



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

# DISCIPLINARY BEST PRACTICES AND ADVISORY GUIDELINES UNDER THE NO FEAR ACT

September 2008

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT



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America*



## **A MESSAGE FROM THE ACTING DIRECTOR OF THE OFFICE OF PERSONNEL MANAGEMENT**

I am pleased to release the report *Disciplinary Best Practices and Advisory Guidelines Under the No FEAR Act*. This report discusses the results of a study by OPM of agency best practices for taking disciplinary action for conduct inconsistent with “Antidiscrimination Laws” and “Whistleblower Protection Laws” as those terms are defined in 5 CFR 724.102. The report also provides advisory guidelines agencies may follow in taking such disciplinary actions. The study and the advisory guidelines were required by the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act).

The No FEAR Act and OPM’s regulations at 5 CFR 724.404 require each agency to provide a written statement to the Speaker of the U.S. House of Representatives; the President Pro Tempore of the U.S. Senate; the Chair, Equal Employment Opportunity Commission (EEOC); the Attorney General; and the Director, OPM describing in detail the extent to which the agency will follow the advisory guidelines. The specific content of the written statements is prescribed in the regulations. The statements must be submitted within 30 working days of the date of this report.

I strongly encourage agencies to draw on the best practices discussed in the report and follow the advisory guidelines to strengthen compliance with the Antidiscrimination Laws and the Whistleblower Protection Laws. As Congress noted in enacting the No FEAR Act: “Federal agencies cannot be run effectively if those agencies practice or tolerate discrimination.”

The report also is available on the OPM Web site at [www.opm.gov](http://www.opm.gov).

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Acting Director

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## **EXECUTIVE SUMMARY**

This report provides the results of a study of agency best practices for taking disciplinary action for employee conduct inconsistent with “Antidiscrimination Laws” and “Whistleblower Protection Laws” as those terms are defined in 5 CFR 724.102. The report also provides advisory guidelines agencies may follow when taking appropriate disciplinary action for such conduct. The study and the advisory guidelines are required by the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act).

### ***Methodology***

The U.S. Office of Personnel Management (OPM) conducted the study. As part of the study, OPM reviewed and analyzed annual reports required by the No FEAR Act and provided by 48 agencies. In addition, OPM conducted interviews with officials from 11 agencies and five major agency components concerning their practices in taking disciplinary actions. In selecting the agencies to interview, OPM took into account which agencies reported taking disciplinary actions in their No FEAR reports, which did not, and how agencies scored under the 2006 Federal Human Capital Survey (FHCS) concerning their employees’ views on their leadership.

### ***Best Practices***

The best practices for taking appropriate disciplinary actions address a number of key components of an effective disciplinary process. Among the topics discussed are the development of disciplinary policies; the roles of supervisors, managers, and others; and the communication of information required to recognize and correct inappropriate conduct. Also discussed are preventive measures such as training that agencies have used to help create workplace environments conducive to reducing or preventing improper conduct.

### ***Advisory Guidelines***

There are six advisory guidelines agencies may follow to ensure appropriate disciplinary actions are taken for conduct inconsistent with Antidiscrimination Laws and Whistleblower Protection Laws. These guidelines address the development and communication of disciplinary policies, procedures for ensuring improper conduct is addressed, the necessary ingredients for taking appropriate discipline, the importance of agency officials working together to take action, the importance of good communications in dealing with inappropriate conduct, and the need to prepare staff to provide good advice to supervisors and managers. Agencies are required under the No FEAR Act and OPM’s regulations to report to Congress and others within 30 working days of this report on the extent to which they will follow the advisory guidelines.

## **BACKGROUND**

The United States and its citizens are best served when the Federal workplace is free of discrimination and retaliation. In order to maintain a productive workforce that is fully engaged in the many important missions of the Government, the rights of employees, former employees and applicants for Federal employment must be steadfastly protected and those who violate these rights must be held accountable. Agencies and departments (“agencies”) should take appropriate and timely steps, including discipline, if appropriate, to address conduct inconsistent with “Antidiscrimination Laws” and “Whistleblower Protection Laws” (hereinafter “Antidiscrimination and Whistleblower Protection Laws” or “applicable laws”) as defined in 5 CFR 724.102.

Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act) requires a comprehensive study of best practices in the Executive branch for taking disciplinary action for conduct inconsistent with Antidiscrimination and Whistleblower Protection Laws. The Act also requires the issuance of advisory guidelines agencies may follow when taking disciplinary action for such conduct. OPM has completed the required study and is issuing this report on best practices and advisory guidelines.

### ***Methodology***

To identify agency best practices for addressing conduct inconsistent with Antidiscrimination and Whistleblower Protection Laws, OPM began its study by analyzing agencies’ Fiscal Year (FY) 2006 No FEAR reports to identify which agencies took disciplinary action (as well as the conduct on which the action was based), reviewing their disciplinary policies where publicly available, and reviewing the results of the 2006 Federal Human Capital Survey (FHCS) to identify agencies having the most favorable employee perceptions about how effectively they manage their workforce.

From that review and analysis, OPM selected 11 agencies and five components for in-depth interviews to find out more about their practices for addressing inappropriate conduct. Specifically, OPM interviewed five of the six agencies which reported taking disciplinary action in FY 2006, as well as five agency components that had taken disciplinary action. In addition, OPM interviewed six agencies which reported no disciplinary action taken in their FY 2006 No FEAR reports and were among the 2006 FHCS Top-10 agencies where employees hold their leadership in high regard, both overall and on specific facets of leadership.

When possible, OPM interviewed both the Equal Employment Opportunity (EEO) and Employee Relations (ER) Directors to discuss the agency’s disciplinary process and practices concerning antidiscrimination and whistleblower protection. In one

instance, OPM interviewed Office of General Counsel staff. OPM reviewed additional materials provided by agencies interviewed, including training and resource materials provided on agency Intranet sites, brochures, and CD-ROMs.

### ***No FEAR Reports from Agencies***

The FY 2006 No FEAR reports from agencies showed that six agencies took disciplinary action. Some of the agency reports provided detailed discussions of trends, causal analysis, and practical knowledge gained through experience with taking discipline. These discussions contributed to the identification of best practices for taking disciplinary action and preventive measures.

### ***Federal Human Capital Survey Results***

OPM reviewed the 2006 FHCS results for the agencies that took discipline and other agencies that were highly rated by their employees on leadership (i.e., the extent employees hold their leadership in high regard, both overall and on certain aspects of leadership). The leadership category of the FHCS includes the questions most relevant to successful antidiscrimination and whistleblower protection practices. These questions cover the employee's trust and confidence in his or her supervisor, the employee's level of respect for the organization's senior leaders, and whether leaders in an organization generate high levels of motivation and commitment in the workforce. For example, employees were asked to rate this statement: "I can disclose a suspected violation of any law, rule or regulation without fear of reprisal." The agencies which reported taking disciplinary action in FY 2006 ranked at the higher end of agencies scoring well for this question. Another FHCS item is: "Prohibited Personnel Practices (for example, illegally discriminating for or against any employee/applicant, obstructing a person's right to compete for employment, knowingly violating veterans' preference requirements) are not tolerated." All except one of the agencies taking disciplinary action were above the government-wide average for this FHCS item.

### ***Agency Interviews***

As noted above, five agencies and five agency components OPM interviewed took disciplinary actions for conduct inconsistent with Antidiscrimination Laws during FY 2006. Overall, the types of conduct on which discipline was based included creating a hostile work environment, harassment, sexual harassment, making ethnic slurs toward another employee, and other inappropriate conduct based upon race, gender, or some other protected category. The level of discipline agencies took included removal, demotion, and suspension. In some instances, employees resigned or retired to avoid discipline.

Agencies also used alternative means for correcting behavior. For example, some employees who could have been disciplined were reassigned or transferred. In addition, lesser penalties of written and oral counseling were used by one agency for misconduct by employees in certain circumstances. In another agency, alternative discipline was used where the collective bargaining agreement provided it could be initiated by the employee being disciplined. While alternative dispute resolution processes were available in some agencies, those agencies generally did not use them. No agencies reported taking discipline for conduct inconsistent with Whistleblower Protection Laws in FY 2006.

