



Testimony

Before the Subcommittee on Oversight
and Investigations, Committee on
Veterans' Affairs, House of
Representatives

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VA WHISTLEBLOWERS

Retaliation Claim Investigations and Settlement Agreements

Statement of Thomas Costa, Director,
Education, Workforce, and Income Security

Revised October 27, 2023 to correct figures 2, 3, and 4 and to revise rescheduled hearing date. The corrected figure 2 should show the volume of Office of Accountability and Whistleblower Protection (OAWP) cases for fiscal years 2020-2023. The corrected figure 3 should show the volume of Office of Special Counsel (OSC) cases Involving Department of Veterans Affairs (VA) employees for fiscal years 2018-2022. The corrected figure 4 should show the median case length for OSC investigations involving VA employees for fiscal years 2018-2022.

GAO Highlights

Highlights of [GAO-24-107090](#), a testimony before the Subcommittee on Oversight and Investigations, Committee on Veterans' Affairs, House of Representatives.

Why GAO Did This Study

Whistleblowers can help protect the public interest by reporting allegations of wrongdoing, such as a violation of law or gross mismanagement. While whistleblowers potentially safeguard the government from fraud, waste, and abuse, they may risk reprisal from their agencies for disclosures, such as demotion, reassignment or termination.

VA is one of the largest federal agencies and employs around 400,000 people across hundreds of medical facilities, clinics, and benefits offices. Whistleblowers at the VA can file complaints of retaliation internally, through the agency's OAWP, or externally with other agencies, such as OSC. In some cases, whistleblowers will enter into a settlement agreement with VA to resolve the dispute.

This testimony summarizes GAO's May 2023 report on VA whistleblower retaliation claims and settlements, as well as preliminary observations from related ongoing work. Specifically, this testimony examines: 1) the characteristics of OAWP whistleblower retaliation investigations, 2) the characteristics of OSC whistleblower retaliation investigations, and 3) how VA resolves such allegations through settlement agreements.

GAO reviewed OSC and VA documents, interviewed agency officials, analyzed OSC case management system data from fiscal years 2018-22, which were the most recent data at the time of the report. In addition, as part of our ongoing work, we collected additional information on whistleblower retaliation claims and settlements from OAWP's Matter Tracking System.

View [GAO-24-107090](#). For more information, contact Thomas Costa at (202) 512-4769 or costat@gao.gov.

November 2, 2023

VA WHISTLEBLOWERS

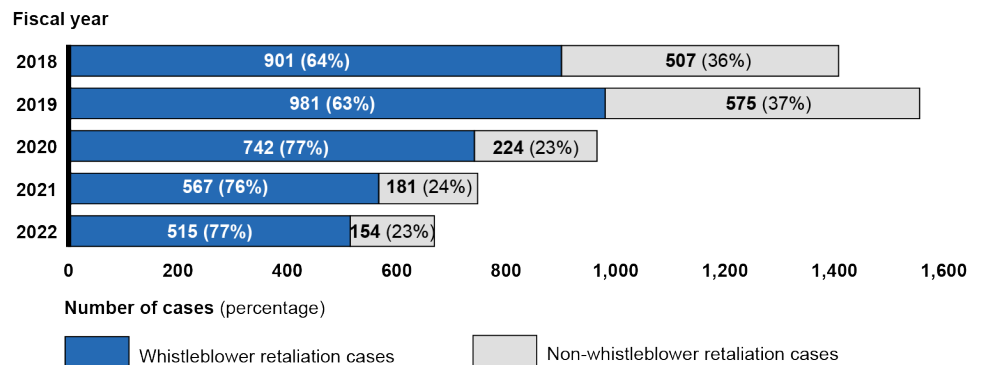
Retaliation Claim Investigations and Settlement Agreements

What GAO Found

The number of whistleblower retaliation cases that the Department of Veterans Affairs (VA) Office of Accountability and Whistleblower Protection (OAWP) has received increased since fiscal year 2020. The number of other cases also increased. Specifically, OAWP received 577 whistleblower retaliation cases in fiscal year 2020 and 736 in fiscal year 2023. The non-whistleblower retaliation cases that OAWP received increased from 1,594 in fiscal year 2020 to 1,972 in fiscal year 2023.

Office of Special Counsel (OSC) investigations of allegations of whistleblower retaliation from VA employees have decreased in number and have increasingly closed with a favorable action that benefits the complainant (i.e., whistleblower). Most OSC investigations of complaints from VA employees included allegations of whistleblower retaliation. From fiscal years 2018 through 2022, 69 percent of OSC cases involving VA employees included allegations of whistleblower retaliation. Specifically, OSC received 901 whistleblower retaliation cases involving VA in fiscal year 2018 and 515 in fiscal year 2022 (see figure). The percentage of these cases with a favorable action increased from 3 percent to 10 percent.

Volume of Office of Special Counsel (OSC) Cases Involving Department of Veterans Affairs Employees, Fiscal Years 2018–2022



Source: GAO analysis of OSC case management system data. | GAO-24-107090

According to VA OGC officials, the settlement agreement process involves three distinct phases: initiation, negotiation, and monitoring. VA and a complainant can settle claims of whistleblower retaliation in the office where a dispute arises at any point in the complaint process. The agency has settled 71 whistleblower retaliation cases since it began tracking them in 2022. OAWP tracking information showed that most of the settlements included monetary awards for the whistleblower, ranging from about \$1,800 to 525,000. In addition, the settlement may also have included salary adjustments or back-pay. OAWP information also showed that complaints come from program offices across the agency, but most of the settlements originate from complaints out of VA's Veteran's Health Administration, the largest of VA's three administrations.

