Title 5 U.S.C. § 2302. Prohibited personnel practices

Prohibited Personnel Practices

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

A Study Retrospective

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

A Report to the President
and the Congress of the United States
by the U.S. Merit Systems Protection Board

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee

THE CHAIRMAN

U.S. MERIT SYSTEMS PROTECTION BOARD
1615 M Street, NW
Washington, DC 20419-0001

June 2010

The President
President of the Senate
Speaker of the House of Representatives

Dear Sirs and Madam:

In accordance with the requirements of 5 U.S.C. 1204(a)(3), it is my honor to submit this Merit Systems Protection Board (MSPB) report, *Prohibited Personnel Practices—A Study Retrospective*. Since MSPB is launching a reexamination of the prevalence of prohibited personnel practices within the Federal Government, this report is intended to provide our stakeholders with a foundation of past MSPB research that examined these issues.

MSPB has conducted extensive research to examine the occurrence of prohibited personnel practices in the Federal Government, as well as adherence to their complement, the merit system principles. In selected previous reports that are summarized here we have noted that the percentage of employees reporting discrimination based on ethnicity/race, sex, age, and religion have declined over time, while an increasing percentage of Federal employees believe that they are being treated fairly.

However, we have also acknowledged that the Federal Government still has work to do to ensure a workplace free of prohibited personnel practices. For example, although a decreasing percentage of employees believe that they have experienced prohibited discrimination, many employees believe that personnel decisions are often based on factors other than merit, such as favoritism. There is also a continuing gap between minority and nonminority employees' perceptions of the prevalence of discrimination and other prohibited personnel practices.

I believe you will find this retrospective report useful as you consider issues related to prohibited personnel practices in the Federal civil service, and I look forward to sharing the results of our reexamination of these issues with you.

Respectfully,

Susan Tsui Grunmann

Enclosure

U.S. Merit Systems Protection Board

Susan Tsui Grundmann, *Chairman*

Anne M. Wagner, *Vice Chairman*

Mary M. Rose, *Member*

Office of Policy and Evaluation

Director

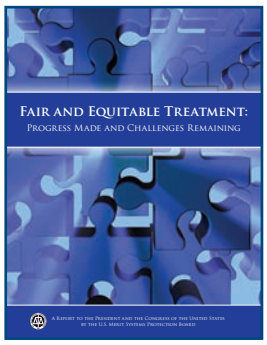
John Crum, Ph.D.

Deputy Director

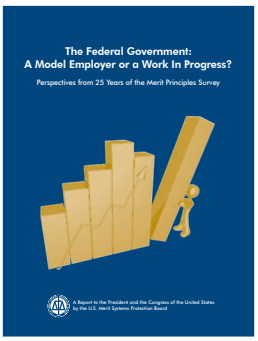
Laura Shugrue

ATTRIBUTIONS

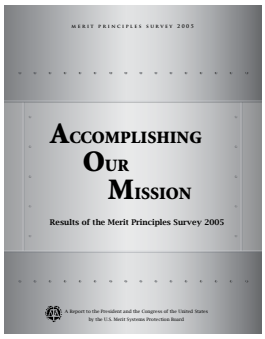
The MSPB thanks all current and former staff members who contributed to the studies referenced in this retrospective report:



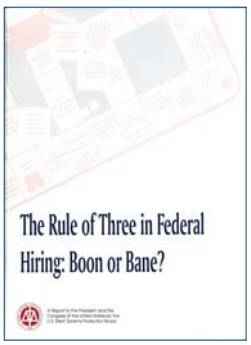
Project Manager:
Cynthia H. Ferentinos, Ph.D.
Assistant Project Manager:
James J. Tsugawa
Project Analysts
Dee Ann Batten, Ph.D.
Annette Butler
J. Peter Leeds, Ph.D.
Paul van Rijn, Ph.D.



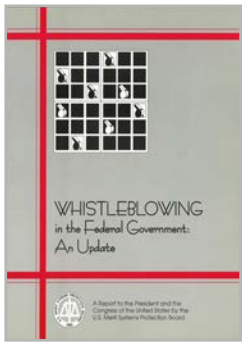
Project Manager:
Cynthia H. Ferentinos, Ph.D.
Assistant Project Manager:
James J. Tsugawa
Project Analysts
J. Peter Leeds, Ph.D.
Allison M. Wiley



Project Manager:
John M. Ford, Ph.D.
Project Analysts
Laura Shugrue
Paul van Rijn, Ph.D.
Annette Butler
Doug Nierle



Project Manager:
Harry C. Redd, III
Project Analysts
Jamie J. Carlyle, Ph.D.



Project Manager:
Jamie J. Carlyle, Ph.D.

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INTRODUCTION

PURPOSE OF THIS REPORT

One of the statutory missions of the U. S. Merit Systems Protection Board (MSPB) is to study Federal merit systems to determine if the Federal workforce is being managed in adherence with the merit system principles and is free from prohibited personnel practices (PPPs).[1] As a part of this mission, MSPB is launching a re-examination of the prevalence of prohibited personnel practices within the Federal Government. As a service to our stakeholders, and in order to provide a foundation for that research effort, this retrospective report highlights what we have learned from past studies in which we examined prohibited personnel practices. [2]

This report focuses on the PPPs because occurrences of these particular behaviors can have an exceptionally negative impact on the morale and productivity of any Federal office. The 12 PPPs identified at 5 U.S.C. § 2302 (b), are, in short:[3]

(1) Discriminate against an employee or applicant based on race, color, religion, sex, national origin, age, disability, marital status, or political affiliation;

(2) Solicit or consider any recommendation that is not job-related and based on personal knowledge of the employee or applicant;

(3) Coerce the political activity of any person;

(4) Deceive or obstruct any person from competing for employment;

(5) Influence anyone from withdrawing from competition;

(6) Give an unauthorized preference or advantage to an employee or applicant;

(7) Give employment advantages to relatives;

(8) Retaliate against employees or applicants for whistleblowing;

[1] 5 U.S.C. § 1204(a)(3).

[2] Each of the MSPB studies excerpted in this report are available for download at www.mspb.gov/studies.

[3] See p. 27 of this report for a complete list of prohibited personnel practices.

(9) Retaliate against employees or applicants for filing an appeal, complaint, or grievance;

(10) Discriminate based on personal conduct which is not job related;

(11) Violate veterans' preference requirements; and

(12) Take or fail to take any personnel action that violates any law, rule, or regulation directly concerning the merit system principles.

