

111TH CONGRESS
1ST SESSION

H. R. 67

To amend and to strengthen accountability features introduced by the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 6, 2009

Ms. JACKSON-LEE of Texas introduced the following bill; which was referred to the Committee on Oversight and Government Reform, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend and to strengthen accountability features introduced by the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Notification and Federal Employee Antidiscrimination
6 and Retaliation Act of 2009” or the “No FEAR Act of
7 2009”.

1 (b) TABLE OF CONTENTS.—The table of contents of
 2 this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—GENERAL PROVISIONS

Sec. 101. Findings.

Sec. 102. Sense of Congress.

Sec. 103. Definitions.

Sec. 104. Amendments to Title I of the No FEAR Act of 2002.

TITLE II—AMENDMENTS TO TITLE II OF THE NO FEAR ACT OF 2002

Sec. 201. Amendments relating to reimbursement requirement.

Sec. 202. Amendments relating to notification requirement.

Sec. 203. Amendments relating to reporting requirement.

Sec. 204. Training.

TITLE III—ACCOUNTABILITY PROVISIONS

Sec. 301. Disciplinary action requirement.

Sec. 302. Sanctions.

Sec. 303. Role of Department of Justice.

Sec. 304. No FEAR Oversight Office.

TITLE IV—DAMAGES AND RELIEF

Sec. 401. Clarification of Title VII liability caps, damages remedies.

Sec. 402. No immunity from individual liability for Federal officials.

3 **TITLE I—GENERAL PROVISIONS**

4 **SEC. 101. FINDINGS.**

5 Congress finds that—

6 (1) agencies that engage in discrimination, re-
 7 taliation, harassment, or violations of Federal dis-
 8 crimination or whistleblower protection laws dem-
 9 onstrate a gross disregard for taxpayer dollars, un-
 10 dermine the confidence of the American people in
 11 the Government, put the public’s safety and services
 12 at risk, and reduce the Government’s ability to time-
 13 ly and adequately address vital public needs;

1 (2)(A) Congress has heard testimony from indi-
2 viduals which point to chronic problems of discrimi-
3 nation and retaliation against Federal employees,
4 and which, in turn, negatively affect the Federal
5 Government’s efficiency and effectiveness;

6 (B) in the case of Dr. Marsha Coleman-
7 Adebayo, a jury found in August 2000 that the En-
8 vironmental Protection Agency had discriminated
9 against the scientist based on race, color, and a hos-
10 tile work environment; agency managers retaliated
11 by relieving the scientist of her duties after she re-
12 ported that an American company exposed its Afri-
13 can miners and their families to vanadium, a deadly
14 substance; and the agency has consistently retaliated
15 against the employee since she prevailed in her jury
16 verdict and testified twice before Congress; and

17 (C) in the case of Matthew F. Fogg v. Janet
18 Reno, Attorney General of the United States, a case
19 that was filed 21 years ago—

20 (i) a Federal jury found that the United
21 States Marshals Service had discriminated
22 against United States Marshal Fogg, and was
23 a “hostile environment” for all African-Ameri-
24 cans serving in the United States Marshals
25 Service; and

1 (ii) 10 years after that jury verdict, hand-
2 ed down on April 28, 1998, the Department of
3 Justice continued to use taxpayer money to ap-
4 peal this case; and

5 (3)(A) Federal agencies should foster a work-
6 place free of discrimination and should timely re-
7 solve prima facie cases of discrimination and retalia-
8 tion, particularly in cases of class-wide allegations;
9 and

10 (B) in the case of Janet Howard, et al. v. Car-
11 los M. Gutierrez, Secretary, United States Depart-
12 ment of Commerce, the Department of Commerce
13 allowed employee complaints to languish and used
14 taxpayer dollars to litigate a race-based discrimina-
15 tion class action first filed in 1995; in fiscal year
16 2001, rather than resolve employee concerns, the
17 Department established the Class Action Project
18 Fund (since renamed the Complex Litigation Unit),
19 which serves to defend a workforce culture that per-
20 petuates unlawful and intentional discrimination in
21 the workplace.

