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THE FEDERAL WORKFORCE

Observations on Protections From Discrimination and Reprisal for Whistleblowing

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Mr. Chairman and Members of the Committee:

I am pleased to have this opportunity to provide information for your deliberations on H.R. 169, the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2001, commonly referred to as the NoFEAR Act.

In a high-performing workplace, federal employees must be able to pursue the missions of their organizations free from discrimination and should not fear or experience retaliation or reprisal for reporting—blowing the whistle on—waste, fraud, and abuse. To help achieve such a workplace, federal antidiscrimination laws protect these employees from discrimination based on their race, color, sex, religion, national origin, age, or disability, as well as retaliation for filing a complaint of discrimination.[1] In addition, the Civil Service Reform Act of 1978 articulates the merit system principles for the fair and equitable treatment of the federal workforce and defined personnel practices that are prohibited. Among the prohibited personnel practices is reprisal for whistleblowing. Several other laws also protect employees from reprisal by prohibiting agencies' taking or threatening to take—or not to take—a personnel action because of an employee's whistleblowing activities.

Unfortunately, despite these protections, some federal employees have experienced or believe that they have been subject to workplace discrimination or reprisal for whistleblowing. Such experiences or perceptions—and the complaints and lawsuits they spur—not only disrupt the lives of the affected employees, they can also undermine the efficient and effective delivery of government services to the public and discourage a diverse, pluralistic, and accountable workforce.

With these thoughts in mind, I have three points to make that relate to the principles underlying the proposed act.

- **Reporting.** Because data are not readily available, there is no clear picture of the number of complaints of workplace discrimination and reprisal for whistleblowing at agencies or governmentwide and the outcome of these cases. Data of this nature are important because they can be a starting point for agency managers to understand the nature and scope of issues in the workplace involving discrimination, reprisal, and

[1]Applicants for federal employment are also covered under these laws.

other conflicts and problems, and can help in developing strategies for dealing with those issues.

- **Accountability.** Accountability is a cornerstone of results-oriented management. Agencies and their leaders and managers should be accountable for providing fair and equitable workplaces, free from discrimination and reprisal. In addition, individuals need to be held accountable for their actions in cases where discrimination or reprisal for whistleblowing has occurred.
- **Notification.** Finally, in order for the full benefit of laws protecting the workforce to be realized, agencies need to take steps to make federal employees sufficiently aware of their protections from discrimination and reprisal for whistleblowing.

In making our observations today, and as agreed with the Committee, I will draw upon our work examining discrimination and whistleblower issues in the federal workplace and performance management principles embodied in the Government Performance and Results Act, particularly in regard to human capital.

Reporting: No Clear Picture of Complaint Activity

The federal government lacks a clear picture of the volume of discrimination and whistleblowing reprisal cases involving federal employees. The lack of a complete accounting of cases is in part a by-product of the complexity of the redress system for federal employees and the different ways in which case data are reported. The NoFEAR Act would require agencies to report the number of discrimination and whistleblower reprisal cases.

Executive branch civil servants are afforded opportunities for redress of complaints of discrimination or retaliation for whistleblowing at three levels: first, within their employing agencies; next, at one of the administrative bodies with sometimes overlapping jurisdictions that investigate or adjudicate their complaints; and, finally, in the federal courts.[2]

- Where discrimination is alleged, the Equal Employment Opportunity Commission (EEOC) hears complaints employees file with their agencies

[2]We have previously reported that the redress system for federal employees has been criticized for being adversarial, inefficient, time-consuming, and costly. See *Federal Employee Redress: A System in Need of Reform* (GAO/T-GGD-96-110, Apr. 23, 1996) and *Federal Employee Redress: An Opportunity for Reform* (GAO/T-GGD-96-42, Nov. 29, 1995).

and reviews agencies' decisions on these complaints.[3] In a case in which an employee alleges that discrimination was the motive for serious personnel actions, such as dismissal or suspension for more than 14 days, the employee can request a hearing before the Merit Systems Protection Board (MSPB). MSPB's decisions on such cases can then be reviewed by EEOC.