These prohibitions are important because they help ensure that managers treat employees fairly and equitably, while strengthening the trust that the American public has that their public servants are not being managed arbitrarily or based on non-merit factors. Avoiding each of these PPPs is critical since the existence of just one of these actions can damage the working environment in any organization.

Over the past 30 years, MSPB has conducted extensive research to examine the occurrence of prohibited personnel practices in the Federal Government, as well as adherence to their complement, the merit system principles. MSPB's findings and recommendations have been summarized in over 100 reports to the President and Congress, each dealing with a different aspect of how to improve the management of the Federal workforce. Many of these findings have been based on data from our periodic Governmentwide Merit Principles Surveys (MPSs) of Federal employees. Between 1983 and 2007, MSPB administered the MPS eight times to solicit Federal employee perceptions of their jobs, work environment, supervisors, and agencies. Over this period, the MPS included items asking employees whether they had been subjected to prohibited personnel practices, allowing us to track trends over time.

Although all of MSPB's previous studies are not devoted exclusively to the PPPs, each study brings to light different aspects of merit and what Federal agencies are doing to keep the workplace free from PPPs. In the following chapters, we summarize some of our main findings about the PPPs by using excerpts from key current and historical reports.

Future Prohibited Personnel Practices Studies

The MSPB continues to build and expand upon our past research regarding the prohibited personnel practices. For fiscal year 2010, MSPB is launching a multi-pronged research effort to examine the prevalence of prohibited personnel practices in the Federal Government.

In addition to questions crafted to assess Federal employee perceptions regarding the health of the merit systems, the Merit Principles Survey 2010 will have sections devoted to PPPs in general and to whistleblower protections specifically.

Additionally, particular attention will be devoted to the prohibited personnel practice of retaliating against a whistleblower. Within the next year, MSPB will begin to issue a series of reports that will explore what the law requires for an employee to be considered a whistleblower, as well as opinions from employees and other stakeholders concerning the whistleblowing process and barriers to reporting wrongdoing. We will also review data from recent MSPB cases to provide our stakeholders with more details about how whistleblowers fare in the adjudication of their complaints.

In addition, we will continue to update our previous studies regarding fair and equitable treatment in the Federal Government. In the 1990s, MSPB conducted a series of studies that examined the extent to which discriminatory employment practices impacted the representation and careers of minorities and women in the Federal workforce. These studies included:

- *Fair & Equitable Treatment: A Progress Report on Minority Employment in the Federal Government (1996);*
- *Achieving a Representative Federal Workforce: Addressing the Barriers to Hispanic Participation (1997); and*
- *A Question of Equity: Women and the Glass Ceiling in the Federal Government (1992).*

As these studies have received continued interest from Congress and other MSPB stakeholders, we issued an initial update to the topics they explored in our 2009 report, *Fair and Equitable Treatment: Progress Made and Challenges Remaining.*

FINDINGS REGARDING DISCRIMINATION

TRENDS

Discriminating for or against any employee or applicant for employment on the basis of race, color, religion, sex, national origin, age, disability, marital status or political affiliation is a PPP (5 U.S.C. § 2302(b)(1)). MSPB's 2009 report, *Fair and Equitable Treatment: Progress Made and Challenges Remaining*, noted that the following progress has been made in making the Federal workforce more inclusive: First, the Federal workforce has become more diverse, consistent with the Federal Government's commitment to recruit and retain a workforce that reflects the Nation's diversity. Second, an increasing percentage of Federal employees believe that they are treated fairly, and a decreasing percentage believe that they have experienced discrimination on factors such as ethnicity/race, gender, and age, indicating progress toward managing all Federal employees on the basis of merit and in a manner free from prohibited personnel practices.

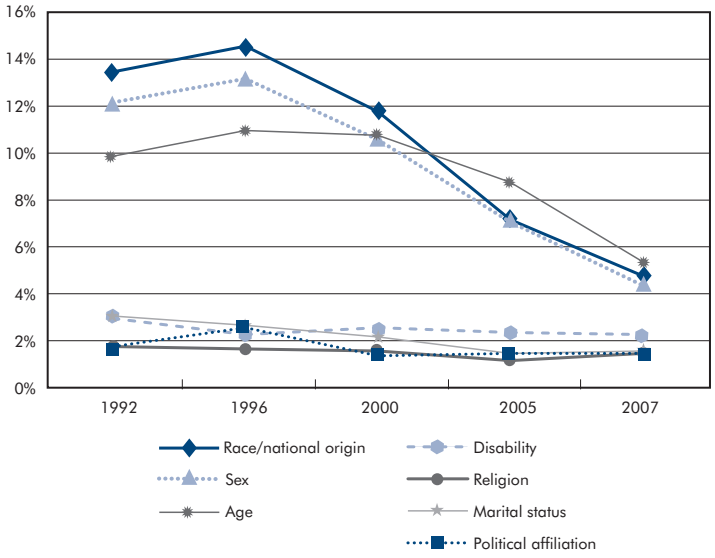
As shown in **Figure 1**, reports of discrimination based on ethnicity and race, sex, and (to a lesser extent) age have dropped dramatically from 1992 to 2007, and reports of discrimination based on disability, religion, marital status, and political affiliation have remained quite low.[4] Ethnicity and race, sex, and age continue to be the most commonly reported bases for discrimination.[5]

[4] We note that a perception of discrimination or retaliation cannot be equated with an actual incident of discrimination or retaliation. Survey responses reflect the respondent's interpretation of events. For example, a respondent may use definitions of discrimination and retaliation that differ from the legal definitions of those terms or base his or her responses on incomplete or incorrect information.

[5] The laws that prohibit discrimination also prohibit retaliation against individuals who oppose unlawful discrimination or participate in an employment discrimination proceeding (e.g., by filing an EEO complaint). Retaliation is addressed in a separate set of MPS items.

Figure 1.

Percentage of employees perceiving that they had been denied a job, promotion, or pay increase, by perceived basis of denial, 1992-2007[6]



Nevertheless, the ideals of a fully representative workforce and fair treatment of all employees have not been wholly realized. Although a statistical analysis of the Federal workforce confirms that diversity has increased, that analysis also shows that progress has been uneven. For example, the Federal Government continues to employ Hispanics at a rate below their availability in the civilian labor force (CLF). Also, the percentage of minorities at higher levels of pay (e.g., General Schedule grades GS-14 and GS-15) and responsibility (e.g., supervisory and executive positions) remains below their rate of employment at lower levels. These differences are the result of a variety of factors, including occupational and educational patterns, as well as other possible influences such as the legacy of past discrimination or other socioeconomic disadvantages.