Chairwoman Kiggans, Ranking Member Mrvan, and Members of the Subcommittee:

Thank you for the opportunity to discuss our work on the Department of Veterans Affairs (VA) process for resolving whistleblower retaliation claims. Federal employee whistleblowers can potentially help protect the government from fraud, waste, and abuse by reporting allegations of wrongdoing, such as a violation of law, abuse of authority, or gross mismanagement. However, these whistleblowers may risk reprisal from their agencies for their disclosures, such as demotion, reassignment, or termination and VA has faced reports of inadequate whistleblower protections within the agency over the last few years. The Civil Service Reform Act of 1978 provided protections for whistleblower disclosures and created the Office of Special Counsel (OSC), now an independent federal investigative and prosecutorial agency. OSC is responsible for investigating prohibited personnel practices (PPP), including complaints of whistleblower retaliation.¹

VA is one of the largest federal agencies, with around 400,000 employees across hundreds of medical facilities, clinics, and benefits offices. In addition to protections under the Civil Service Reform Act of 1978, VA employees who make a whistleblower disclosure are also protected under the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017. This law established the Office of Accountability and Whistleblower Protection (OAWP). OAWP's functions include investigating allegations of misconduct against senior agency officials and receiving and referring whistleblower disclosures.

My statement summarizes the findings from our May 2023 report, as well as related preliminary observations from our ongoing work, and will address: 1) the characteristics of OAWP investigations of whistleblower retaliation allegations, 2) the characteristics of OSC investigations of whistleblower retaliation allegations from VA employees, and 3) how VA

¹ Prohibited personnel practices (PPPs) are employment-related activities that are banned in the federal workforce because they violate the merit system through some form of employment discrimination, retaliation, improper hiring practices, or failure to adhere to laws, rules, or regulations that directly concern the merit system principles.

resolves allegations of whistleblower retaliation through settlement agreements.²

For the May 2023 report on which this testimony is primarily based, we reviewed OSC and VA documents related to whistleblower retaliation investigations, and we interviewed agency officials about the process for settling whistleblower retaliation claims. We also analyzed OSC case management system data from fiscal years 2018 through 2022, which were the most recent at the time of our report.³ We assessed the reliability of these data and determined the data were sufficiently reliable for our purposes. We also interviewed VA officials from OAWP and the Office of General Counsel (OGC) about policies on settlement agreements to resolve claims of whistleblower retaliation. A more detailed explanation of our methodology is available in our May 2023 report. The work upon which this statement is based was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

In addition, as part of our related ongoing work, we collected additional information on whistleblower retaliation claims and settlements from OAWP's Matter Tracking System and determined they were sufficiently reliable for our purposes. This work is being conducted in accordance with generally accepted government auditing standards.

²GAO, *VA Whistleblowers: Resolution Process for Retaliation Claims*, [GAO-23-106111](#) (Washington, D.C.: May 3, 2023). GAO has ongoing work at the request of the chair and ranking member of the House Veterans Affairs Committee Oversight and Investigations Subcommittee, the chair of the Health Subcommittee, and other members of the House. This work examines: 1) characteristics of whistleblower retaliation investigations involving VA employees; 2) how VA resolves allegations of whistleblower retaliation, and how that compares to VA settlements of allegations of other prohibited personnel practices, such as those alleging discrimination, and 3) typical components of settlement agreements, and the extent to which VA monitors compliance with them.

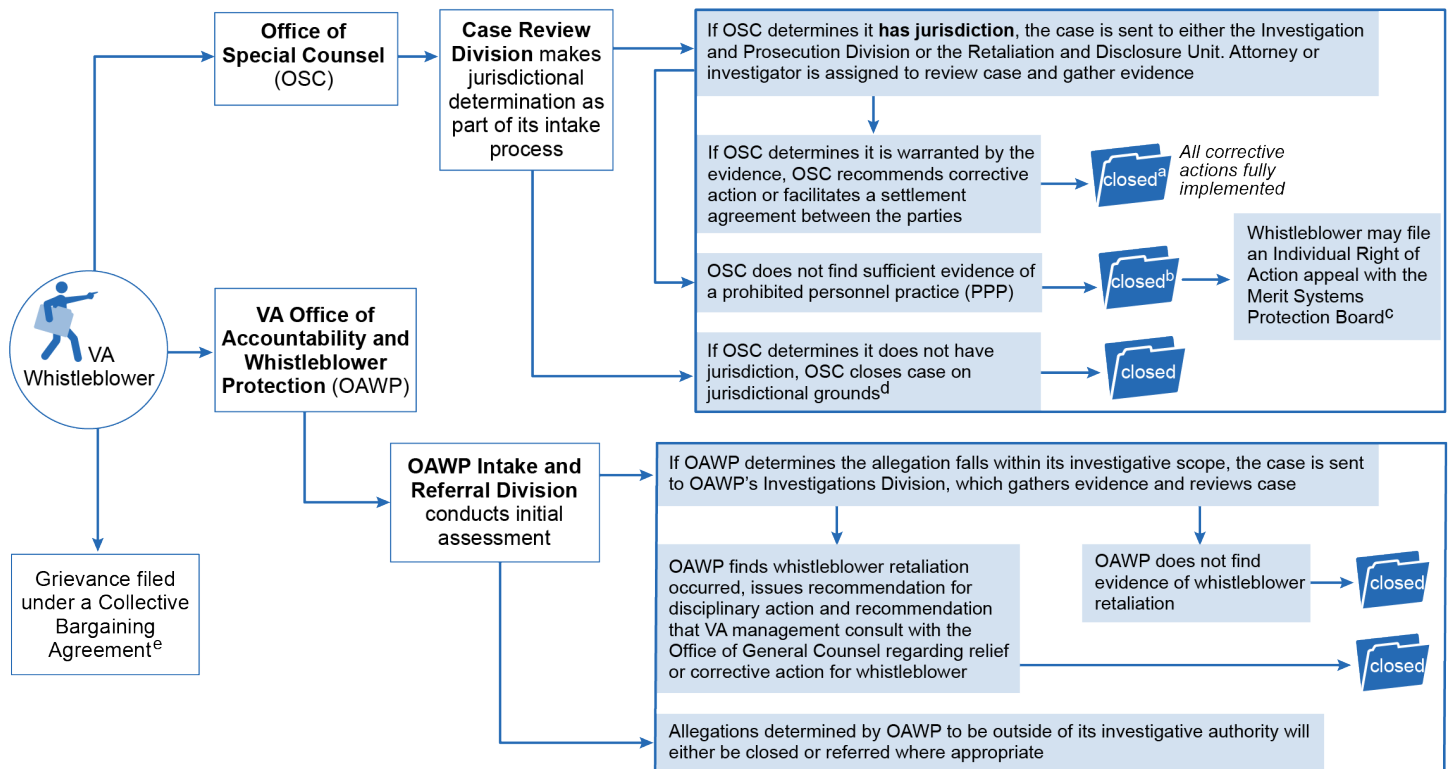
³Data for fiscal year 2022 are as of September 7, 2022, and may exclude cases closed between that date and the end of the fiscal year.

