressed.

There were a number of factors that contributed to the decrease in formal EEO complaints. The Department wants to ensure that lack of trust in the process is not a deterrent to employees exercising their right to participate in the EEO or other administrative processes. Accountability and transparency are essential to an effective EEO program. The Department has made progress in these areas, but more can be done. In 2022, the Department will launch an agency-wide climate survey that will provide additional insights on these dynamics.

The Director of the Office of Civil Rights was also serving as the Department's Chief Diversity Officer. An executive order on diversity, equity, inclusion, and accessibility in the federal workplace was enacted on June 25, 2021. The Secretary appointed Ambassador Gina Abercrombie-Winstanley as the Department's first stand-alone Chief Diversity and Inclusion Officer in April 2021. Under her leadership, a primary function of the Secretary's Office of Diversity and Inclusion (S/ODI) is to focus on Department-wide accountability and transparency.

Planned Actions

Increase No FEAR Act Report Training Compliance

Given S/OCR's robust training program, employees may receive EEO training in other ways; however, compliance with the No FEAR Act remains a priority for Department leadership. Department leadership should explore putting the No FEAR Act training on the Department's mandatory training

dashboard. The reason it is currently not on the dashboard is due to an ongoing legacy system upgrade.

Enhance and Strengthen Accountability Response Measures

Effective accountability response measures support the prevention and elimination of discrimination, harassment, bullying and toxic management. Employees being considered for promotion, assignments, awards, and participation in selection boards are vetted through various offices to ensure that any active performance or conduct issues are considered appropriately for each candidate.

Increase Transparency

Earning and maintaining the confidence of employees is critical and the Department has made significant strides to increase transparency. The Department must continue to be innovative in its efforts to share data and information about programs and policies, while complying with all relevant laws and regulations, and encourage open channels of communication between our diverse workforce and leadership at the highest levels.

Diversity, Equity, Inclusion and Accessibility Strategic Plan Implementation

S/ODI is drafting the Department's Diversity, Equity, Inclusion and Accessibility Strategic Plan which will provide a roadmap for future progress and further promote accountability across the Department. The Department will provide this office with the appropriate support needed to effectively implement the strategic plan upon finalization.