Similarly, although a decreasing percentage of employees believe that they have experienced prohibited discrimination, many employees believe that personnel decisions are often based on factors other than merit, such as favoritism. Moreover, survey data indicate that a substantial group of employees lack confidence in both existing redress procedures (such as the Equal Employment Opportunity (EEO) complaint process) and the willingness or ability of Federal agency leaders to take appropriate action against managers who discriminate or misuse their personnel authority.

[6] Source: U.S. Merit Systems Protection Board, *The Federal Government: A Model Employer or a Work In Progress?*, 2008, p. 39.

Below, we briefly summarize the findings of our 2009 report, *Fair and Equitable Treatment: Progress Made and Challenges Remaining*, that are related to employment discrimination.

Promotion rates.

Promotion rates are generally comparable across lines of ethnicity/race and gender, but some differences persist. Statistical analysis indicates that those differences are driven primarily, although not exclusively, by factors such as occupation, education, and experience. The analysis also suggests that the value of factors such as education and experience depends more on relevance and quality than on sheer quantity. For example, we found that supervisory experience from an earlier position makes little difference in initial advancement but gains importance at higher levels.

Fostering advancement.

Minority employees remain more likely to report a lack of career-enhancing opportunities, such as serving as an "acting supervisor." Employees in ethnic/minority groups also continue to express less confidence than White employees in agency promotion processes. That lack of confidence may be reducing the diversity in candidate pools and, as a consequence, diversity at higher levels. In our surveys, employees sometimes indicated that they had chosen not to apply for a position because they believed the manager (or agency) would not select someone of their ethnicity or race for the position. Although fewer employees reported such a decision in our 2007 survey, the proportion of employees who "opted out" of a competition under the belief that applying would be pointless is not negligible—as high as one in five for some demographic groups.

Views on the impact of ethnicity and race.

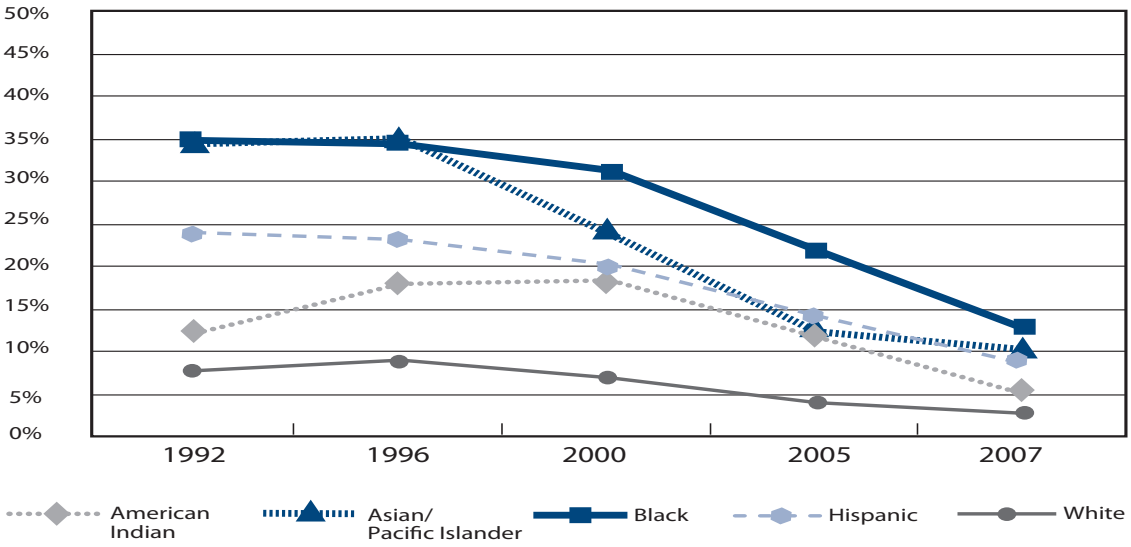
Survey results show a dramatic decrease in the percentages of employees who believe that they have recently experienced discrimination on the basis of their ethnicity or race. Nevertheless, a considerable percentage of employees still feel that their ethnicity or race has hindered their advancement or otherwise disadvantaged them. Also, employees appear to be less aware of—or less inclined to believe in—discrimination against employees of a different ethnicity or race. Such differences in opinion have significant implications for personnel policy and practice. In particular, they create the potential for disagreement and discord over matters such as the prevalence and severity of discrimination in Federal agencies, the appropriateness of giving agencies and managers greater discretion in hiring and pay, and the need for measures to prevent and address prohibited discrimination.

Perceptions Regarding Ethnicity/Race-Based Discrimination

Since 1996, the percentage of employees reporting ethnicity- or race-based discrimination has declined for all groups, as shown in **Figure 2**. In particular, the percentages of Asian/Pacific Islander, Black, and Hispanic employees who reported that they have experienced discrimination have dropped substantially. Nevertheless, in 2007 approximately 10 percent of employees in each of these groups reported experiencing discrimination within the previous 2 years.

Figure 2.

Percentage of employees perceiving denial of a job, promotion, or other job benefit on the basis of race and national origin, by ethnicity and racial group, 1992-2007[7]



