Notification and Federal Employee Antidiscrimination and Retaliation Act Report

Fiscal Years 2004 - 2006

United States Nuclear Regulatory Commission

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I. Executive Summary

The U.S. Nuclear Regulatory Commission (NRC) provides its FY 2004 - 2006 consolidated Annual Report to Congress as required by Section 203 of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), Public Law 107-174.

The No FEAR Act requires that the first report submitted by the agency include data for each of the five fiscal years preceding FY 2004, to the extent such data is available. The agency began collecting data pursuant to the No FEAR Act in FY 2002. Therefore, this report includes data for the period FY 2002 through FY 2006.

The NRC's mission is to license and regulate the Nation's civilian use of byproduct, source, and special nuclear materials to ensure adequate protection of public health and safety, promote the common defense and security, and protect the environment. The NRC is headed by a five member Commission. The President designates one member as Chairman and official spokesperson. The Executive Director for Operations (EDO) carries out the policies and decisions of the Commission. Currently, NRC has a workforce of approximately 3,350 permanent employees and its headquarters is located in Rockville, Maryland. NRC's four regional offices are located in King of Prussia, Pennsylvania; Atlanta, Georgia; Lisle, Illinois; and Arlington, Texas.

The NRC believes that continued efforts to enhance employee satisfaction and encourage early intervention to resolve workplace disputes are key elements in reducing the number of complaints filed against the agency. From FY 2002 through FY 2006, the agency's workforce substantially increased by approximately 300 employees, yet the NRC averaged 28 informal cases filed per year, which is less than 1% of it's total workforce. During this period, a total of 141 informal complaints were filed, of which 58 (41%) resulted in formal complaints filed against the agency. The greatest number of complaints filed was under Title VII of the Civil Rights Act of 1964, as amended (Title VII), and the Age Discrimination in Employment Act of 1967, as amended (ADEA). Age and race discrimination were the most frequently filed bases, and non-sexual harassment and non-selection for promotion were the most common issues. During this period, the agency issued 27 final agency decisions, of which there was one finding of discrimination under the Rehabilitation Act of 1973.

From FY 2002 through FY 2006, 10 cases were filed in Federal district court against the agency. Of the 10 cases, one case was filed under the Whistleblower Protection Act, and nine cases were filed under either Title VII or the ADEA. Of the ten cases, only one Title VII case resulted in an award wherein the agency reimbursed $50,000 to the Judgment Fund. No employees were disciplined for discrimination, retaliation, harassment or other infractions of a provision of law cited under the No FEAR Act stemming from Federal district court actions. There are no cases pending in Federal district court.

Since the enactment of the No FEAR Act, the NRC has had many accomplishments that have positively impacted the workplace climate. These include the Commission and senior executives continually express support of these initiatives through policy statements and in key meetings; implementation of the Comprehensive Diversity Management Plan (CDMP), which includes goals and strategies to assist the agency in reaching its objectives; semi-annual equal employment opportunity (EEO) briefings; and training for managers and employees on the No

FEAR Act, EEO, diversity, the Whistleblower Protection Act (WPA), prohibited personnel practices, and alternative dispute resolution (ADR). The NRC has been committed to raising awareness and promoting the agency's ADR Program to resolve complaints at the earliest stages.

II. Introduction

The No FEAR Act requires Federal agencies to submit annual reports to the Speaker of the House of Representatives, the President *pro tempore* of the Senate, the Committee on Governmental Affairs of the Senate, the Committee on Government Reform of the House of Representatives, each committee of Congress with jurisdiction relating to the agency, the Attorney General, the U.S. Equal Employment Opportunity Commission (EEOC) and the Office of Personnel Management (OPM). This report is submitted by the NRC to satisfy this reporting requirement.

III. Background

The No FEAR Act was signed into law by President George W. Bush on May 15, 2002, and became effective on October 1, 2003. The Act requires Federal agencies to be accountable for violations of antidiscrimination and whistleblower protection laws and post on its website certain statistical data relating to Federal sector EEO complaints filed with the agency. Section 203 of the No FEAR Act requires that each Federal agency submit an annual report to Congress not later than 180 days after the end of each fiscal year. Agencies must report on the number of Federal district court cases arising under each of the respective areas of law specified in the Act in which discrimination was alleged; the status or disposition of cases; the amount of money required to be reimbursed to the Judgment Fund; the number of employees disciplined; any policies implemented related to appropriate disciplinary actions against a Federal employee who discriminated against any individual or committed a prohibited personnel practice; and an analysis of the data collected with respect to trends and causal analysis.