## **DISCIPLINARY BEST PRACTICES**

In accordance with existing law (typically chapter 75 of title 5, United States Code), Federal employees may be disciplined for conduct inconsistent with applicable laws, up to and including removal from the Federal service. This study identified the following best practices to follow in considering such disciplinary actions.

### ***Develop or modify disciplinary policy through joint effort of relevant agency program offices and senior staff***

Agency disciplinary policies are likely to be effective if they are developed or modified collaboratively by the various offices involved in taking disciplinary actions and subsequently defending them before third parties when they are challenged. In this manner, technical and legal requirements could be reflected in the disciplinary policy. OPM found at least one agency that generally used a collaborative approach to craft policy and this agency created a No FEAR task force to propose revisions to the agency's disciplinary policy. The task force consisted of senior officials from the agency's offices of Human Resources (HR), EEO, Inspector General, legal counsel, and information and technology. The task force submitted its proposals to the agency's leadership for its joint review and approval. The revisions were fully implemented in FY 2007. Using this approach, the agency was able to generate commitment and buy-in from program offices and agency leadership before the policy was effected.

### ***Provide written guidance to supervisors and managers on their responsibility to take appropriate steps to address conduct inconsistent with Antidiscrimination and Whistleblower Protection Laws, and on selecting the appropriate penalty***

Supervisors and managers are responsible for observing and enforcing applicable laws. A disciplinary policy and any other written disciplinary guidance communicates

the agency's expectations with respect to correcting misconduct, including conduct inconsistent with antidiscrimination and whistleblower protection, and taking disciplinary action, when appropriate. Providing instruction on selecting an appropriate penalty is a critical part of any disciplinary policy or guidance because the application of appropriate penalties discourages behavior that undermines the efficiency of the civil service, while ensuring consistency of penalty selection. For that reason, it also helps ensure the action taken is legally defensible. Ideally, the policy and guidance should be drafted to be unambiguous to any reader regardless of his or her level of experience in dealing with misconduct and should set forth the steps supervisors and managers must take, including identifying which agency officials should be notified or consulted, and requiring disciplinary actions be taken promptly.

We found several agencies' disciplinary policies addressed the specific responsibility of supervisors and managers, and most policies clearly stated how supervisors and managers should determine the penalty. Some policies advised supervisors they are to keep employees informed of rules, regulations and standards of conduct and to take disciplinary action when appropriate. Several policies required supervisors to gather and carefully consider all relevant facts and circumstances, to include reviewing prior similar cases within the agency, before proposing or recommending disciplinary action. These instructions help ensure equity and consistency in the agency's imposition of discipline. Employee Relations (ER) staff and legal counsel can advise the supervisor or manager on the right charge to bring based on the conduct at issue, what is required to prove the charge and the penalties the agency has imposed in similar cases, if any, to assist in determining the appropriate penalty in his or her case.

One FHCS top-ranked agency recently modified its disciplinary policy to incorporate specific procedures for taking disciplinary actions against employees for conduct inconsistent with applicable laws. The revised policy now requires its EEO Director to notify a designated agency official in writing when he or she learns an employee may have engaged in this prohibited behavior. That official is then required to advise appropriate senior management who would be responsible for taking disciplinary action if warranted. The policy provides the specific content of the written notification and the steps for determining whether disciplinary action is warranted, including making an inquiry as soon as possible to gather and analyze facts. An unambiguous policy like any of the policies discussed here helps to affirm the agency's commitment to uphold Antidiscrimination and Whistleblower Protection Laws and will aid managers and supervisors in taking appropriate disciplinary action.

In addition to the disciplinary policy, other agency guidance can effectively inform supervisors of their responsibility in this area. For example, one agency issued a memorandum recently from its Deputy Director to senior management on disciplinary and adverse actions. The communication emphasized the responsibility of executive managers to ensure employees receive their due process rights in all disciplinary and



adverse actions. Managers were reminded discipline must promote the efficiency of the service, their decisions must reflect a conscientious application of all relevant factors, and they should use all available resources to properly take disciplinary action.