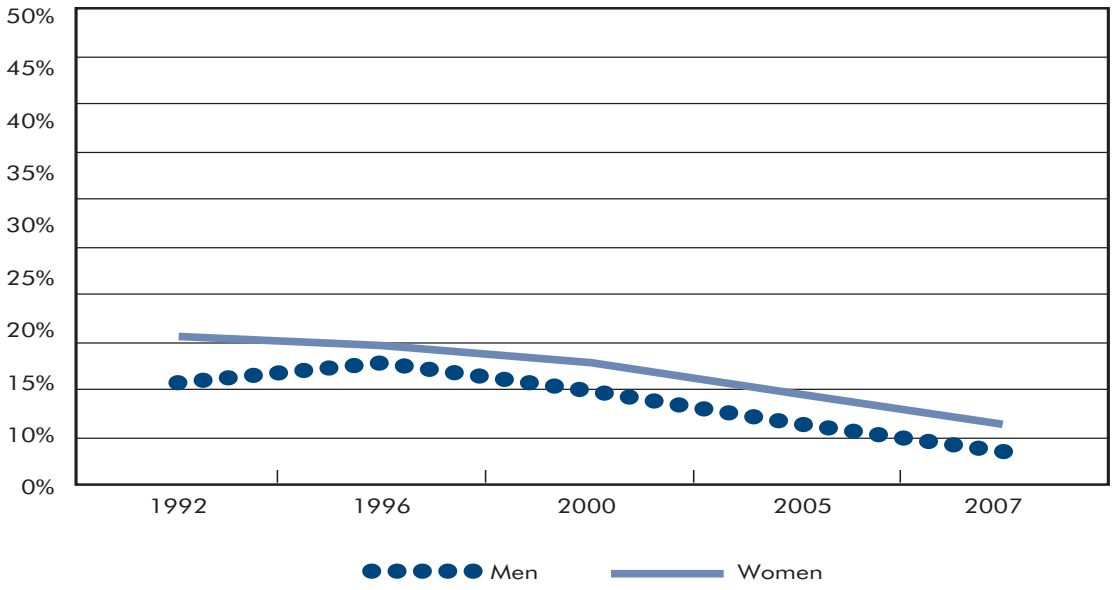
The pattern observed for most MPS items, in which responses from minority employees were less positive (favorable) with regard to discrimination than those of nonminority employees, appeared here also, but with two clear differences. First, on many nondiscrimination items (including items such as treatment with respect, having adequate training and resources, information sharing, teamwork and recognition), American Indian employees were the least positive, but they reported discrimination based on race and national origin at a rate lower than other minority groups. Second, on many nondiscrimination items (including information sharing, teamwork, fair performance standards, having opinions count, and satisfaction with supervisors and managers), Asian/Pacific Islanders were the most positive, but they believed that they had experienced discrimination at rates higher than those for all other groups except Black employees.

[7] Figure 2 and accompanying discussion excerpted from: U.S. Merit Systems Protection Board, *The Federal Government: A Model Employer or a Work In Progress?*, 2008, pp. 40-41.

Perceptions Regarding Gender-Based Discrimination

As we noted earlier, men and women responded similarly across most items that we have tracked longitudinally. Even responses about discrimination based on sex, depicted in **Figure 3**, showed no large differences between men and women during 1992-2007.

Figure 3.
Percentage of employees reporting denial of a job, promotion, or other job benefit on the basis of sex, by gender, 1992-2007[8]



Perceptions Regarding Age-Based Discrimination

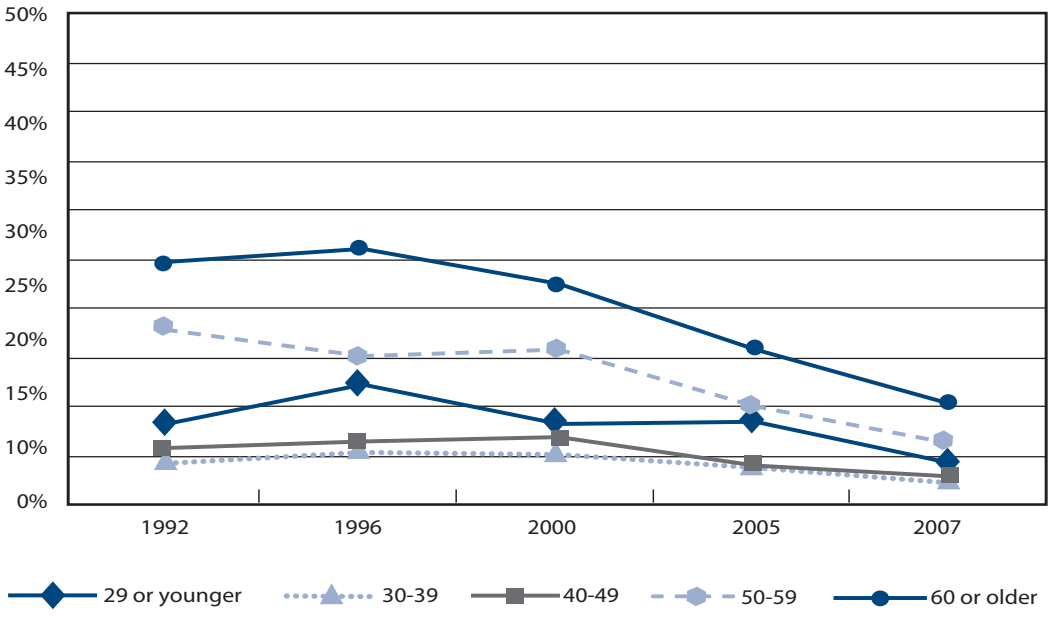
As shown previously in **Figure 1**, perceptions of age-based discrimination decreased from 9.8 percent to 5.3 percent between 1992 and 2007. Yet that decrease is smaller, in both absolute and relative terms, than the decreases in reports of ethnicity and race-based and sex-based discrimination. Analysis of responses by age group within the context of an

[8] Source: U.S. Merit Systems Protection Board, *The Federal Government: A Model Employer or a Work In Progress?*, 2008, p. 41.

increase in the proportion of older employees[9] provides a possible explanation for the slower decrease in reports of age-based discrimination. **Figure 4** shows that employees age 50 and older (those in the categories "50-59" and "60 or older") have consistently been the most likely to perceive age-based discrimination. The figure also shows a sharp decrease in the percentage of employees who are over age 50 who reported discrimination, which is certainly a positive trend.

Figure 4.

Percentage of employees perceiving denial of a job, promotion, or other job benefit on the basis of age, by age group, 1992-2007[10]



Perceptions Regarding Other Bases for Discrimination

In the 2005 MPS, very few employees—2 percent or less, Governmentwide—reported experiencing discrimination within the past 2 years on the basis of disability, religion, marital status, or political affiliation. However, as shown in **Table 1**, the Governmentwide figures conceal some clear differences across agencies.

[9] In 1983, employees age 50 or older accounted for 29 percent of the workforce. By 2007, they accounted for 43 percent of the workforce. Thus, there are now more employees at an age level where they are most likely to report age discrimination.

[10] Figure 4 and accompanying discussion excerpted from: U.S. Merit Systems Protection Board, *The Federal Government: A Model Employer or a Work In Progress?*, 2008, p. 42.

Table 1.