22 **SEC. 102. SENSE OF CONGRESS.**

23 It is the sense of Congress that—

24 (1) additional enforcement and remedies under
25 Federal law are needed to make Federal agencies

1 more accountable for their violations of employment
2 discrimination and whistleblower protection laws;

3 (2) defining and prescribing timely, definitive
4 disciplinary action for Federal managers and super-
5 visors found violating the No FEAR Act of 2002
6 provides more accountability and consequences for
7 discrimination and retaliation against whistle-
8 blowers;

9 (3) establishing a definitive period for reimburs-
10 ing the Judgment Fund (as prescribed in section
11 201 of the No FEAR Act of 2002) should encourage
12 timely resolution or settlement of complaints;

13 (4) extending notification of No FEAR provi-
14 sions to cover all employees, including employees of
15 contractors receiving a majority of their funding
16 from contracts with the United States Government,
17 should increase Federal agency compliance with the
18 law;

19 (5) addressing damages and relief should clarify
20 compensation available to complaining parties pursu-
21 ant to the 1991 amendments to Title VII; and

22 (6) extending whistleblower protection to vet-
23 erans hospitals and physicians and other medical
24 professionals who work in health care facilities that
25 receive the majority of their funding from the Fed-

1 eral Government should support and protect medical
2 professionals from discrimination and retaliation.

3 **SEC. 103. DEFINITIONS.**

4 For the purposes of this Act—

5 (1) the term “claim” means a cause of action
6 or an alleged discriminatory or retaliatory act identi-
7 fied in a complaint;

8 (2) the term “criminal violation” includes any
9 of the offenses proscribed by section 241, 371, 373,
10 or 1962 of title 18, United States Code, including
11 fraud, perjury, bribery, witness tampering, and ob-
12 struction of justice;

13 (3) the term “culpable official” means an indi-
14 vidual, currently or formerly employed by a Federal
15 agency, whose conduct in the course of that employ-
16 ment is the basis for a final finding of discrimina-
17 tion;

18 (4) the term “disciplinary action” includes a
19 suspension, demotion, or termination;

20 (5) the term “employee” means any Federal
21 employee within the meaning of section 103 of the
22 No FEAR Act of 2002 and any other individual, in-
23 cluding permanent, temporary, full- or part-time em-
24 ployees or independent contractors performing serv-
25 ices for an organization that in whole or in part is

1 a contractor or grantee or other entity that receives
2 a majority of its funding from the Federal Govern-
3 ment;

4 (6) the term “Federal official” means any man-
5 ager, supervisor, or senior policy official employed by
6 a Federal agency and having any of the powers and
7 responsibilities of management—

8 (A) to give instructions or orders to subor-
9 dinates;

10 (B) to be held responsible for the work and
11 actions of other employees; or

12 (C) to administer discipline and penalties;

13 (7) the term “final finding of discrimination”
14 means a finding of discrimination (as described in
15 section 201(a) of the No FEAR Act of 2002) that
16 is final and not appealable, and includes an order of
17 settlement;

18 (8) the term “immediately” means within less
19 than 10 calendar days;

20 (9) the term “Title VII” means title VII of the
21 Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.);
22 and

23 (10) the term “whistleblower” means an em-
24 ployee who discloses information which the employee
25 reasonably believes evidences—

1 (A) a violation of Title VII or any other
2 law, or of any rule or regulation; or

3 (B) gross mismanagement, a gross waste
4 of funds, an abuse of authority, or a substantial
5 and specific danger to public health or safety.