Another agency guide warned that any personnel action intended to punish an employee for whistleblowing may be investigated by the Office of Inspector General or the Office of Special Counsel as a reprisal, which is a prohibited personnel practice under 5 U.S.C. 2302(b)(8)(A) and (B). Further, the guide stated a supervisor (or other employee) who is found to have reprimed against an employee is subject to serious sanctions including, but not limited to, reduction in grade or removal from Federal employment. This and the other types of advisories provide support to an agency's disciplinary policy.

***Require supervisors and managers to work with ER staff and legal counsel to take appropriate disciplinary action***

Sound disciplinary actions are based on advice and guidance the supervisor or manager receives from those with expertise in taking and defending disciplinary actions. OPM found several agencies require supervisors and managers to consult with the ER office before taking disciplinary action, including obtaining their concurrence on all adverse action proposals and decision letters. In one agency, a similar requirement was supplemented by an instruction for the personnel officer to consult with an appropriate staff attorney or the organization involved in litigating appeals or grievances on behalf of the agency. When the supervisor or manager relies on advice from ER staff and legal counsel in taking disciplinary action, agencies can better ensure consistency in their disciplinary practices and the legal sufficiency of their cases.

***Provide ER staff with the knowledge and tools necessary to provide managers sound advice and to elevate issues within the management chain if necessary***

Agency ER offices are generally responsible for advising managers on how and when to take appropriate disciplinary action. A good working relationship between ER staff and the managers they advise is critical to ensuring the agency takes appropriate and defensible disciplinary action so employees know they will be held accountable for engaging in misconduct. Providing ER staff with adequate training, mentoring, and supervision to ensure they communicate accurate and well-reasoned advice to managers is the first step in establishing a good working relationship with management. Agency ER offices interviewed generally have good working relationships with management, because they have invested the time and resources

to ensure their staff provide managers with high-quality ER advice. In such cases, managers tend to respect and follow the advice provided. When managers are resistant to taking appropriate discipline, particularly in cases involving supervisory misconduct, ER offices indicated they elevate matters within the supervisory chain as needed and seek the assistance of legal counsel. By authorizing ER offices to notify higher-level agency officials if they believe management is not taking appropriate discipline, the agency can take steps to ensure misconduct is properly addressed.

### ***Develop effective working relationships among the agency's ER office, EEO office, and legal counsel through periodic discussions or meetings***

Encouraging regular communication between these offices (whether they are at headquarters, field offices or components) facilitates the appropriate exchange of information while establishing good working relationships among agency organizations. Several agencies have informal, periodic updates between two or more of these offices regarding new or ongoing issues within the agency. At one agency, in addition to meeting with colleagues from the other offices, the EEO office has appointed a member of its staff as a liaison with the agency's ER office. An audio-conference is used to bring ER and EEO staffs together at an agency where the discussion includes noticeable trends. The offices which hold these periodic meetings and communications have developed a level of trust which has allowed them to better understand each other's respective roles in addressing conduct inconsistent with applicable laws. These work relations are enhanced over time and, with the continued efforts by all parties, help the agency effectively address these cases of misconduct.

### ***Use alternative discipline when appropriate***

Alternative discipline is a tool available to managers and supervisors in correcting improper behavior. Working with ER and legal counsel, supervisors can use their discretion based on all of the information available to assess whether alternative discipline would result in correcting improper behavior. Few agencies use alternative discipline for conduct inconsistent with Antidiscrimination and Whistleblower Protection Laws. However, alternative discipline could be successfully used in some cases by giving an employee a last chance agreement, i.e., holding in abeyance appropriate disciplinary action pending successful completion of some requirement intended to correct inappropriate conduct. In such cases, if the terms of the last chance agreement are not met, the discipline would be imposed immediately, typically without further recourse by the employee disciplined. This alternative means of discipline may be appropriate, for example, when the employee has many years of service free of any previous disciplinary actions or allegations of improper conduct and demonstrates good potential for rehabilitation. Again, a careful analysis of the

facts and circumstances of the case and the employee's work record would be required to successfully utilize alternative discipline as a way to correct improper behavior.