The President delegated responsibility for the issuance of regulations governing implementation of the No FEAR Act to OPM. OPM published interim regulations on January 22, 2004, concerning the reimbursement provisions of the Act. On December 28, 2006, OPM published the final regulations for reporting in the *Federal Register*. The effective date of the final rule was February 26, 2007. Like most Federal agencies, NRC elected to wait until the final regulations were published to submit its first report.

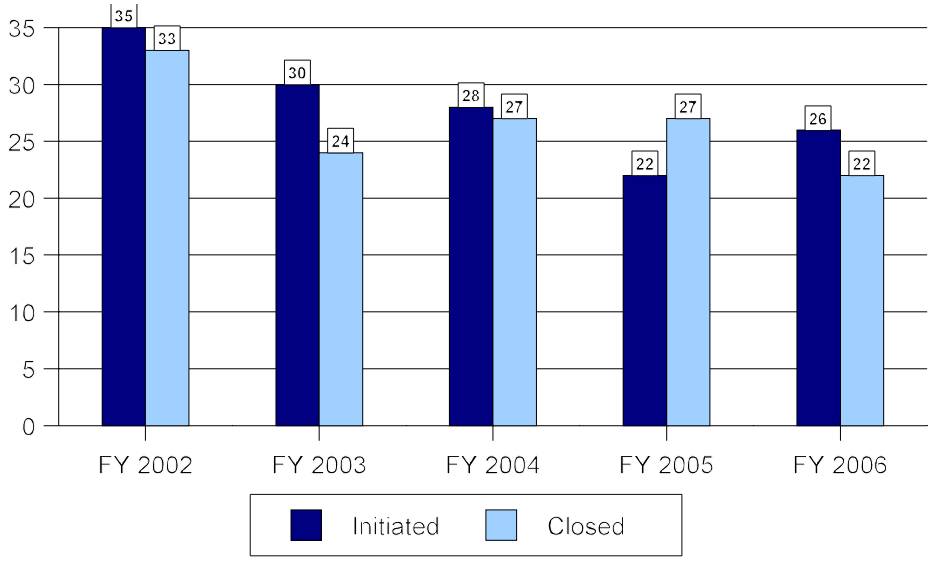
NRC's Office of Small Business and Civil Rights (SBCR) is responsible for administering and ensuring agency compliance with the Federal EEO laws, regulations, policies, and guidance that prohibit discrimination in the Federal workplace based on race, color, national origin, religion, gender, age, disability, or reprisal. SBCR is also responsible for preparing the agency's Annual No FEAR Act Report. The Office of Human Resources (HR), Office of the Inspector General (OIG) and Office of the General Counsel (OGC) also play a role in the implementation of the No FEAR Act for NRC employees.