Percentage of employees perceiving denial of a job, promotion, or other job benefit on selected bases—highest and lowest agency percentages, 2005[11]

Basis	Agency with		
	Highest Percentage	Lowest Percentage	Governmentwide Average
Disability	5.0%	0.8%	2.3%
Religion	2.6%	0.4%	1.1%
Marital status	2.4%	0.6%	1.4%
Political affiliation	2.8%	0.5%	1.4%

The differences across agencies are not large in absolute terms but assume greater significance when viewed in terms of odds. For example, employees in the "highest" agency were more than six times more likely to report experiencing discrimination based on religion than employees in the "lowest" agency.

We caution that these figures reflect differences in perception; they do not necessarily reflect differences in the actual incidence of discrimination. Nevertheless, the figures reinforce two points. First, agencies should not necessarily interpret positive Governmentwide results as endorsements of their own individual cultures and practices. Second, even if these differences merely reflect differences in organizational culture and climate, they provide a tangible reminder of the costs of a poor organizational climate. Organizations with low levels of trust and morale pay a price much greater than a poor showing in "best places to work" rankings. In such organizations, employees may mistrust even the best-intentioned management initiatives and decisions. That will greatly complicate efforts to make constructive changes to work processes and personnel practices, even when such changes would benefit employees. Mistrust also increases the likelihood that employees will attribute personnel decisions to factors such as favoritism and discrimination, and that employees will challenge management decisions formally or informally.

[11] Table 1 and accompanying discussion excerpted from: U.S. Merit Systems Protection Board, *The Federal Government: A Model Employer or a Work In Progress?*, 2008, p. 43.

FINDINGS REGARDING WHISTLEBLOWING

Retaliating against applicants for employment or employees for whistleblowing is another PPP (5 U.S.C. § 2302(b)(8)) that MSPB has studied in the past. In 1981, we published two reports regarding whistleblowing: *Do Federal Employees Face Reprisal for Reporting Fraud, Waste, or Mismanagement?* and *Whistleblowing and the Federal Employee: Blowing the Whistle on Fraud, Waste, and Mismanagement—Who Does it and What Happens.* These reports were followed by a later report in 1984, *Blowing the Whistle in the Federal Government: A Comparative Analysis of the 1980 and 1983 Survey Findings,* and a 1993 report, *Whistleblowing the Federal Government: An Update* . Our earlier studies uncovered some disturbing information: A large percentage of Federal employees were reluctant to report instances of illegal or wasteful activities they had observed. Further, among those who did report such activities, a significant percentage felt they experienced some form of reprisal as a result. Our 1993 report (which was based on 1992 survey data) noted that some progress had been made toward the goal of encouraging employees to report illegal or wasteful activities. Unfortunately, the percentage of employees who claimed they had been the victims of reprisal because of their disclosures had also increased.

Observing and Reporting Illegal or Wasteful Activity

In 1992, 18 percent of the survey respondents said they had seen or had obtained direct evidence of an illegal or wasteful activity, compared with 23 percent in 1983. Waste caused by either a badly managed program or unnecessary or deficient goods or services continued to be the types of activities most frequently observed.

Half of the employees surveyed in 1992 (50 percent) who had witnessed an illegal or wasteful activity also said they had reported that activity. This figure contrasts sharply with the 30 percent of employees in our 1983 survey who indicated they had reported such activities.

Fifty-nine percent of the 1992 respondents who had observed illegal or wasteful activities and had not reported them, chose not to do so because they felt nothing would be done to correct the activities. This was also the predominant reason given for not reporting by our 1983 survey respondents. The second most frequently cited reason for not reporting, both in 1992 and in 1983, concerned the risks taken for reporting.

As shown in **Table 2**, in 2000 and 2005 relatively few employees made formal disclosures of Federal Government wrongdoing[12]

Table 2.

Percentage of employees indicating that they engaged in a protected activity, 2000 and 2005[13]

In the past 2 years, have you—	Year	
	2000	2005
Made any formal disclosure of fraud, waste, or abuse, or unlawful behavior at work?	6.6%	5.6%

Reprisal for Blowing the Whistle

In 1992, over a third (37 percent) of employees who had reported an illegal or wasteful activity said that they had experienced or had been threatened with some sort of reprisal as a result. This is significantly higher than the 24 percent of employees in MSPB's 1983 survey who said they had experienced or had been threatened with reprisal after reporting an illegal or wasteful activity.

Of the employees who said in 1992 that they had reported an illegal or wasteful activity and had experienced a reprisal action as a result, 49 percent said the reprisal took the form of shunning by coworkers or managers, 47 percent said the reprisal took the form of a poor performance appraisal, and 47 percent said they experienced verbal harassment or intimidation. (These percentages do not equal 100 because employees were allowed to select more than one type of reprisal that they had experienced.)

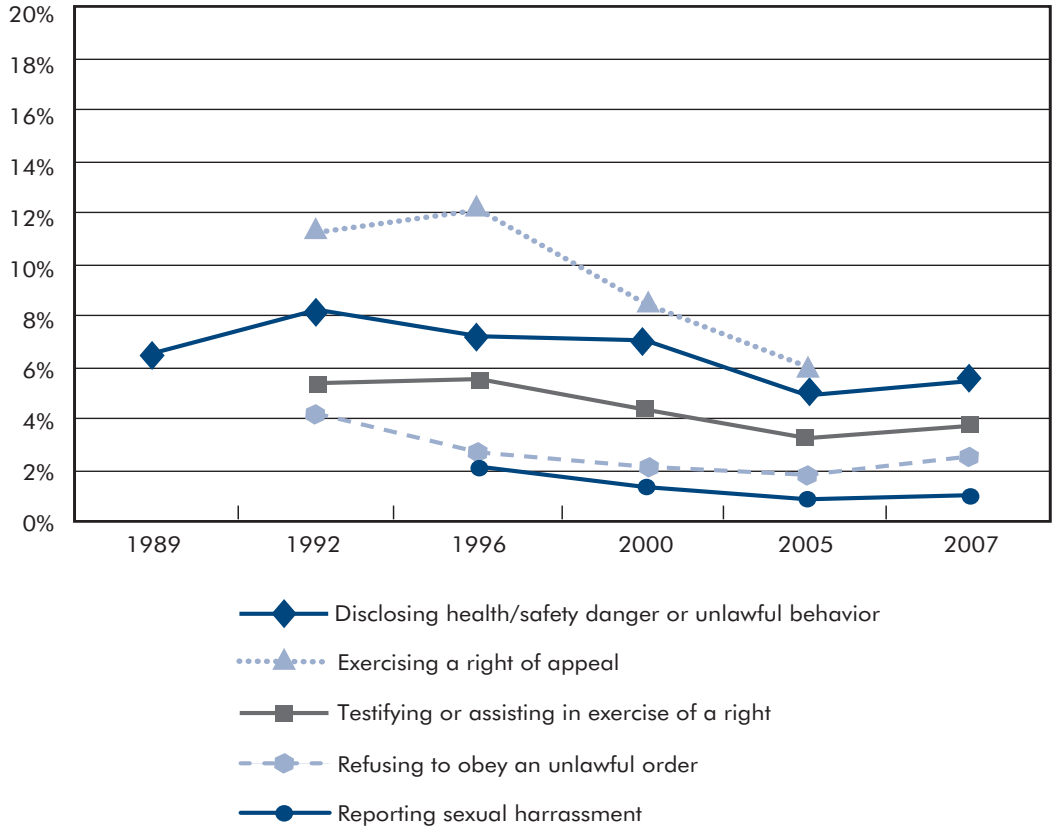
[12] It is important to note that the MPS queries employees regarding activities that are broader in scope than those enumerated at 5 U.S.C. § 2302(b)(8). Therefore, just because our survey respondents report making a disclosure, it does not necessarily follow that such disclosure is a protected disclosure under the Whistleblower Protection Act.