- For federal employees who believe that they have been subject to whistleblower reprisal, the Office of Special Counsel (OSC) will investigate their complaints and seek corrective action when a complaint is valid. When agencies fail to take corrective action, OSC or the employee can take the case to MSPB for resolution. Alternatively, an employee can file a whistleblower reprisal complaint directly with MSPB, if the personnel action taken against the person is itself appealable to MSPB. In addition, under certain environmental laws and the Energy Reorganization Act, employees can ask the Department of Labor (DOL) and the Nuclear Regulatory Commission to investigate their complaints.
- Employees who belong to collective bargaining units represented by unions can also file grievances over discrimination and reprisal allegations under the terms of collective bargaining agreements. In those situations, the employee must choose to seek relief either under the statutory procedure discussed above or under the negotiated grievance procedure, but not both. If an employee files a grievance alleging discrimination under the negotiated grievance procedure, the Federal Labor Relations Authority (FLRA) can review any resulting arbitrator's decision. A grievant may appeal the final decision of the agency, the arbitrator, or FLRA to EEOC.

A complainant dissatisfied with the outcome of his or her whistleblower reprisal case can file an appeal to have the case reviewed by a federal appeals court.[4] An employee with a discrimination complaint who is dissatisfied with a decision by MSPB or EEOC, however, can file a lawsuit in a federal district court and seek a *de novo* trial. [5]

[3]Discrimination complaints against federal agencies are processed in accordance with regulations promulgated by EEOC. Complaints are filed with and investigated by agencies with hearings conducted by EEOC administrative judges. EEOC also hears appeals of agency and administrative judges' decisions on cases.

[4]In a whistleblower reprisal case decided by MSPB, an appeal can be filed with the U.S. Court of Appeals for the Federal Circuit. For a case decided by DOL, an appeal can be filed with the U.S. Court of Appeals for the circuit in which the alleged reprisal occurred.

[5]In a *de novo* trial, a matter is tried anew as if it had not been heard before.

With reporting requirements and procedures varying among the administrative agencies and the courts, data on the number of discrimination and whistleblower reprisal cases are not readily available to form a clear and reliable picture of overall case activity. However, available data do provide some insights about caseloads and trends. These data and our prior work show that most discrimination and whistleblower reprisal cases involving federal employees are handled under EEOC, MSPB, and OSC processes, with complaints filed under EEOC's process by far accounting for the largest volume of cases. In fiscal year 2000, federal employees filed 24,524 discrimination complaints against their agencies under EEOC's process. In fiscal year 2000, MSPB received 991 appeals of personnel actions that alleged discrimination. MSPB also received 414 appeals alleging whistleblower reprisal in fiscal year 2000, while OSC received 773 complaints of whistleblower reprisal. There are two caveats I need to offer about these statistics. The first is that because of jurisdictional overlap among the three agencies, the statistics cannot be added together to give a total number of discrimination and whistleblower reprisal complaints. The second caveat is that in our past work, we found some problems with the reliability and accuracy of data reported by EEOC.[6]

Notwithstanding these caveats, the available data also show that the last decade saw an overall increase in the number of cases, particularly discrimination complaints under EEOC's jurisdiction.[7] The number of cases under EEOC's jurisdiction, which stood at 17,696 in fiscal year 1991, showed a fairly steady upward trend, peaking at 28,947 in fiscal year 1997. Although the number of new cases each year has declined since fiscal year 1997, the number of cases in fiscal year 2000—24,524—is almost 40 percent greater than in fiscal year 1991, despite a smaller federal workforce.

[6]For a further discussion about the reliability and accuracy of data reported by EEOC, see *Equal Employment Opportunity: Data Shortcomings Hinder Assessment of Conflicts in the Federal Workplace* (GAO/GGD-99-75, May 4, 1999).