IV. Data Posted for FY 2002 - FY 2006

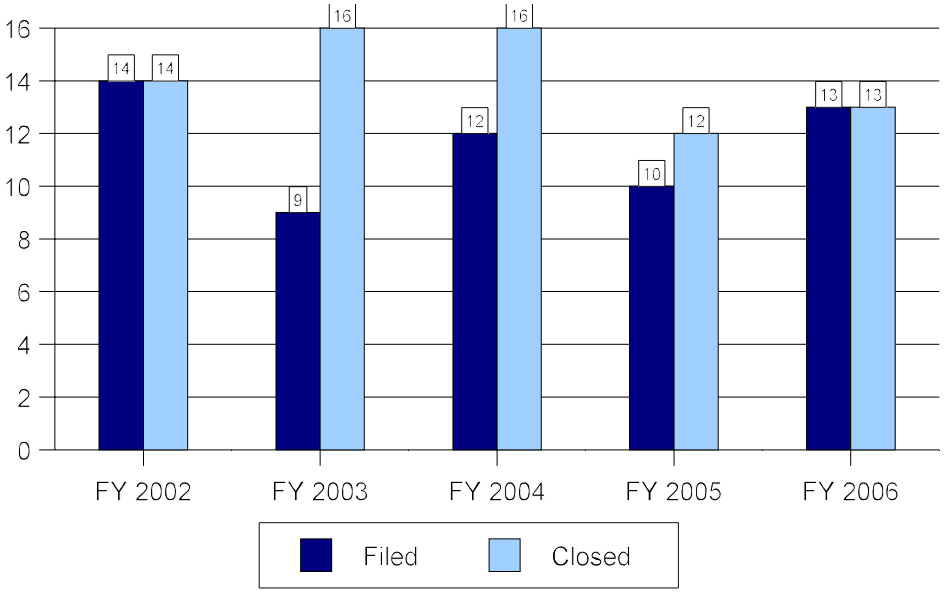
As required by the No FEAR Act, NRC timely posted and prominently displayed a link to the No FEAR Act data on its main website (www.nrc.gov) not later than 30 calendar days after the end of each quarter beginning with FY 2002. See Attachment 1 for details.

Overall, NRC's informal and formal complaint activity is relatively low. We believe that this is due to a continual effort to maintain a positive work environment and the fact that a number of work-place disputes are resolved prior to complainants initiating the informal process. The following sections provide more information on the informal and formal complaints filed against the agency:

a. Informal (Pre-complaint) Counseling Activity



b. Formal Complaint Activity



From FY 2002 through FY 2006, a total of 141 informal complaints were filed, and 133 (94%) cases were closed. Over the past five years, there was a minor decline in the number of informal complaints filed against the agency, yet the filing of formal complaints remained relatively stable. Of the 141 informal complaints, 58 (41%) formal complaints were filed against the agency averaging about a dozen formal cases filed each year. SBCR attributes the low number of formal complaints to the agency's proactive early intervention to resolve workplace disputes, encouraging use of the agency's ADR Program, and providing EEO and No FEAR Act training to NRC managers, supervisors, and employees. Analysis shows that there have been very few repeat complaint filers. The agency has made considerable strides to reduce the number of pending investigations at the end of each fiscal year from 11 cases in FY 2002 to 5 cases in FY 2006. Currently, two investigations not only are based on EEOC's regulatory requirement to investigate cases within 180 calendar days due to one investigation being held in abeyance because of an appeal to the Merit Systems Protection Board (MSPB) and one investigation requiring a supplemental investigation. During this period, the agency issued 27 final agency decisions, of which there was one finding of discrimination under the Rehabilitation Act of 1973. The agency made this finding against itself due to a process error that delayed the agency's response to requests for reasonable accommodation. The complainant appealed this finding to EEOC.

c. Bases and Issues

The available data for FY 2002 through FY 2006 shows that complainants identified age (26 claims), race (25 claims), reprisal (25 claims) and sex (18 claims) as the most frequently filed bases that gave rise to complaints. Additionally, the data shows that complainants identified non-sexual harassment (36 claims), promotion/non-selection (29 claims), performance evaluations (26 claims) and assignment of duties (25 claims) as the most common issues for filing complaints. Several complaints included multiple bases and issues. See Attachment 1 for details.

V. Civil Cases - Reimbursement to the Judgment Fund

Section 203(1) of the No FEAR Act requires that agencies include in their annual report the number of civil cases arising under the Whistleblower Protection Act and antidiscrimination laws, the status of such cases, and the amount of money reimbursed to the Judgement Fund.

OPM published interim final regulations on January 22, 2004, to clarify the agency reimbursement provisions of the No FEAR Act. These interim regulations stated that the Federal Management Service (FMS), U.S. Department of Treasury, will provide notice to an agency's Chief Financial Officer within 15 business days after payment from the Judgment Fund. The agency is required to reimburse the Judgment Fund within 45 business days after receiving the notice from FMS or must contact FMS to make arrangements in writing for reimbursement.

During FY 2002, two Federal district court cases were filed against the agency. One case was filed under the Whistleblower Protection Act and the second under Title VII and the ADEA. The case alleging whistleblower allegations was resolved in favor of the agency. The Title VII/ADEA case was settled using agency appropriations and not the Judgment Fund.