Background

Whistleblower Retaliation Complaints

Currently, VA whistleblowers can choose to submit complaints of whistleblower retaliation both internally and to external agencies (see fig. 1).

Figure 1: Selected Avenues that Department of Veterans Affairs Whistleblowers May Choose to File a Claim of Retaliation



Sources: GAO interviews with agency officials and analysis of agency documents; GAO (images). | GAO-24-107090

^aIf an agency disagrees with OSC’s finding of a PPP or corrective action, OSC may file a complaint seeking corrective action directly with the Merit Systems Protection Board.

^bAllegations that are investigated by OSC can close for a variety of reasons and OSC tracks over 40 closing dispositions. For example, a case may close if the complainant withdraws their complaint or does not provide further information.

^cUnder an Individual Right of Action, an individual must seek corrective action from OSC before appealing to the Merit Systems Protection Board. There are some circumstances under which an individual can file an appeal with the Merit Systems Protection Board, without first filing with OSC, known as “otherwise appealable actions.”

^dOSC may refer cases to the Office of Inspector General or other agencies in certain circumstances.

^eIn these circumstances, the relevant union would represent the whistleblower in the grievance process.

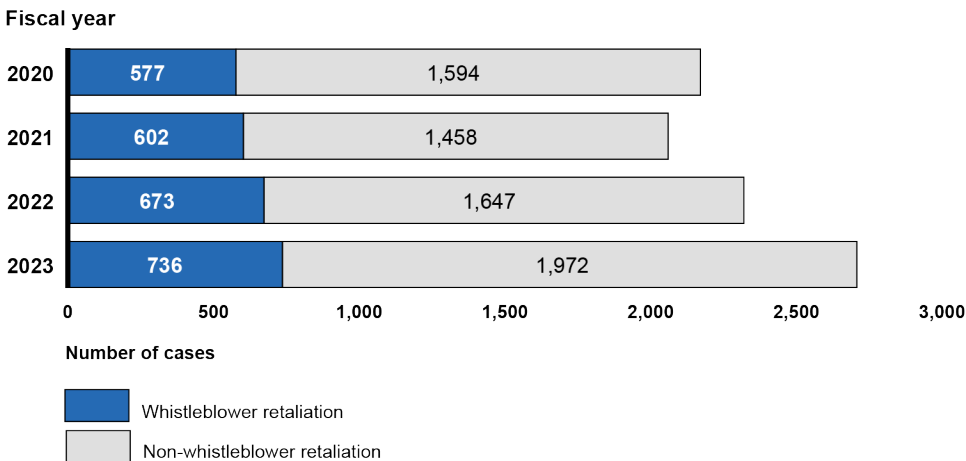
Settlement Agreements

Settlement agreements are voluntary arrangements made between a complainant and the VA. They can resolve employment disputes, including allegations of whistleblower retaliation, with a legally binding resolution, while avoiding lengthy litigation. These agreements can involve monetary compensation for the complainant, and in return, the complaint may be withdrawn.

OAWP Investigations of Whistleblower Retaliation Allegations

The number of whistleblower retaliation cases that OAWP has received has increased since fiscal year 2020. The number of other OAWP cases also increased (see fig. 2). Specifically, OAWP received 577 whistleblower retaliation cases in fiscal year 2020 and 736 in fiscal year 2023. The largest categories of non-whistleblower retaliation cases that OAWP tracks are cases that OAWP determines to not be an OAWP matter and cases that OAWP refers to other agencies or VA offices because they are not within OAWP's authority to investigate. The non-whistleblower retaliation cases that OAWP received increased from 1,594 in fiscal year 2020 to 1,972 in fiscal year 2023. We plan to further analyze OAWP case management data as part of our ongoing review.

Figure 2: Volume of Office of Accountability and Whistleblower Protection (OAWP) Cases, Fiscal Years 2020-2023



Source: GAO analysis of OAWP's Matter Tracking System Data. | GAO-24-107090

OSC Investigations of VA Whistleblower Allegations

OSC's Investigation Process

When OSC receives a PPP complaint it first determines if it has jurisdiction, and if so, sends the case to its Investigation and Prosecution Division. In certain instances where there is a companion whistleblower disclosure within 10 days of the complaint, the case is referred to its Retaliation and Disclosure Unit, according to OSC officials. The relevant unit assigns an investigative attorney to the case who requests and reviews documents and interviews witnesses, among other efforts.

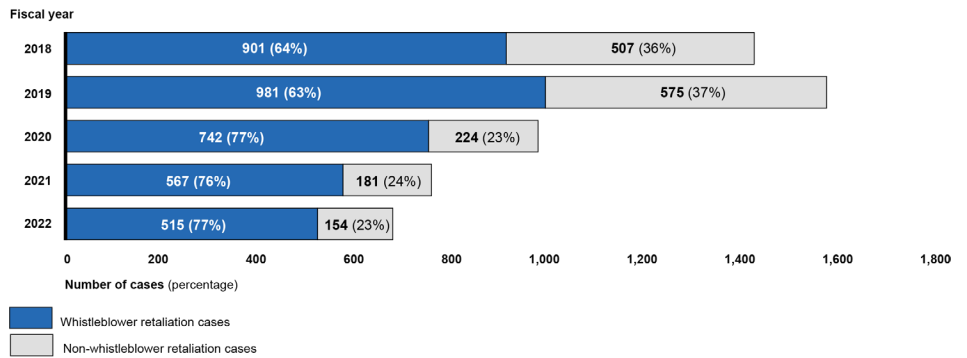
If warranted by the evidence, OSC recommends corrective action—such as backpay or damages—to restore the complainant, or it facilitates a settlement agreement between the parties. Once all corrective actions have been fully implemented, OSC closes the case, according to OSC officials.