[7]In earlier reports, we discussed factors behind the increase in the number of discrimination complaints in the forum under EEOC's jurisdiction and how rising caseloads have been accompanied by an increase in case processing time. See *Equal Employment Opportunity: Discrimination Complaint Caseloads and Underlying Causes Require EEOC's Sustained Attention* (GAO/T-GGD-00-104, Mar. 29, 2000); *Equal Employment Opportunity: Complaint Caseloads Rising, With Effects of New Regulations on Future Trends Unclear* (GAO/GGD-99-128, Aug. 16, 1999); and *Equal Employment Opportunity: Rising Trends in EEO Complaint Caseloads in the Federal Sector* (GAO/GGD-98-157BR, July 24, 1998).

Caseload data can be a starting point for agency managers to understand the nature and scope of issues in the workplace involving discrimination, reprisal, and other conflicts and problems, and can help in developing strategies for dealing with these issues. However, caseload data can only be a starting point because they obviously do not capture any discrimination or reprisal that is not reported.

As I discussed above, most discrimination complaints are handled within the process under EEOC's jurisdiction. However, we have found in our past work that EEOC does not collect data in a way needed by decisionmakers and program managers to discern trends in workplace issues represented by discrimination complaints, understand the issues underlying these complaints, and plan corrective actions.[8] Although EEOC has initiatives under way to deal with data shortcomings, relevant information is still lacking on such matters as (1) the statutory basis (e.g., race, sex, or disability discrimination) under which employees filed complaints and (2) the kinds of issues, such as nonselection for promotion or harassment, that were cited in the complaints.[9]

The NoFEAR Act would also require agencies to report the status or disposition of discrimination and whistleblower reprisal cases. The available data show that most allegations of discrimination and reprisal for whistleblowing are dismissed, withdrawn by the complainant, or closed without a finding of discrimination. However, many other cases are settled. Of the discrimination cases within EEOC's jurisdiction, 5,794 (21.3 percent) of the 27,176 cases were closed through a settlement. At MSPB, 279 (28.5 percent) of the 980 appeals that alleged discrimination were settled. With regard to the 440 whistleblower cases at MSPB, 93 (21 percent) were settled. While settlements are made when evidence may point to discrimination or reprisal, at other times an agency may make a business decision and settle for a variety of reasons, including that pursuing a case may be too costly, even if the agency believes it would have ultimately prevailed. Finally, in some cases, discrimination or reprisal is found. Of the 27,176 cases within the discrimination complaint process under EEOC's jurisdiction that were closed in fiscal year 2000, 325 (about 1 percent) contained a finding of discrimination. At MSPB, of the 980 cases alleging discrimination, discrimination was found in 4 (four-tenths of a

[8]GAO/GGD-99-75.

[9]See GAO/T-GGD-00-104 for a discussion of EEOC initiatives to deal with data shortcomings.

percent). In 440 cases alleging whistleblower reprisal it reviewed, MSPB found that a prohibited personnel practice occurred in 2 (five-tenths of a percent) of the cases. At OSC, favorable actions were obtained in 47 of 671 (7 percent) whistleblower reprisal matters closed in fiscal year 2000.[10]

Agency Movement Toward Alternative Dispute Resolution

It is important to note that agencies have responded to the rise in the number of complaints and the costs associated with them by adopting alternative means of dispute resolution (ADR). Using ADR processes, such as mediation, agencies intervene in the early stages of conflicts in an attempt to resolve or settle them before positions harden, workplace relationships deteriorate, and resolution becomes more difficult and costly. A premise behind a requirement EEOC put in place in 1999 that agencies make ADR available was that the complaint system was burdened with many cases that reflected basic workplace communications problems and not necessarily discrimination. Some agencies, most notably the Postal Service, have reported reductions in discrimination complaint caseloads through the use of ADR. In fact the Postal Service, from fiscal year 1997 through fiscal year 2000, saw a 26 percent decline in the number of discrimination complaints that the agency largely attributes to its mediation program.[11] Because ADR prevents some disputes from rising to formal complaints, a reduction in the number of formal complaints should not necessarily be looked at as a reduction in workplace conflict, but it can indicate that an agency is more effectively dealing with workplace conflict.

[10]Favorable actions include actions taken directly to benefit the complaining employee; actions taken to punish, by disciplinary or corrective action, the supervisor involved in the personnel action; and systemic action, such as training or educational programs, to prevent future questionable personnel actions.