During FY 2003, five Federal district court cases were filed against the agency. All of the cases were filed under Title VII. Of the five cases, one case resulted in a monetary award. The award was $50,000, including attorney's fees. While the case was filed in FY 2003, the agency did not receive notification from FMS for reimbursement until FY 2005. The $50,000 was promptly reimbursed to FMS upon receipt of the notification.

From FY 2004 through FY 2006, three Federal district court cases were filed against the agency. All three cases were filed under Title VII and were resolved in the agency's favor; therefore, no money was reimbursed to the Judgment Fund. There were no budgetary adjustments identified to comply with reimbursement requirements under the No FEAR Act.

VI. Disciplinary Actions

Section 203(a)(6) of the No FEAR Act requires that agencies include in their annual report a detailed description of the policy implemented by the agency relating to disciplinary actions imposed against a Federal employee who discriminated against any individual in violation of any of the laws cited under section 201(a)(1) or (2), or committed another prohibited personnel practice that was revealed in the investigation of a complaint alleging a violation of any of the laws cited under section 201(a)(1) or (2). Further, the Act requires that, with respect to each such laws, the agency report on the number of employees who were disciplined in accordance with such policy and the specific nature of the disciplinary action taken.

The NRC's policy is to take appropriate disciplinary action against any employee who discriminates against an individual or engages in other prohibited personnel actions against an individual including retaliation for lawful whistleblowing activities or for exercising an appeal, complaint, or grievance right. The NRC has issued three policy statements that reinforce its commitment to establish a workplace free from discrimination, harassment, and retaliation. On September 24, 2004, the NRC issued a policy to all employees entitled "Agency Policy on Appropriate Disciplinary Action for Engaging in Prohibited Personnel Practices." Additionally, on September 29, 2006, the NRC issued the "Equal Employment Opportunity and Diversity Policy Statement," which emphasizes the expectation for managers and the staff that each employee work to create an environment that is free of discrimination and respects an employee's right to participate in the EEO process without fear of harassment or retaliation. Moreover, on January 24, 2007, the agency issued a new updated and expanded version of its policy on harassment in the workplace entitled, "NRC Policy for Preventing and Eliminating Harassing Conduct in the Workplace." This policy cautions that such behavior will result in appropriate disciplinary actions. No NRC employee was disciplined in accordance with the aforementioned policies. See Attachments 2 - 6 for details. As mentioned earlier, there was one finding of discrimination against the agency and in that case, the finding resulted from a process error that delayed the agency's response to requests for reasonable accommodation. Therefore, no disciplinary action was taken in this case. However, in this and several other cases, deciding officials and/or senior executives have counseled managers and supervisors on questionable personnel practices identified during investigations.

In addition to the aforementioned policies, on January 26, 2007, the agency issued a notice to all employees regarding their rights with respect to whistleblower protections and prohibited personnel practices. The notice also reminded new employees about the requirement to take the No FEAR Act training. In December 2006, the agency posted notices on whistleblower protection rights and prohibited personnel practices in all NRC buildings and regional offices.

VII. Training Requirement for No FEAR Act

Section 202(c) of the No FEAR Act requires that agencies train employees about the provision of the Act. To comply with the provision, on September 30, 2005, the agency implemented a No FEAR Act web-based training course concerning the rights and remedies applicable to NRC employees under antidiscrimination and whistleblower protection laws. All NRC employees were required to complete the web-based training course by December 31, 2006. New employees must complete the training within 90 calendar days of being hired by the agency. See Attachment 7 for details.

VIII. Trends, Analysis, and Practical Knowledge

Section 203(7) of the No FEAR Act requires that agencies examine trends, causal analysis, practical knowledge gained through experience, and any actions planned or taken to improve the complaint or civil rights program of the agency.