## **PREVENTIVE MEASURES**

Many agencies recognize the necessity for all responsible offices to work with managers and supervisors to address workplace issues before they develop into misconduct requiring disciplinary action. Several agencies, especially the FHCS top-performing organizations, focus on preventing misconduct. A number of approaches were helpful in efforts to deter misconduct. The following is a discussion of preventive measures.

### ***Provide effective training and otherwise raise awareness of supervisors and managers about EEO and ER services and how to handle potential disciplinary issues early***

#### **Deliver training specifically for supervisors and managers**

As part of an overall training strategy, training targeted toward supervisors and managers allows them to discuss issues, questions and solutions concerning disciplinary issues with their peers. Several agencies have found a variety of vehicles useful in delivering their supervisory training, such as agency leadership institutes or development programs, online training, conferences and classroom training. Through training dedicated to them, supervisors and managers are better able to identify conduct inconsistent with applicable laws and to understand their responsibilities with respect to addressing inappropriate conduct.

Several agencies provided training on taking disciplinary actions as part of a broader HR training program for supervisors and managers. One agency provided training as part of a forum to discuss various human capital issues while another agency's field office required all managers to attend an annual two-day retreat for EEO training. Another agency took advantage of the opportunity presented by a lengthy training program for supervisors and incorporated classroom training on issues such as diversity and anti-harassment.

An advantage of including training in taking disciplinary actions as part of a broader HR curriculum is supervisors are more likely to make time in their busy schedules to attend. Such events lead to increased awareness of antidiscrimination and whistleblower protection issues. In addition, they are opportunities for managers and supervisors to become familiar with who to contact for assistance.

## **Use a combination of computer-based training and in-person training**

While there are pros and cons to using computer-based training versus classroom training, agencies are starting to use more online training. The benefits to using face-to-face training include the potential to increase the participants' understanding of covered materials through classroom questions and answers. The benefits of online computer-based training include ensuring an agency-wide audience receives the same message and its delivery to employees is cost effective.

Several agencies deliver in-person training to small groups to allow more interaction between the trainer and the audience. In addition, attendees learn a great deal through discussion of issues. A few agencies conduct training with a combination of online and at least a simulation of in-person delivery through computer interaction techniques, if not actual face-to-face classes. To give participants a more dynamic learning experience, one agency complemented the online training with audio-visual scenarios to continually engage participants. In another instance, an agency used a combination of online training (on antidiscrimination issues) followed by a panel discussion to receive questions. Such designs can assist agencies to effectively exploit the benefits of both types of training. Moreover, training that is fresh, interesting and diversified in delivery will help keep the audience engaged and attentive.

## **Include legal counsel as a presenter in training and awareness sessions for supervisors and managers**

Agency legal counsel typically is an integral partner in advising management on addressing misconduct and how and when to take disciplinary action. Because it represents the agency before third-party adjudicators when disciplinary actions are challenged, it is important for supervisors and managers to understand when they should seek the advice of agency legal counsel to avoid potential legal liabilities.

## **Provide training on interpersonal and conflict resolution skills**

Supervisors and managers must be able to work and communicate effectively with their employees to ensure workplace issues do not escalate into large problems requiring more formal action. This is a challenging skill to master. Supervisors must learn how to recognize early warning signs and not allow issues to fester and become more serious. To gain these skills, supervisors should be trained in interpersonal communications and related areas. Some agencies offer training opportunities for supervisors and managers on preventive tools and techniques in the areas of team building, emotional intelligence, and conflict resolution in the workplace.

Some agencies characterize on-site conflict resolution training as performing interventions or facilitated discussions. Some agencies have found this type of training to be very productive. At one agency, for example, a one-day session on team building was so helpful to the office, it requested the trainers to provide additional training, and a two-day session on the topic was provided. Follow-up one year later indicated success was sustained beyond the immediate intervention. At another agency, a Conflict-Management Initiative was successfully piloted and will be implemented as ongoing training. It is a one-day session on dealing with interpersonal conflict. Supervisors and managers are trained separately from employees in this program. Sometimes referred to as “soft” skills, interpersonal communication and associated proficiencies are essential components of strong, effective supervision and management.