OSC Data on VA Whistleblower Cases

Overall PPP cases arising from VA employee complaints comprise about a third of OSC's total workload, and most of these complaints include allegations of whistleblower retaliation. According to our analysis of OSC's case management system data, from fiscal years 2018 through 2022, over two-thirds (69 percent) of VA PPP cases involved allegations of whistleblower retaliation. While the total number of federal agency cases, as well as VA cases, with whistleblower retaliation allegations has generally decreased over the last 5 years, the proportion of VA PPP cases that include a whistleblower retaliation allegation has generally increased (see fig. 3).⁴

⁴We observed a similar trend across all federal agencies in the proportion of PPP cases containing whistleblower retaliation allegations.

Figure 3: Volume of Office of Special Counsel (OSC) Cases Involving Department of Veterans Affairs Employees, Fiscal Years 2018–2022

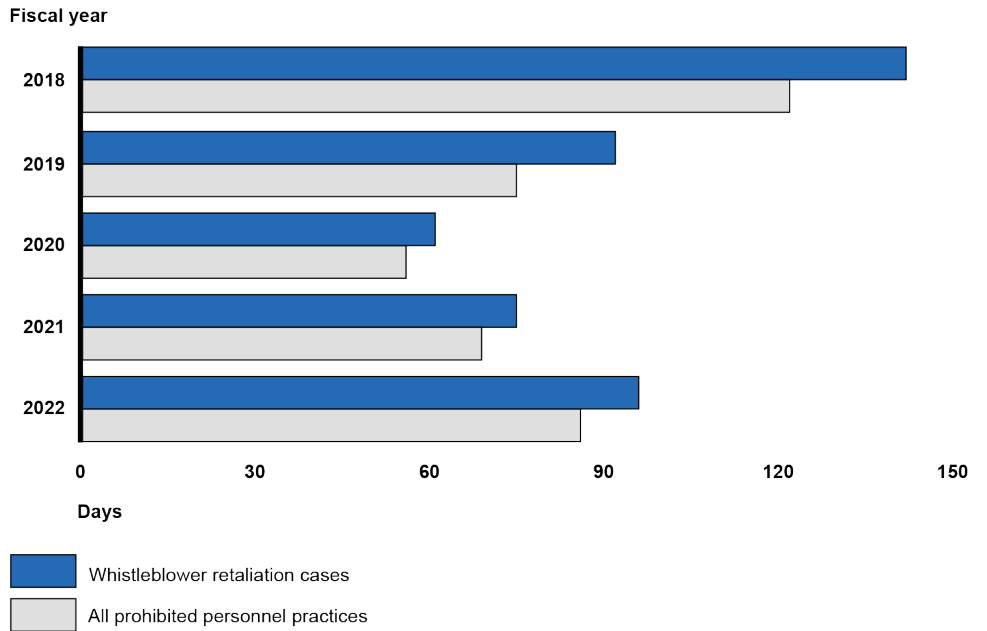


Source: GAO analysis of OSC case management system data. | GAO-24-107090

Notes: OSC implemented a new case management system in August 2019, but the data fields we analyzed are generally comparable between the old and new system across the period analyzed. We defined whistleblower retaliation to include allegations of retaliation for disclosures protected under federal law, as well as other protected activities that can be related to whistleblowing, such as exercising an appeal right. Cases can have multiple allegations, and whistleblower retaliation cases are those that include whistleblower retaliation allegations, though these cases could cover other issues as well. Data for fiscal year 2022 are as of September 7, 2022, and may exclude cases closed between that date and the end of the fiscal year.

For VA employees, the length for cases involving whistleblower retaliation allegations was longer than across all PPP cases (see fig. 4). From fiscal years 2018 through 2022, the median length for whistleblower retaliation cases was 94 days, and the average length was 190 days. In comparison, over the last 5 fiscal years, the median case length was 83 days for all PPP cases involving VA employees. The average case length was 166 days.

Figure 4: Median Case Length for Office of Special Counsel (OSC) Investigations Involving Department of Veterans Affairs Employees, Fiscal Years 2018–2022