[13] Source: U.S. Merit Systems Protection Board, *The Federal Government: A Model Employer or a Work In Progress?,* 2008, p. 48.

Responses to survey items concerning retaliation over the period 1989-2007, illustrated in **Figure 5**, indicate that employees have become less likely to report experiencing retaliation for engaging in a protected activity. That is a positive development, but closer examination of the data in Figure 5 is not reassuring.

Figure 5.

Percentage of employees perceiving retaliation for engaging in a legally protected activity, by type of activity, 1989-2007[14]



[14] Figure 5 and accompanying discussion excerpted from: U.S. Merit Systems Protection Board, *The Federal Government: A Model Employer or a Work In Progress?*, 2008, pp. 48-49.

First, the percentage of employees who perceived that they had been retaliated against for engaging in a protected activity was slightly higher in 2007 than in 2005 for all types of activity.[15] We cannot conclude that this change represents a trend or that the differences are significant—but it is still disquieting. Second, response patterns do not reflect positively on how agencies respond to complaints, grievances, or employee disagreement with a management policy or decision. The percentage of employees who reported retaliation in 2005 for engaging in a specific protected activity is quite close to the percentage of employees who reported engaging in that activity—suggesting that most employees who reported disclosing wrongdoing or filing a grievance believe that they experienced negative repercussions for doing so.

In response to a reprisal or the threat of a reprisal, the largest percentage of employees reported in 1992 that they took no action (43 percent). The most frequently cited actions taken by employees who did respond were to complain to a higher level of agency management and to complain to some other office within the agency, such as the personnel office or the Equal Employment Opportunity office. Among those who took action, however, fewer than 10 percent reported that their situations improved as a result of that action.

Morale, organizational performance, and (ultimately) the public suffer unnecessarily when employees are reluctant to disclose wrongdoing or to seek redress for inequities in the workplace. Furthermore, the costs in time, money, and various other forms of negative impact are significant. As discussed in our report *Accomplishing Our Mission: Results of the Merit Principles Survey 2005*, these results on retaliation suggest that work remains to be done in creating a workplace where employees can raise concerns about organizational priorities, work processes, and personnel policies and decisions without fear of retaliation, and where managers can respond to such concerns openly and constructively. [16]

[15] For 2007, survey data on retaliation for exercising a right of appeal were not available because of a technical problem with the electronic version of the survey.

[16] See U.S. Merit Systems Protection Board, *Accomplishing Our Mission: Results of the Merit Principles Survey 2005*, Washington, DC, February 2007, pp. 38-41.

FINDINGS REGARDING MERIT-BASED HIRING

In addition to outright discrimination, there are other PPPs that relate to the Federal hiring process including:

- Obstructing any person with respect to such person's right to compete for employment (5 U.S.C. § 2302(b)(4));
- Influencing any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment (5 U.S.C. § 2302(b)(5));
- Granting unauthorized preference to any employee or applicant for employment for the purpose of improving or injuring the prospects of any particular person for employment (5 U.S.C. § 2302(b)(6)); and,
- Appointing, employing, promoting, advancing, or advocating for appointment, employment, promotion, or advancement any individual who is a relative (5 U.S.C. § 2302(b)(7)).

The MSPB has conducted numerous studies that not only focus on improving the Federal hiring process but also track the incidence with which Federal employees perceive that these PPPs occur through the periodic Merit Principles Surveys (MPS). MSPB's 2008 report, *The Federal Government: A Model Employer or a Work in Progress?*, analyzes employee perceptions regarding these PPPs across all the administrations of the MPS.

Perceptions of Unfair Competition

As shown in **Table 3**, the percentage of employees reporting the listed incidences of unfair competition has declined over time. In 2007, the percentage of employees who reported experiencing the flagrant prohibited personnel practice of a manager asking an employee to withdraw an application or a manager engaging in nepotism (hiring a relative), was only 3 percent. However, the apparent rarity of such practices does not mean that employees believe that competition for jobs always takes place on a "level playing field." In 2007, although decreasing percentages of employees reported inappropriate manipulation of the hiring process, 11 percent of employees reported that they had been discouraged from competing for a job, and 15 percent believed that an unfair advantage had been given to another job applicant.

Table 3.

Percentage of employees perceiving that they experienced an instance of unfair competition, 1986-2007[17]

Reported Experience	Survey Year						
	1986	1989	1992	1996	2000	2005	2007
Discouraged from competing[18]			16%	18%	14%	12%	11%
Influenced to withdraw	4%	5%	5%	5%	4%	3%	3%
Unfair advantage given to another	28%	30%	19%	25%	22%	19%	15%
Denied a job because of nepotism	6%	6%	4%	5%	4%	3%	3%

Note: The experiences listed are from MPS questions that are abbreviated here for readability. Gray shading indicates that the item was not included in that year's verison of the MPS.

[17] Table 3 and accompanying discussion excerpted from: U.S. Merit Systems Protection Board, *The Federal Government: A Model Employer or a Work In Progress?*, 2008, pp. 46-47.