6 **SEC. 104. AMENDMENTS TO TITLE I OF THE NO FEAR ACT**
7 **OF 2002.**

8 Section 102(6) of the Notification and Federal Em-
9 ployee Antidiscrimination and Retaliation Act of 2002 (5
10 U.S.C. 2301 note), in this Act referred to as the “No
11 FEAR Act of 2002”, is amended—

12 (1) in subparagraph (A), by striking “within a
13 reasonable time” and inserting “no later than two
14 years after the Judgment Fund makes the pay-
15 ment”; and

16 (2) in subparagraph (B), by striking “agency,
17 may need to extend reimbursement over several
18 years” and inserting “agency, may need to make ar-
19 rangements for a payment schedule with the Treas-
20 ury not to exceed two years”.

1 **TITLE II—AMENDMENTS TO**
 2 **TITLE II OF THE NO FEAR**
 3 **ACT OF 2002**

4 **SEC. 201. AMENDMENTS RELATING TO REIMBURSEMENT**
 5 **REQUIREMENT.**

6 Subsection (b) of section 201 of the No FEAR Act
 7 of 2002 is amended—

8 (1) by making the text of such subsection a
 9 paragraph (1), indented 2 ems and with a heading
 10 that reads as follows:

11 “(1) IN GENERAL.—”; and

12 (2) by adding at the end the following:

13 “(2) NOTICE TO BE PROVIDED BY AGENCY.—

14 No later than 45 days after the date of the receipt
 15 of a final finding of discrimination, the agency shall
 16 notify the Department of the Treasury—

17 “(A) of its responsibility to repay the
 18 Judgment Fund; and

19 “(B) to arrange payment of the full
 20 amount or to make arrangements for a pay-
 21 ment schedule in accordance with paragraph
 22 (3).

23 “(3) DEADLINE FOR REPAYMENTS GEN-
 24 ERALLY.—The agency shall repay the Judgment
 25 Fund in full no later than the close of the second

1 fiscal year beginning after the date on which the
2 Judgment Fund makes the payment (or, if made
3 under a payment schedule, the close of the second
4 fiscal year beginning after the date on which the
5 Judgment Fund makes the final payment).”.

6 **SEC. 202. AMENDMENTS RELATING TO NOTIFICATION RE-**
7 **QUIREMENT.**

8 Section 202 of the No FEAR Act of 2002 is amend-
9 ed—

10 (1) in subsection (a), by striking “to Federal
11 employees,” and inserting “to Federal employees
12 (including any employee of a contractor receiving
13 more than 50 percent of its annual gross revenues
14 from Federal contracts),”;

15 (2) in subsection (b), by adding at the end the
16 following: “Within 3 days after the date of the en-
17 actment of the No FEAR Act of 2009, and annually
18 thereafter, each Federal agency shall notify its em-
19 ployees, by e-mail or voice mail, of the Internet site
20 used by such agency in compliance with the pre-
21 ceding sentence.”; and

22 (3) by amending subsection (c) to read as fol-
23 lows:

24 “(c) EMPLOYEE TRAINING.—Each Federal agency
25 shall ensure that employees of such agency receive training

1 regarding the rights and remedies applicable to such em-
2 ployees under the respective provisions of law covered by
3 paragraphs (1) and (2) of section 201(a).”.

4 **SEC. 203. AMENDMENTS RELATING TO REPORTING RE-**
5 **QUIREMENT.**

6 (a) IN GENERAL.—Section 203(a) of the No FEAR
7 Act of 2002 is amended—

8 (1) by striking “and” at the end of paragraph
9 (7);

10 (2) by striking the period at the end of para-
11 graph (8) and inserting a semicolon; and

12 (3) by adding after paragraph (8) the following:

13 “(9) data on all class actions filed, including
14 size, status, filing date, number of suits filed against
15 the agency, and demographic make-up;

16 “(10) request for counseling by race or sex, as
17 well as individuals who fall within both categories;

18 “(11) total workforce and ethnic representation,
19 including race and national origin data;

20 “(12) number and nature of personnel griev-
21 ances alleging prohibited personnel practices;

22 “(13) the total dollar amount by fiscal years
23 that the agency owes the Judgment Fund;

1 “(14) total costs associated with processing and
2 litigating cases, including salaries and travel costs of
3 all personnel involved;

4 “(15) number of plaintiffs that prevailed in jury
5 trials or administrative proceedings; and

6 “(16) specific agency office where discrimina-
7 tion was found.”.