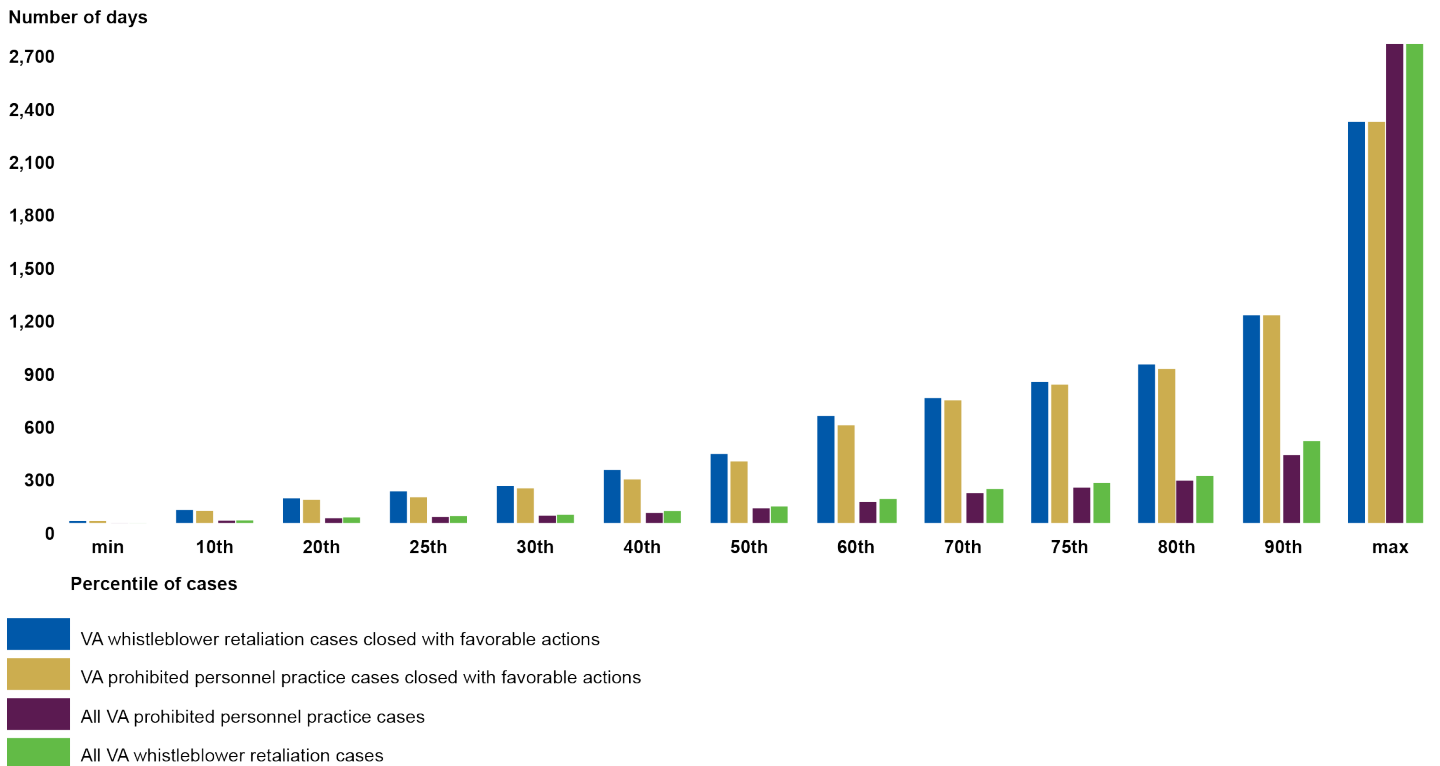


Source: GAO analysis of OSC case management system data. | GAO-24-107090

Notes: OSC implemented a new case management system in August 2019, but the data fields we analyzed are generally comparable between the old and new system across the time period analyzed. We defined whistleblower retaliation to include allegations of retaliation for disclosures protected under federal law, as well as other protected activities that can be related to whistleblowing, such as exercising an appeal right. Cases can have multiple allegations, and whistleblower retaliation cases are those that include whistleblower retaliation allegations, though these cases could cover other issues as well. Data for fiscal year 2022 are as of September 7, 2022, and may exclude cases closed between that date and the end of the fiscal year. “All prohibited personnel practices” includes cases with whistleblower retaliation allegations.

Cases that close with a favorable action tend to last longer than overall PPP cases (see fig. 5). A favorable action is an outcome in a case that could result in a specific benefit to the complainant.

Figure 5: Case Length for Office of Special Counsel (OSC) Investigations Involving Department of Veterans Affairs Employees by Percentile, Fiscal Years 2018–2022



Source: GAO analysis of OSC case management system data. | GAO-24-107090

Notes: A favorable action is an outcome in a case that could result in a specific benefit to the complainant. OSC implemented a new case management system in August 2019, but the data fields we analyzed are generally comparable between the old and new system across the period analyzed. We defined whistleblower retaliation to include allegations of retaliation for disclosures protected under federal law, as well as other protected activities that can be related to whistleblowing, such as exercising an appeal right. Cases can have multiple allegations, and whistleblower retaliation cases are those that include whistleblower retaliation allegations, though these cases could cover other issues as well. Data for fiscal year 2022 are as of September 7, 2022, and may exclude cases closed between that date and the end of the fiscal year. “All VA prohibited personnel practice cases” includes cases with whistleblower retaliation allegations and those that close with favorable actions.

The percentage of OSC whistleblower retaliation cases for VA employees closed with favorable actions has increased. Specifically, from fiscal years 2018 through 2022, VA PPP cases that had whistleblower retaliation allegations and closed with a favorable action for the whistleblower increased from 3 percent to 10 percent (see table 1). According to OSC officials, the increase in the percentage of cases with favorable outcomes for whistleblowers has contributed to longer case times.

Table 1: Percentage of Office of Special Counsel (OSC) Whistleblower Retaliation Cases Involving Department of Veterans Affairs (VA) Employees with Favorable Actions

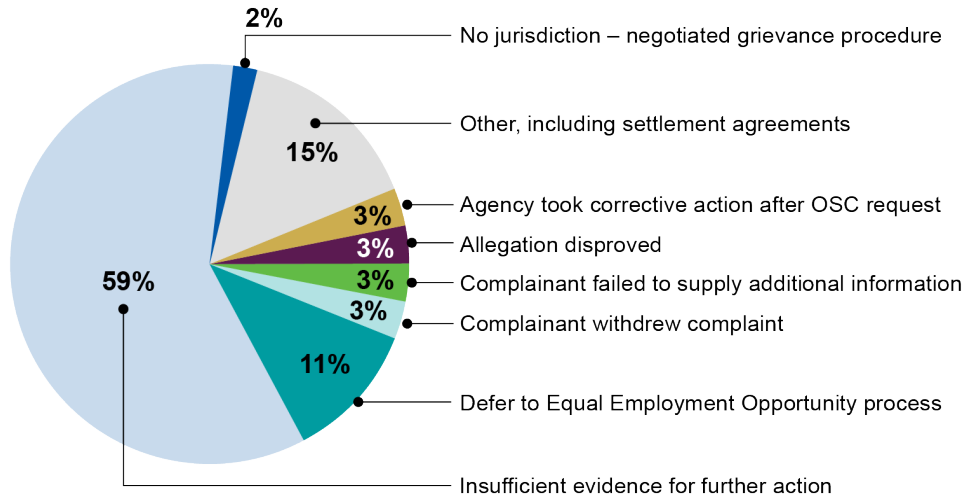
Fiscal year	Total number of VA cases involving whistleblower retaliation	Total number of VA cases involving whistleblower retaliation closed with favorable action	Percentage of cases closed with favorable action
2018	901	24	3%
2019	981	23	2%
2020	742	37	5%
2021	567	41	7%
2022	515	49	10%
Total	3706	174	5%