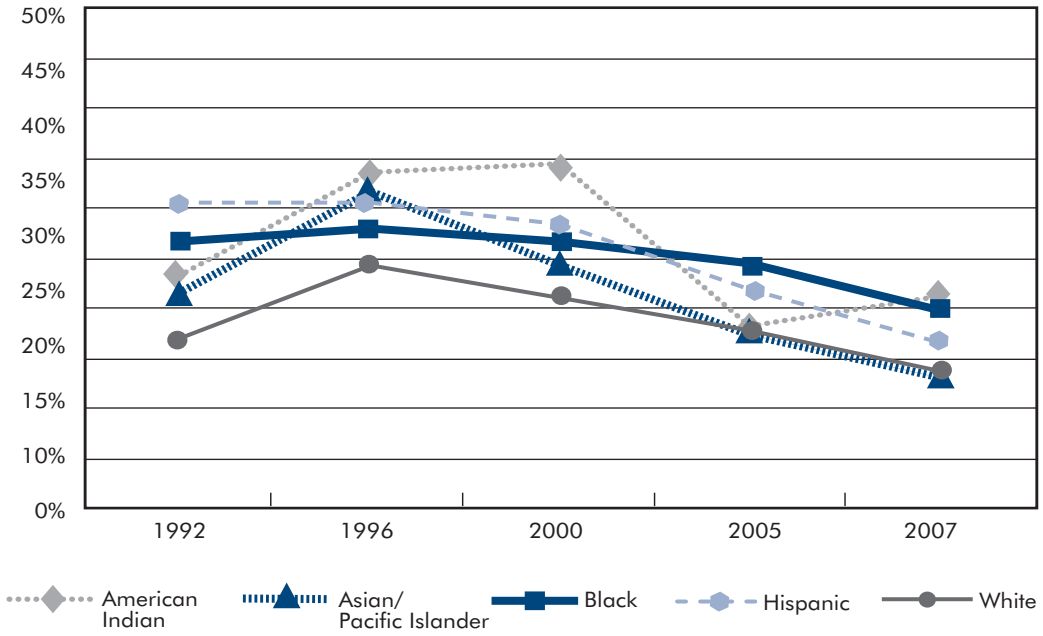
[18] The wording of the MPS item ("discouraged from competing") is broader than that of the prohibited personnel practice, which is to "deceive or willfully obstruct any person with respect to such person's right to compete for employment." (5 U.S.C. § 2302(b)(4))

Perceptions of Unfair Advantage

Figure 6 presents the percentage of employees who perceived denial of a job or promotion because an unfair advantage was given to another person. Two patterns of interest are evident from these data. First, among most groups, perceptions of unfairness were higher in 1996 than in 1992. One possible explanation for this increase is a shortage of promotional opportunities during that time. [19]

Figure 6.

Percentage of employees perceiving denial of a job or promotion because another applicant was given an unfair advantage, by ethnicity and racial group, 1992-2007[20]



[19] Many Federal agencies were reducing staff during the 1990's. Permanent full-time Federal employment decreased steadily between 1992 and 2000.

[20] Figure 6 and accompanying discussion excerpted from: U.S. Merit Systems Protection Board, *The Federal Government: A Model Employer or a Work In Progress?*, 2008, pp. 47-48.

Findings Regarding Merit-Based Hiring

The second pattern of interest is the continuing differences across ethnicity and racial groups. In particular, American Indian and Black employees were more likely to report that they were "passed over" because a position had been filled unfairly. These differences reinforce the importance of openness in terms of advertising opportunities, communicating the criteria for advancement, and in assuring that employees have equitable access to opportunities, such as training and high-profile work assignments, that can enhance an employee's chances of promotion. Based on these differences, we caution managers against relying on informal networks to recruit applicants for jobs or to provide insight into job applicants' qualifications. Such reliance can disadvantage minority employees if they are not fully represented or included in informal networks.

FINDINGS REGARDING VETERANS' PREFERENCE

Veterans' preference is a benefit granted by law to individuals who meet certain criteria related to military service. Its purpose is to recognize the personal sacrifices veterans have made to society through their military service. The most visible form of veterans' preference is preference in Federal hiring. Veterans' preference augments the rating of a qualified veteran ("preference eligible"[21]) in an employment examination and restricts the circumstances in which an agency may select a non-preference eligible applicant over a preference eligible applicant. Violating these veterans' preference requirements is also a PPP (5 U.S.C. § 2302(b)(11)) that has been the subject of past MSPB research.

Veterans' Preference and the Rule of Three

MSPB's 1995 report, *The Rule of Three in Federal Hiring: Boon or Bane*, noted that some hiring officials have asserted that the interaction between veterans' preference and the rule of three could be a barrier to quality selection. These assertions reflected the belief that veterans' preference could preclude the selection of the most qualified candidates by (1) increasing the score of any qualified preference eligible and (2) placing certain preference eligibles at the top of the certificate, regardless of score.[22] Consequently, it was perceived that the hiring official could be faced with hiring unqualified or less-qualified veterans or allowing jobs to go unfilled. Related concerns included perceived difficulties in hiring individuals that the agency had spent time and money to recruit, such as targeted candidates for underrepresented occupations.

The Rule of Three in Federal Hiring: Boon or Bane explored these assertions. First, MSPB found no evidence that veterans' preference prevented an agency from selecting a highly qualified applicant. For instance, veterans blocked name-requested candidates only 4 percent of the

[21] An individual who is entitled to veterans' preference is commonly referred to as a "preference eligible." We note that military service and veterans' preference are not synonymous. 5 CFR § 211 describes eligibility criteria for, and the basic provisions of, veterans' preference.

[22] For further information on veterans' preference in competitive service employment, see 5 U.S.C. Chapter 33, Subchapter I and OPM's Delegated Examining Operations Handbook. Veterans' preference also applies in much excepted service hiring, although specific rules and provisions may differ.

time.[23] Second, MSPB found little support for the assertion that a hiring manager would leave a vacancy unfilled rather than select a preference eligible. Certificates that were headed by a preference eligible applicant did not have significantly higher nonselection rates (i.e., were not more likely to be returned unused) than were certificates headed by a non-preference eligible applicant. Finally, MSPB did not find that veterans' preference required an agency to offer a position to a preference eligible who was not qualified; agency requests to "pass over" a preference eligible were usually sustained.

What MSPB did find was that the rule of three was not an effective way to promote merit-based hiring.[24] In effect, the rule of three presumes that the top three candidates are the best candidates. That demands pre-referral assessment processes that can make very fine distinctions very reliably. However, such assessment processes are neither possible nor practical. Consequently, the rule of three may simply exclude highly qualified applicants from consideration, regardless of veterans' preference.