8 (b) ADDITIONAL REPORTS.—Section 203 of the No
9 FEAR Act of 2002 is amended by adding at the end the
10 following:

11 “(c) REPORTS BY GAO.—The Government Account-
12 ability Office shall, within 90 days after the end of each
13 fiscal year, prepare and submit to Speaker of the House
14 of Representatives, the President pro tempore of the Sen-
15 ate, and each of the committees named or described in
16 subsection (a), a report on the total costs incurred during
17 such fiscal year which are associated with processing and
18 litigating cases arising under each of the respective provi-
19 sions of law covered by paragraphs (1) and (2) of section
20 201(a), including costs associated with Department of
21 Justice litigation.

22 “(d) REPORTS BY AGENCIES.—

23 “(1) IN GENERAL.—Effective with respect to
24 agency performance plans for fiscal years beginning
25 not later than 6 months after the date of the enact-

1 ment of this subsection, each Federal agency shall
2 establish performance goals reflective of its efforts to
3 implement this Act.

4 “(2) DEFINITIONS.—For purposes of this sub-
5 section—

6 “(A) the term ‘agency performance plan’
7 refers to an agency performance plan under
8 section 1115 of title 31, United States Code
9 (or, for purposes of the United States Postal
10 Service, section 2803 of title 39, United States
11 Code); and

12 “(B) the term ‘performance goal’ has the
13 meaning given such term by section 1115(g)(4)
14 of title 31, United States Code (or, for purposes
15 of the United States Postal Service, section
16 2801(3) of title 39, United States Code).”.

17 **SEC. 204. TRAINING.**

18 (a) The No FEAR Institute, a nonprofit, non-Federal
19 Government entity, is hereby specified as a source of train-
20 ing and counseling for Federal employees that is man-
21 dated by this Act with regard to their rights and remedies
22 under antidiscrimination, retaliation, and harassment, as
23 well as whistleblower protection laws.

24 (b) The No FEAR Institute shall be recognized as
25 an official Federal Government training institute and re-

1 ceive annual funding, in accordance with such agreements
 2 as agencies and contractors may enter into with the No
 3 FEAR institute, in order to provide training to Federal
 4 employees and contractors receiving more than 50 percent
 5 of their annual budget from the Federal Government.

6 **TITLE III—ACCOUNTABILITY** 7 **PROVISIONS**

8 **SEC. 301. DISCIPLINARY ACTION REQUIREMENT.**

9 (a) FINAL FINDING OF DISCRIMINATION WHERE
 10 MENTAL OR PHYSICAL HEALTH IS HARMED.—Upon a
 11 final finding of discrimination with respect to a culpable
 12 official in a case in which such official’s discriminatory
 13 or retaliatory acts are determined to have contributed to
 14 a loss of life or limb or any other substantial diminishment
 15 of an employee’s mental or physical health, the culpable
 16 official shall immediately—

- 17 (1) be terminated from Federal service;
- 18 (2) be debarred from Federal employment for a
 19 period not to exceed 5 years; and
- 20 (3) forfeit any right to serve as a worker em-
 21 ployed under any Federal contract.

22 (b) FINAL FINDING OF DISCRIMINATION NOT COV-
 23 ERED BY SUBSECTION (a).—

- 24 (1) APPLICABILITY.—This subsection applies in
 25 the case of any final finding of discrimination, with

1 respect to a culpable official, which is not subject to
2 subsection (a).

3 (2) INITIAL FINDING.—Upon an initial finding
4 of discrimination as described in paragraph (1)—

5 (A) the culpable official shall imme-
6 diately—

7 (i) be removed from service as a Fed-
8 eral official; and

9 (ii) be demoted at least 1 pay grade
10 (or the equivalent); and

11 (B) the employing agency shall include in
12 the culpable official's official personnel record a
13 notation to the effect that such a finding
14 against such official was made.