An analysis of formal complaints from FY 2002 through FY 2006 shows there has been a slight decrease in the number of informal complaints filed, yet formal complaint filings have remained consistent, averaging a dozen or so for each fiscal year. There was an increase in complaint activity at the beginning of FY 2006; however, this trend did not continue throughout the year. Complaint activity alleging age, sex, and reprisal has remained relatively constant since FY 2002; however, there has been an increase in the number of complaints that allege race discrimination. The issue of harassment has been slightly increasing since FY 2003. The agency anticipates that, with the issuance of the new Anti-Harassment Policy harassment, complaints will decline. The issue of non-selection/promotion has remained constant. The issues of assignment of duties and performance evaluations have increased since FY 2002. Practical knowledge gained indicates several reasons for continued complaint activity, to include that more employees have become aware of the complaint process as a result of the requirement to take the agency's No FEAR Act training course, there has been an effort on the part of management to issue more realistic performance evaluations to employees, and there have been several organizational changes at headquarters and the regional offices wherein aggrieved persons believe their career opportunities for promotion and advancement have been affected. During FY 2007, SBCR will begin conducting assessments of offices to identify and eliminate barriers to the agency achieving a model EEO program.

During the past year, the agency has worked diligently to improve the processing time for investigations and reduce the number of pending complaints. For example, the number of cases pending from previous fiscal years was dramatically reduced from 12 cases in FY 2002 to 2 cases in FY 2006. Moreover, the number pending completion of investigation was reduced from 11 cases in FY 2002 to 5 cases in FY 2006. The average processing time for investigations has also improved. For example, the average number of days for investigations have declined from 442 days (2 cases investigated) in FY 2005 to 315 days (10 cases investigated) in FY 2006. It is anticipated that all cases filed during FY 2007 will be investigated within 180 calendar days. An analysis shows that the delays in completing investigations has been due to the time it took for witnesses to submit affidavits and investigators to obtain documentary evidence, the need for supplemental investigations to adequately address the merits of cases, and a request to hold a case in abeyance pending an MSPB appeal. The agency has made great progress in developing standard operating procedures and internal controls to improve investigations. The agency has

also improved its procurement process to employ quality contractor services for investigations more efficiently and expediently.

To help resolve workplace disputes in the EEO process, the NRC implements an ADR Program. The NRC has been very committed to promoting ADR to eliminate actions that may give rise to EEO complaints and offered ADR to 100% of its complainants. The EEOC recognized and commended the agency for its innovative approaches of conducting pre-ADR meetings with parties. The ADR program manager meets with the agency official and employee separately to discuss the ADR process and brainstorm about the issues in dispute. The parties are encouraged to think "outside of the box," to discuss creative ways to resolve matters, and develop a clear understanding of what needs to be done to resolve the dispute (EEOC ADR Report: Best Practices in Alternative Dispute Resolution FY 2003-2004). During FY 2005, the agency's participation rate for using ADR fell to 22.2% compared to a 45.4% participation rate for the Federal Government. During FY 2006, the NRC examined several ways to increase the agency's use of ADR. As a result, the Chairman recently issued a statement supporting the ADR program, the SBCR staff held two informational exhibits about ADR, new ADR brochures were distributed to employees, an assessment of ADR sessions was conducted, and awareness training has been planned for FY 2007. While the ADR participation rate has recently increased to 30%, more extensive evaluation is necessary and will be conducted to document both the successes and opportunities for continued improvement.

With respect to an analysis of civil cases filed against the agency and reimbursement to the FMS' Judgment Fund, the NRC only had one case where the agency was required to reimburse the Judgment Fund. The case was filed in FY 2003; however, the agency did not receive notification from FMS for reimbursement until FY 2005. The $50,000 was promptly reimbursed to FMS upon receipt of the notification. Practical knowledge gained was that the agency did not have a formal process in place for reimbursing FMS. SBCR coordinated with the Office of the Chief Financial Officer and OGC to implement a process to reimburse FMS.

SBCR has recruited a staff with a vast amount of EEO complaint processing experience for the Civil Rights Program. As a result, the Civil Rights Program has improved communication with complainants and managers; provided EEO training to employees to prevent discrimination; reduced the processing time for investigations; trained its collateral duty EEO Counselors on the No FEAR Act, ADR, and EEO case law; and publicized the ADR Program. SBCR continues to maintain contact with other Federal agencies and the Council of Federal EEO and Civil Rights Executives to gain knowledge and learn about best practices in the civil rights area.