[11]For a further discussion of ADR initiatives, see *Alternative Dispute Resolution: Employers' Experiences With ADR in the Workplace* (GAO/GGD-97-157, Aug. 12, 1997).

Accountability: A Cornerstone of Performance Management

Meaningful data along the lines I discussed earlier are useful in helping to measure an agency's success in adhering to merit system principles, treating its people in a fair and equitable way, and achieving a diverse and inclusive workforce. We encourage such assessments of agencies' workplaces and human capital systems to help them align their people policies to support organizational performance goals.[12] In addition, data foster transparency, which in turn provides an incentive to improve performance and enhance the image of the agency in the eyes of both its employees and the public.

Another possible means of promoting accountability might be to have organizations bear more fully the costs of payments to complainants and their lawyers made in resolving cases of discrimination and reprisal for whistleblowing. Currently, federal agencies do not always bear the costs of settlements or judgments in discrimination or reprisal complaints. Agencies will pay these costs when a complaint is resolved by administrative procedures, such as the discrimination complaint process. However, when a lawsuit is filed, any subsequent monetary relief is generally paid by the Judgment Fund. (One exception is the Postal Service, which is responsible for settlement and judgment costs.) The Judgment Fund provides a permanent indefinite appropriation to pay settlements and judgments against the federal government. Congress created the Judgment Fund to avoid the need for a specific congressional appropriation for settlement and judgment costs and to allow for prompter payments. The NoFEAR Act would require that agencies reimburse the Judgment Fund for payments made for discrimination and whistleblower reprisal cases.

Table 1 below shows payments made by agencies for discrimination complaint cases processed under administrative procedures within EEOC's jurisdiction and payments from the Judgment Fund for employment discrimination lawsuits (these were the only readily available data). In addition to attorney fees and expenses, payments made to complainants include back pay, compensatory damages, and lump sum payments. As the table shows, agencies made payments totaling about $26 million in fiscal year 2000 for discrimination complaint settlements

[12]We have prepared *Human Capital: A Self-Assessment Checklist for Agency Leaders* (GAO/OGC-00-14G, Sept. 2000) to help make this assessment.

and judgments. At the same time, agencies were relieved of paying almost $43 million in cases because of the existence of the Judgment Fund.[13]

Table 1: Payments Made in Discrimination Cases by Agencies and the Judgment Fund, Fiscal Years 1998-2000 (Dollars in Millions)

	FY 1998	FY 1999	FY 2000
Agencies	$24.4	$26.3	$26.1
Judgment Fund	37.1	41.8	42.7
Total	**$61.5**	**$68.1**	**$68.8**

Source: EEOC and Treasury Department Judgment Fund Data.

The availability of the Judgment Fund to pay settlement and judgment costs has brought about debate with regard to agency accountability. On one hand, it could be argued that the Judgment Fund provides a safety net to help ensure that agency operations are not disrupted in the event of a large financial settlement or judgment. It can also be argued, however, that the fund discourages accountability by being a disincentive to agencies to resolve matters promptly in the administrative processes; by not pursuing resolution, an agency could shift the cost of resolution from its budget to the Judgment Fund and escape the scrutiny that would accompany a request for a supplemental appropriation.[14] Congress dealt with a somewhat similar situation when it enacted the Contract Disputes Act[15] in 1978, which requires agencies to either reimburse the Judgment Fund for judgments awarded in contract claims from available appropriations or to obtain an additional appropriation for such purposes. This provision was intended to counter the incentive for an agency to avoid settling and prolong litigation in order to have the final judgment against the agency occur in court. In reconciling these viewpoints on financial accountability, Congress will need to balance accountability with the needs of the public to receive expected services.

[13]For additional discussion about payments made by agencies and from the Judgment Fund for discrimination cases, see *Discrimination Complaints: Monetary Awards in Federal EEO Cases* (GAO/GGD-95-28FS, Jan. 3, 1995).

[14]In most lawsuits, the Department of Justice is responsible for handling the litigation and safeguarding the Judgment Fund by approving all settlements.