Furthermore, we found in the 1995 study that hiring under category rating was generally fairer to veterans than other traditional hiring approaches.[25] In category rating, candidates are assessed and placed into one of at least two quality categories. Those with preference eligibility are then placed ahead of non-preference eligibles within the quality category. Compensably disabled preference eligibles (those veterans with at least 10 percent service connected disability) are placed at the top of the highest quality category, meaning that they "float to the top" as they do in the rule of three. The study showed that category rating is more effective at meeting the dual objectives of observing veterans' preference and enabling Federal agencies to select among highly qualified candidates. Our 2006 report, *Reforming Federal Hiring: Beyond Faster and Cheaper*, reiterated these findings. In 2002, Congress enacted legislation to make category rating available throughout the Civil Service.[26]

[23] OPM's 1999 Delegated Examining Operations Handbook defined a name request as "a means by which Federal agencies can request that a particular individual(s) be considered for inclusion on a certificate of eligibles if within reach for certification." A name request is merely a tie-breaker that can prevent a candidate from being eliminated from consideration in a tied-score situation; it does not guarantee that therequested candidate will be referred, nor does it increase a candidate's score or override veterans'preference.

[24] Contrary to common belief, the rule of three was not established primarily to constrain selecting officials. Instead, the rule of three was established to make a selecting official's discretion meaningful. Consistent with this intent, 5 U.S.C. § 3317 requires OPM (and agency delegated examining units) to certify enough names to assure that a selecting official can consider at least three qualified candidates for each vacancy.

[25] U.S. Merit Systems Protection Board, *The Rule of Three in Federal Hiring: Boon or Bane?*, 1995, p. viii.

[26] See the Chief Human Capital Officers Act of 2002 (Title XIII of the Homeland Security Act of 2002, P.L. 107-296) and 5 U.S.C. § 3319.

Nevertheless, concerns about agency willingness to recruit and hire veterans and to observe veterans' preference requirements remained. Concurrent with our 1995 study Congress enacted the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). USERRA sought, among other things, to minimize the disruption to the lives of persons performing service in the uniformed service by providing prompt reemployment of such persons upon the completion of their military service.[27] Congress later enacted the Veterans Employment Opportunities Act of 1998 (VEOA). VEOA sought to expand employment opportunities for veterans and to enforce veterans' preference by:

- requiring agencies to accept applications from eligible veterans when considering applicants other than current agency employees;
- establishing an appointing authority for such veterans;[28]
- making it a prohibited personnel practice to violate veterans' preference; and
- providing a means of redress for a violation of veterans' preference. [29]

These laws reinforce veterans' preference and promote the public policy that the Federal Government be a model employer in supporting military service and employing those who have served and defended the Nation.

[27] 38 U.S.C. § 4301.
[28] 5 U.S.C. § 3304(f).
[29] 5 U.S.C. §§ 3330a-3330b.

CONCLUSION

As noted in *The Federal Government: A Model Employer or a Work in Progress?*, our analysis of the results of the eight administrations of the MPS indicates that the Federal Government has made great strides in achieving a workplace free from prohibited personnel practices. The percentage of employees reporting discrimination based on ethnicity/race, sex, age, and religion have declined since the first administrations of the survey. In addition, the data suggest that there has been progress in eliminating sex-based discrimination, given that men and women generally held similar opinions of their jobs, agencies, and treatment.

These trends are good news, though in that report we acknowledge that the Federal Government still has work to do to ensure a workplace free of prohibited personnel practices. Employees continue to express concerns about how agencies fill jobs and distribute awards. While the trust between employees and supervisors has improved over time, it remains an area to be strengthened. Also, there is a continuing gap between minority and nonminority employees' perceptions of the fairness of personnel policies and decisions, and the prevalence of discrimination and other prohibited personnel practices. In addition, the percentage of employees who reported retaliation for engaging in a specific protected activity (on the MPS 2005 survey) was almost the same percentage of employees who reported engaging in that activity.

Therefore, Federal agencies must persistently strive to reduce the incidences of illegal behavior and remain vigilant against PPPs. To assist agencies in this effort, and as a part of our statutory mission, the MSPB launches its re-examination of the prevalence of prohibited personnel practices within the Federal Government.

PROHIBITED PERSONNEL PRACTICES

Title 5 U.S.C. § 2302. Prohibited personnel practices

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;

(11) (A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement; or

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

REPORT LIST

Listed below are a number of MSPB reports that are related to perceptions of and the incidence of prohibited personnel practices in the Federal Government. All MSPB reports and newsletters are available at: www.mspb.gov/studies.

- Fair and Equitable Treatment: Progress Made and Challenges Remaining (2009)
- The Federal Government: A Model Employer or a Work in Progress? Perspectives from 25 Years of the Merit Principles Surveys (2008)
- Accomplishing Our Mission: Results of the Merit Principles Survey 2005 (2007)
- Reforming Federal Hiring: Beyond Cheaper and Faster (2006)
- The Federal Workforce for the 21st Century: Results of the Merit Principles Survey 2000 (2003)
- Restoring Merit to Federal Hiring: Why Two Special Hiring Programs Should Be Ended (2000)
- The Changing Federal Workplace: Employee Perspectives (1998)
- Achieving a Representative Federal Workforce: Addressing the Barriers to Hispanic Representation (1997)
- Adherence to the Merit Principles in the Workplace: Federal Employees' Views (1994)
- Fair and Equitable Treatment: A Progress Report on Minority Employment in the Federal Government (1996)
- The Rule of Three in Federal Hiring: Boon or Bane (1995)
- Working for America: An Update (1994)
- Whistleblowing the Federal Government: An Update (1993)
- The Changing Face of the Federal Workforce: A Symposium on Diversity (1993)
- A Question of Equity: Women and the Glass Ceiling in the Federal Government (1992)
- Blowing the Whistle in the Federal Government: A Comparative Analysis of the 1980 and 1983 Survey Findings (1984)
- Breaking Trust: Prohibited Personnel Practices in the Federal Service (1982)
- Whistleblowing and the Federal Employee: Blowing the Whistle on Fraud, Waste, and Mismanagement--Who Does it and What Happens (1981)
- Do Federal Employees Face Reprisal for Reporting Fraud, Waste, or Mismanagement? (1981)

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Prohibited Personnel Practices

A Study Retrospective