Source: GAO analysis of OSC case management system data. | GAO-23-107090

Notes: A favorable action is an outcome in a case that could result in a specific benefit to the complainant. OSC implemented a new case management system in August 2019, but the data fields we analyzed are generally comparable between the old and new system across the time period analyzed. We defined whistleblower retaliation to include allegations of retaliation for disclosures protected under federal law, as well as other protected activities that can be related to whistleblowing, such as exercising an appeal right. Cases can have multiple allegations, and whistleblower retaliation cases are those that include whistleblower retaliation allegations, though these cases could cover other issues as well. Data for fiscal year 2022 are as of September 7, 2022, and may exclude cases closed between that date and the end of the fiscal year.

OSC closes most whistleblower retaliation allegations from VA employees due to insufficient evidence. On average, OSC PPP cases involving VA employees addressed three allegations in 2022. Each allegation can have a different closing disposition within a case. We analyzed the closing dispositions of whistleblower retaliation allegations from VA employees, and a majority (about 59 percent) were closed due to insufficient evidence (see fig. 6). From fiscal years 2018 through 2022, less than 1 percent of whistleblower retaliation cases involving VA employees were closed due to a settlement agreement.

Figure 6: Office of Special Counsel (OSC) Closing Disposition of Whistleblower Retaliation Allegations from Department of Veterans Affairs Employees, Fiscal Years 2018–2022



Source: GAO analysis of OSC case management system data. | GAO-24-107090

Notes: OSC implemented a new case management system in August 2019, but the data fields we analyzed are generally comparable between the old and new system across the period analyzed. There are over 40 types of closing dispositions, and closing dispositions are not reflective of any investigative stage. The “Other” category combines closing dispositions representing fewer than 2 percent of whistleblower retaliation allegations, such as instances where the agency was unable to contact the complainant, or the allegation closed via a settlement agreement. We defined whistleblower retaliation to include allegations of retaliation for disclosures protected under federal law, as well as other protected activities that can be related to whistleblowing, such as exercising an appeal right. Data for fiscal year 2022 are as of September 7, 2022, and may exclude cases closed between that date and the end of the fiscal year.

In 2018, OSC changed its process for initially examining complaints, and as a result, data on the percentage of cases since then that are closed after a preliminary investigation are not readily available.⁵ Since August 2019, OSC investigators have been able to identify the cases that are further investigated in a data field in its case management system. According to OSC officials, while this data field is used regularly, it is subject to human error. However, officials said from fiscal years 2019 through 2022, between 10 and 14 percent of cases were marked as being further investigated. We plan to follow up with OSC about this as part of

⁵Anecdotally, about 90 percent of cases are closed after an initial review without further investigation, according to OSC officials. They said that a common reason for complaints to not be further investigated is because OSC received insufficient information to show that a PPP occurred.

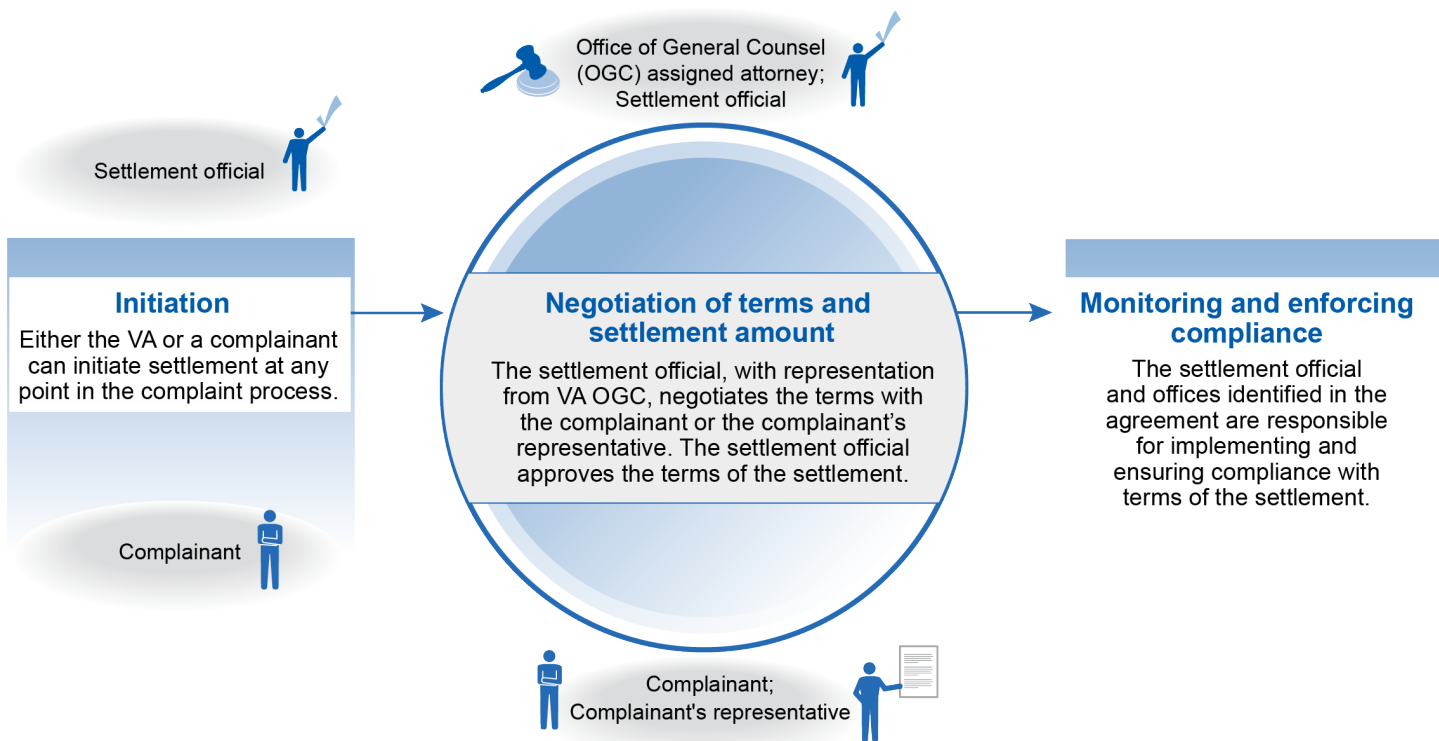
our ongoing review to determine what additional steps, if any, the agency is taking to accurately collect information in its case management system.