15 (3) SUBSEQUENT FINDING.—Upon a subse-
16 quent finding of any discrimination with respect to
17 the same official, such official shall immediately—

18 (A) be terminated from Federal service;

19 (B) be debarred from Federal employment
20 for a period not to exceed 5 years; and

21 (C) forfeit any right to serve as a worker
22 employed under any Federal contract.

23 **SEC. 302. SANCTIONS.**

24 The Secretary of the Treasury shall impose a mone-
25 etary penalty of \$10,000 on an agency of the United States

1 for each week that agency fails to take action against em-
2 ployees who falsify evidence in a proceeding under Title
3 VII.

4 **SEC. 303. ROLE OF DEPARTMENT OF JUSTICE.**

5 (a) REFERRAL.—The Equal Employment Oppor-
6 tunity Commission and any agency that becomes aware
7 of a criminal violation shall refer the matter to the Depart-
8 ment of Justice for prosecution when agency officials are
9 found liable for intimidating or harassing employees that
10 testify before Congress. If an employee alleges that intimi-
11 dation or harassment has occurred as a result of congres-
12 sional testimony by that employee, Congress should work
13 in collaboration with the No FEAR Oversight office to in-
14 vestigate the allegation and refer it to the Department of
15 Justice for prosecution if appropriate.

16 (b) REPORT.—Not later than 180 days after a deter-
17 mination not to prosecute a matter referred under this
18 section, the Department of Justice shall provide to Con-
19 gress a justification for that determination.

20 **SEC. 304. NO FEAR OVERSIGHT OFFICE.**

21 The Comptroller General shall take such measures as
22 may be necessary to ensure that an office, to be known
23 as the “No FEAR Oversight Office”, shall be created
24 within the Government Accountability Office. The No
25 FEAR Oversight Office shall be the official clearinghouse

1 for the Federal Government and provide written informa-
2 tion to Congress, the executive branch, and the public on
3 the enforcement of the No FEAR Act of 2002. The No
4 FEAR Oversight Office shall be established within 30
5 days after the date of the enactment of this Act.

6 **TITLE IV—DAMAGES AND** 7 **RELIEF**

8 **SEC. 401. CLARIFICATION OF TITLE VII LIABILITY CAPS,** 9 **DAMAGES REMEDIES.**

10 (a) CLARIFY TITLE VII LIABILITY LIMITS.—For
11 Federal Government Title VII cases, the liability limits for
12 Federal workplace discrimination cases under Title VII is
13 \$300,000 per each claim or alleged violation of said law
14 adjudicated in favor of the claimant, whether or not said
15 violation sustains one or more additional claims when con-
16 sidered in conjunction with other unlawful activity. There-
17 fore, claimants are not limited to \$300,000 compensatory
18 damage cap per case as currently being interpreted by the
19 Federal courts, but rather \$300,000 per each claim
20 awarded in favor of the plaintiff in the entire case. Fur-
21 thermore, Title VII is only the exclusive remedy for work-
22 force discrimination claims. Title VII is not the exclusive
23 source of Federal statutory, workforce rights or exclusive
24 remedy for their violation.

1 (b) RELIEF.—Should an administrative agency or
2 court find for the employee in a subsequent claim and that
3 the relief requested some or all was appropriate, the em-
4 ployee shall be entitled to liquidated damages (after taxes)
5 plus all reasonable fees to attorneys. This shall not be con-
6 sidered a part of compensatory damages. Entitlement to
7 damages under this provision is a post judgment pro-
8 ceeding.

9 **SEC. 402. NO IMMUNITY FROM INDIVIDUAL LIABILITY FOR**
10 **FEDERAL OFFICIALS.**

11 It shall not be a defense to a civil action against an
12 individual arising out of a violation of Title VII that the
13 individual was acting in the capacity of a Government offi-
14 cer and employee at the time of the violation.

○