### ***Use a variety of media to communicate agency policy regarding conduct inconsistent with Antidiscrimination and Whistleblower Protection Laws***

To reach the maximum number of employees, it is helpful to use various forms of communication. A multi-media effort, along with other types of outreach to employees, helps promote awareness of agency policies concerning improper conduct. The No FEAR Act requires agencies to ensure employees are trained in the agency’s policies concerning antidiscrimination and whistleblower protection. A clearly defined antidiscrimination policy that defines prohibited behaviors was evident at all of the agencies interviewed. Typically, they provided this information on their Intranet or Internet site. Several agencies list the individual names and contact information for EEO counselors on their web sites. Downloadable fact sheets and brochures, EEO training, and agency guidelines were among the online resources agencies made available. Another issues a quarterly EEO newsletter. Yet another agency reaches its employees at remote locations by providing training on a CD-ROM. By communicating the message of equal employment opportunity in multiple ways, agencies are able to better reinforce their policies against conduct inconsistent with applicable laws.

### ***Issue periodic policy statements or endorsements from the agency head***

Ideally, the responsibility for setting the tone for agency compliance with anti-discrimination and whistleblower protection laws starts with the agency’s top leader. Senior staff, in turn, take their cue from the agency head about the priorities and goals of the organization. While it is important for agencies to post their policies online, it is extremely valuable for the agency head to demonstrate an active involvement in the prevention of conduct inconsistent with Antidiscrimination and

Whistleblower Protection Laws. Over one-half of the agencies' EEO policies were issued and/or signed by the agency head. Many agencies found issuances by the agency head let everyone know, from senior leadership through all employee ranks, discrimination is not tolerated at the agency. When statements or endorsements come from an agency head and are highly visible, they also help signal everyone will be held accountable.

## **CONCLUSION**

The study has identified a wide range of activities and initiatives by agencies to address conduct inconsistent with Antidiscrimination and Whistleblower Protection Laws. Some are unique to individual agencies and some are employed by a number of agencies. Taken together, the best of these activities and initiatives serve as the basis for advisory guidelines intended under the No FEAR Act of 2002 to help all agencies more efficiently and effectively take appropriate disciplinary actions.

## ADVISORY GUIDELINES

The No FEAR Act requires the issuance of advisory guidelines incorporating best practices Federal agencies may follow to take appropriate disciplinary actions against employees for conduct inconsistent with Antidiscrimination and Whistleblower Protection Laws. The Act further requires each agency to provide a written statement to the Speaker of the U.S. House of Representatives; the President Pro Tempore of the U.S. Senate; the Chair, Equal Employment Opportunity Commission (EEOC); and the Attorney General stating the extent to which each agency will follow the guidelines. The specific content of the written statements is prescribed in OPM's regulations at [5 CFR 724.404](#) and must be submitted within 30 working days of date of this report. This government-wide regulation requires the statements also be provided to OPM. The advisory guidelines for taking disciplinary action are:

1. Ensure each agency's disciplinary policy addresses conduct inconsistent with Antidiscrimination and Whistleblower Protection Laws and the agency's human resources office, EEO office, and legal counsel are involved in future modifications to the policy. The policy should clearly set forth the responsibility of managers and supervisors to take appropriate action, should address the sanctions for this type of misconduct, and accurately reflect current developments in law, including case law.
2. Ensure procedures are in place to promptly inform agency management of potential employee conduct inconsistent with Antidiscrimination and Whistleblower Protection Laws which may be the basis for disciplinary action, including an appropriate mechanism by which the EEO office can report potentially inconsistent conduct to an appropriate agency official.
3. Ensure such conduct, if its occurrence is supported by the facts and evidence, is addressed promptly in a manner that is reasonable, based on the circumstances of the case, and, to the extent feasible, consistent, based on any other similar cases (and the degree of similarity).
4. Ensure supervisors and managers, when taking disciplinary actions, work with the employee relations (ER) office as appropriate, as well as the agency's legal counsel or whatever office is responsible for representing the agency in third-party appeals.
5. Ensure ongoing communications among appropriate agency offices such as ER, EEO, and legal counsel concerning new developments in employee misconduct cases and any systemic problems.
6. Ensure ER staff receives adequate training, mentoring, and supervision in order to communicate accurate and well-reasoned advice to supervisors and managers on taking disciplinary action.

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