How VA Resolves Whistleblower Allegations of Retaliation through Settlements

VA's Settlement Agreement Processes

According to VA OGC officials, the settlement agreement process involves distinct phases: initiation, negotiation, and monitoring (see fig 7).

Figure 7: Department of Veterans Affairs (VA) Process to Settle Complaints of Whistleblower Retaliation



Sources: GAO interviews with VA officials; GAO (images). | GAO-24-107090

Settlements can commence at any juncture in the complaint process. The settlement official, an official within the applicable VA office, decides on whether to proceed with negotiations. This official represents the office where the complaint originates. As part of this phase, an attorney from VA's OGC is assigned to the case, determined by the group or geographic district where the complaint arose. VA then discusses settlement terms with the complainant or their representative, if applicable. Following an agreement, the settlement official and the related offices monitor its implementation and ensure compliance.

VA's OGC provides the settlement official with legal counsel, and according to officials they are obligated to represent the best interests of the agency. Complainants, on the other hand, can opt for personal representation, either legal or non-legal, or choose self-representation. In certain instances, neutral OSC mediators may facilitate a settlement if the complaint stems from OSC filings.

VA has disseminated memos detailing the delegation of authority related to settlement amounts for employment disputes. According to an April 2019 memo, disputes culminating in settlements above \$5,000 require clearance by senior VA officials. VA administrations can further delegate this authority.

While the general process for whistleblower retaliation settlement negotiations largely mirrors those for employment discrimination allegations (which have a separate complaint process in VA), differences lie in the guidance and data collection methodologies. Notably, VA does not maintain specific guidance for whistleblower retaliation settlements due to the absence of a statutory or regulatory mandate, according to VA officials. In contrast, the Equal Employment Opportunity Commission has regulatory requirements that agencies adopt procedures for processing complaints of discrimination, and in response, VA has developed guidance for employment discrimination settlement agreements.

OAWP began tracking executed settlement agreements in 2022. Previously, such tracking did not exist, and this change was largely spurred by Congressional inquiries according to VA officials. VA, however, does not have a mechanism to monitor the length of time to

negotiate a settlement.⁶ According to VA officials, while tracking this is theoretically possible, the agency would first have to define settlement agreements in guidance and dedicate resources to update their processes. We plan to follow up with OAWP about this as part of our ongoing review to determine what additional steps, if any, the agency is taking to track various information in its case management system.

VA Whistleblower Settlement Agreement Characteristics

According to information from OAWP's tracking system that we received in the course of our ongoing work on VA whistleblower settlements, as of September 2023, the agency has settled 71 whistleblower retaliation cases since they began tracking them in 2022.⁷

Most of the settlements (64 of 71) included a monetary award for the whistleblower. According to OAWP's tracking system, these settlements totaled around \$5.2 million as of September 2023. The amounts awarded in the settlements varied considerably, from \$1,800 to \$525,000. Additionally, according to information included in VA's tracking system the settlements may provide for salary adjustments or back-pay for the whistleblower, which is not included in these totals.

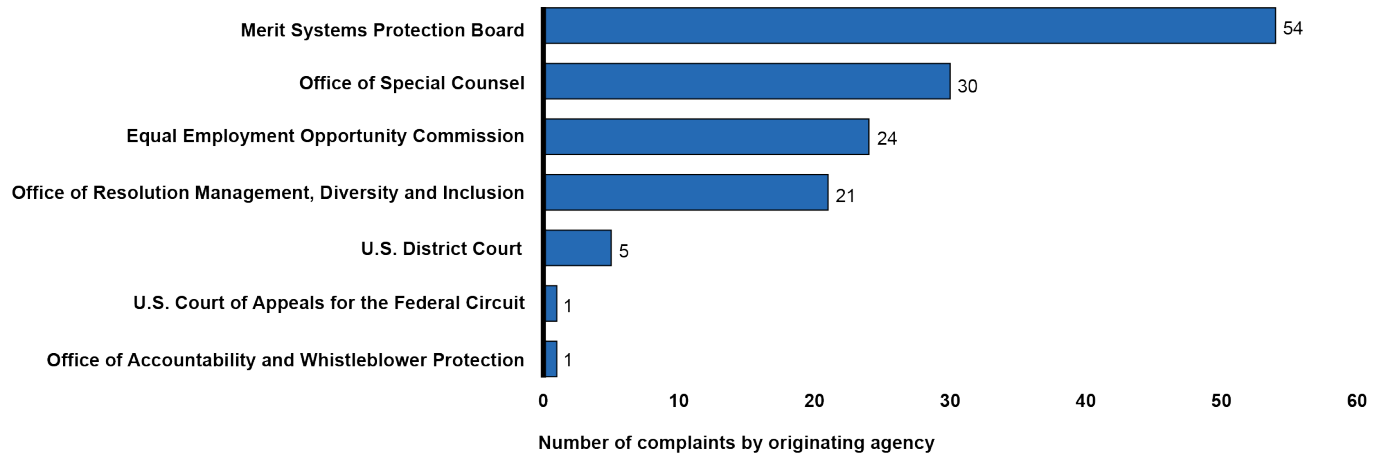
Overall, more than two-thirds (54) settled cases filed with the Merit Systems Protection Board with the remainder settling cases filed with OSC, the Equal Employment Opportunity Commission, and the Office of Resolution Management, Diversity, and Inclusion, and cases filed in U.S. District Court or the U.S. Court of Appeals for the Federal Circuit (see fig. 8). As noted in our prior report, only one of the settlements is from a case filed with OAWP.⁸ Additionally, settlements may address more than one complaint and more than one allegation of whistleblower retaliation.