[15]41 U.S.C. § 612(c).

Individual Accountability

Certainly, just as it is important for agencies to be held accountable in cases where discrimination or reprisal for whistleblowing is found, so must individuals be held accountable for engaging in such misconduct. The NoFEAR Act would require agencies to report the number of employees disciplined for discrimination, retaliation, or harassment.[16] Published statistical data can be important for agencies to send a message to their employees that individuals will be held accountable for their actions in cases involving discrimination, retaliation, or harassment.

Although we have not done any formal work in this area, we know of two agencies—the Department of Agriculture and the Internal Revenue Service (IRS)—that systematically review outcomes of discrimination cases to determine if any individual should be disciplined. Since January 1998, Agriculture has been reviewing cases in which discrimination was found or in which there were settlement agreements to determine if an employee should be disciplined for discrimination or misconduct related to civil rights. An Agriculture official said that a formal policy on accountability and discipline in civil rights-related cases was currently pending approval. Since July 1998, IRS has been reviewing cases in which discrimination was found or in which there were settlement agreements to determine if the discrimination was intentional. Where an employee has been found to have discriminated against another employee of IRS (or a taxpayer or a taxpayer's representative), the IRS Restructuring and Reform Act of 1998 provides that the individual be terminated for his or her actions. Only the IRS Commissioner has the authority to mitigate termination to a lesser penalty.

I would also add that besides traditional forms of discipline—such as termination, suspension, or letter of reprimand—employees can be held accountable for their behavior through an agency's performance management system. For example, an employee whose behavior does not rise to the level of discrimination but otherwise demonstrates insensitivity or poor communication skills can and should have that fact reflected in his or her performance appraisal.

[16]EEOC's regulations (29 C.F.R. 1614.102(a)(6)) require that agencies take appropriate action against employees who engage in discriminatory conduct.

Notification: Making Employees Aware of Their Protections

The NoFEAR Act provides that agencies notify employees of the rights and protections available to them under the antidiscrimination and whistleblower statutes in writing and post this information on their Internet sites. This provision reinforces existing requirements that employees be notified of rights and remedies concerning discrimination and whistleblower protection.[17]

There has been a concern that federal employees were not sufficiently aware of their protections, particularly about protections from reprisal for whistleblowing, and without sufficient knowledge of these protections, may not come forward to report misconduct or inefficiencies for fear of reprisal. We first pointed this out in a report issued in 1992.[18] Now, almost a decade later, OSC has identified "widespread ignorance" in the federal workforce concerning OSC and the laws it enforces, even though agencies are to inform their employees of these protections. According to OSC's fiscal year 2000 *Performance Report*, responses to an OSC survey indicated that few federal agencies have comprehensive education programs for their employees and mangers.

Concluding Observations

To help ensure economical, efficient, and effective delivery of services for the benefit of the American people, allegations of discrimination and reprisal for whistleblowing in the federal workplace must be dealt with in a fair, equitable, and timely manner. Doing so requires, first, reliable and complete reporting of data as a starting point to understand the nature and scope of issues in the workplace involving discrimination, reprisal, and other conflicts and problems, and to help develop strategies for dealing with these issues. Second, agencies and individuals must be accountable for their actions. Third, the workforce must be aware of laws prohibiting discrimination and whistleblower reprisal to deter this kind of conduct but also so that they know what course of action they can take when misconduct has occurred.

[17]The 1994 amendments to the Whistleblower Protection Act require federal agencies to ensure that their employees are informed of the rights and remedies concerning whistleblower protection. In addition, EEOC's regulations (29 C.F.R. 1614.102(b)(5)) require agencies to make written materials available to all employees and applicants informing them of the variety of equal employment opportunity program and administrative and judicial remedies available to them.

[18] *Whistleblower Protection: Survey of Federal Employees on Misconduct and Protection From Reprisal* (GAO/GGD-92-120FS, July 14, 1992).

Mr. Chairman, this concludes my prepared statement. I would be pleased to answer any questions you or other Members of the Committee may have at this time.

Contact and Acknowledgments

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