⁶In November 2022, OAWP collaborated with VA's Office of Resolution Management, Diversity, and Inclusion to enhance OAWP's data collection mechanisms, according to VA officials. OAWP officials said that, while they are interested in incorporating some functions they learned of in the demonstration, they will retain their current system because it is more robust and can be adapted to accommodate further data collection.

⁷ The discussion of whistleblower settlement agreements in this statement relates to work this is still ongoing. The information, observations and analysis discussed here are preliminary and are subject to change.

⁸According to VA, one settlement may have originated in OAWP, but the agency does not have the data to determine if the complaint was first filed with OSC or with OAWP. [GAO-23-106111](#).

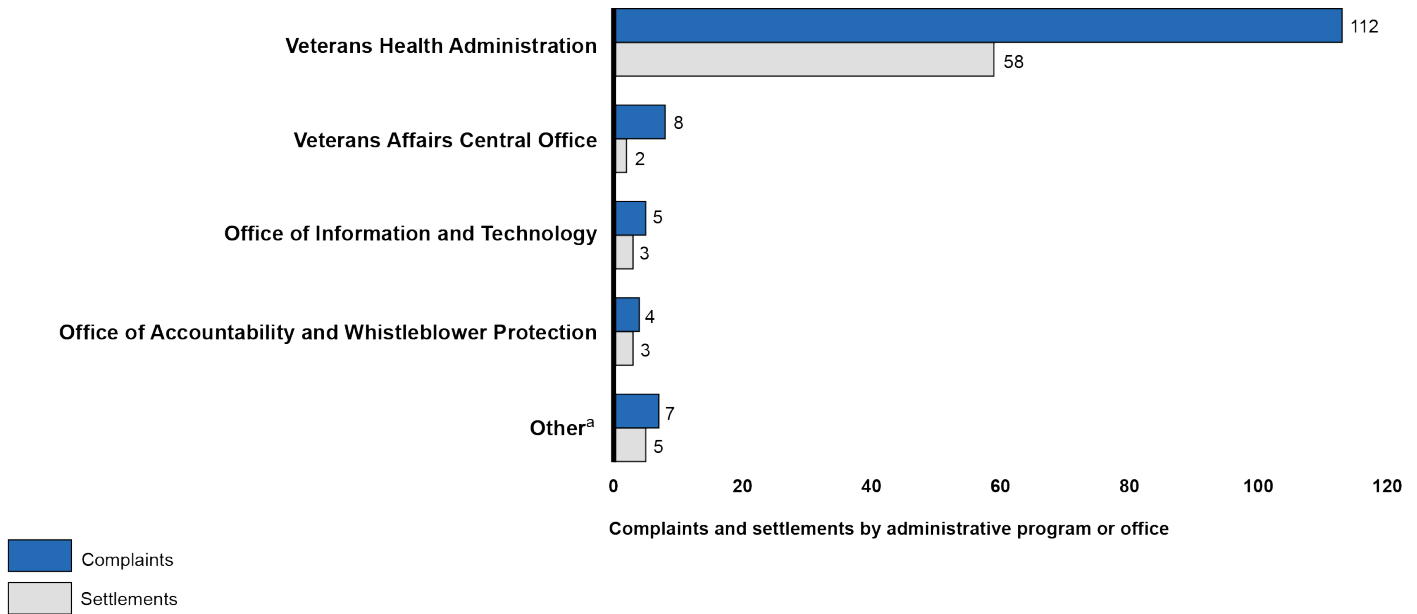
Figure 8: Whistleblower Complaints Settled by Department of Veterans Affairs, Listed by Agency Where the Case Was Filed, Fiscal Years 2022-23



Source: GAO analysis of OAWP’s Matter Tracking System data. | GAO-24-107090

OAWP’s tracking information also indicates that most settlements address complaints out of VA’s Veteran’s Health Administration (VHA), the largest of VA’s three administrations, but complaints come from program offices across the agency. Specifically, 58 of the 71 settlements addressed allegations in VHA, and the VA Central Office, the Office of Information and Technology, and OAWP also had two or more whistleblower retaliation cases settled (see fig. 9). As part of our ongoing review, we plan to conduct further work to learn more about these VA whistleblower retaliation settlements.

Figure 9: Department of Veterans Affairs (VA) Whistleblower Settlements and Complaints Addressed, Listed by Administrative Program or Office within VA, Fiscal Years 2022-23



Source: GAO analysis of OAWP's Matter Tracking System data. | GAO-24-107090

^aAdministrative programs and offices in the "other" category include: Office of Congressional and Legislative Affairs, Office of Construction and Facilities Management, Office of Acquisition, Logistics, and Construction, and Veterans Benefits Administration.

Chairwoman Kiggans, Ranking Member Mryan, and Members of the Subcommittee, this concludes my prepared statement. I would be happy to answer any questions you may have.

GAO Contact and Staff Acknowledgments

If you or your staff have any questions about this statement, please contact Thomas Costa, Director, Education, Workforce, and Income Security, at (202) 512-4769 or costat@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement.

In addition to the contact names above, GAO staff who made key contributions to this statement are Amber Yancey-Carroll (Assistant Director), Lucas Alvarez (Analyst-in-charge), Vincent Patierno-Beavers, Sheila Thorpe, Alex Galuten, Serena Lo, Mimi Nguyen, Jessica Orr, and Adam Wendel.

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