



# Federal Employment Law Training Group

Training By Professionals For Professionals

FELTG Newsletter

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## Introduction

So many bad things going on in the world these days: senseless killings by ISIS in Kenya, potential bomb builders in Queens, a suicidal pilot in France. Some days it makes me wonder whether our “civilization” is evolving into something better, or devolving into something worse, something akin to when our ancestors ran around bashing each other in the head for fun and profit. Fortunately, we don’t have anything nearly as bad as all this in the federal government. But we do have bad people, and even bad people have legal rights. Here at FELTG, we see it to be our job – nay, our duty – to help those of you responsible for a civilized civil service to do what you need to do while respecting the rights of the employees of the people. As you are reading this newsletter, we just last week finished teaching a room full of government investigators how to investigate workplace misconduct and discrimination claims. Next month, we offer a program for employee relations specialists on leave and performance management. We can’t cure all the ills in this big old world, but we do what we can. And our periodic newsletter is one of the small things we do to help you. Take that, ISIS.

Bill

William B. Wiley,  
FELTG President

### UPCOMING WASHINGTON, DC SEMINARS

#### ***Leave & Attendance Management and Performance Management***

May 5-8

#### ***FLRA Law Week***

June 1-5

#### ***Supervisory HR Skills Week***

July 13-17

### AND, IN SAN FRANCISCO

#### ***EEOC Law Week***

June 22-26

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### WEBINARS ON THE DOCKET

#### **Significant Federal Sector Developments: The Latest and Greatest**

April 16

#### **Mediating Employment Disputes in the Federal Workplace: How to Make the Best of a Golden Opportunity**

May 7

#### **Understanding the Family Medical Leave Act: What Practitioners Need to Know**

May 28, June 25 and July 9

**“Your Honor; I’m Deborah Hopkins, Criminal Attorney.”**

By Deborah Hopkins



This semester in law school, I’m enrolled in a clinic - a criminal defense clinic, to be exact. I have a bar card and I’m admitted to practice in DC Superior Court, as long as my supervisor is in the courtroom at hearing, and signs off on any motions or filings I make. It’s been one of the most challenging experiences of my life, particularly because I don’t plan to practice

criminal law, but in many ways it’s been a superlative learning experience. I’ve had at least a dozen hearings before a judge in the past three months, and I know that not a lot of law students get this kind of practice. I’ve also been in the cellblock below the courthouse, I’ve visited clients in jail, and I have survived that horrible moment when my client asked (well, shouted) that he wanted a new lawyer - in open court. In front of a gallery full of people. And my supervisor. (She thought it was funny. Yeah, I’m laughing too.)

I have learned some lessons along the way, lessons that might be amusing to our readers, most of whom are a far cry from criminal defense attorneys. But these lessons are also transferable. You’ll see why.

**Lesson #1: Always be prepared for the judge to ask WHY.**

How many hearings do I have to attend before I remember that whenever I ask for anything, the judge will ask me why? She just will. And then I will have to think of a response other than “Because I think it’s a good idea, or “Because my supervisor told me to,” or “Because I don’t have anything else to say,” and the seconds will feel like hours and the sweat will run down my back as I’m on the spot fumbling for words. So, just like it’s important in a legal analysis to use facts to support the structure, it is important to have something concrete to tell the judge when she asks why she should grant that, do that, allow that, etc. And she will ask. *Oh yes, she will.*

**Lesson #2: A Master’s Degree in Public Speaking does not prepare one to speak in open court.**

This lesson ties in with lesson #1 (above). I have no trepidation when it comes to speaking to a large group of people. I’ve been on television. I’ve spoken to a crowd of 5,000. I hosted my own radio show, a million years ago. I’ve been a teacher since I was 21. But, no amount of experience speaking to the masses can prepare one for speaking in open court when someone’s liberty is on the line. The nerves are there, and they probably always will be. I have found that being well-prepared helps a lot, but

still, when the judge asks me a question and I *know* that I know the answer, I find my response comes out akin to the teacher on those *Charlie Brown* cartoons: “Waw waaah wah waaah waaah wah wah.” And that doesn’t even include speaking out of turn or about the right thing, at the wrong time. How humbling this experience has been.

**Lesson #3: Read, research, and learn as much as possible.**

Being prepared is of utmost importance in the cases we handle - whether in this clinic, or as federal employment law practitioners. I’ve picked up cases this semester and have felt like I’ve gotten in way above my head, and more than once have thought, “There is no way I’m equipped to handle this case.” But the thing is, I don’t have to know all the answers. I just have to be diligent to go find them. The skills to be acquired here are not merely learning what the jury instruction says for a charge, or doing a *Douglas* factors analysis - rather, the important skills include anticipating the other events and circumstances that require research and knowledge, that might come in to play in a hearing or at trial. For example, knowledge of other case activity in a client’s past (or present) is important because it might impact the current case. Knowing the administrative judge and doing research on the way that judge makes decisions is critical. Understanding the If/Then ramifications of certain events in the life of the case is also important, both to the advocate as a means of preparation, and also to effectively counsel the client about her options.

**Lesson #4: Observation is Key**

One final lesson comes by observation; much of my learning this semester has come from sitting in a courtroom, watching the proceedings. Shortly after coming to FELTG, I made my way to the MSPB regional office to sit in on some hearings to get a feel for how they run. I recommend anyone in this arena do the same; sit in on hearings before several different judges before ever doing your own hearing, to get an idea of what might be in store. [Hopkins@FELTG.com](mailto:Hopkins@FELTG.com)

**Ordering a Reluctant Employee to a Medical Exam**

By Barbara Haga



This column will focus on a removal based on an employee’s failure to report for properly ordered medical examinations.

**Background**

*James R. Smith II v. Department of Defense*, DC-0752-13-0065-I-1 (2014) (NP), is interesting in several

respects. Smith was an employee of the Defense Logistics Agency (DLA), the same DoD component which employed Archeda in the case reviewed last month. The Board's decision was issued on May 16, 2014, so it is another relatively recent one. Unlike Archeda, Smith was a blue collar employee, so the conditions under which his examinations were ordered are different. While non-precedential, the decision demonstrates that management's right to order medical examinations will be sustained when agencies follow the provisions of 5 CFR 339.

Smith was a Materials Handler. This line of work is part of the WG-6900 Warehousing and Stock Handling Family. Materials Handlers are responsible for receiving, storing, and assembling materials and supplies for issue, shipment, and distribution. The full performance level for this job is WG-5.

Blue collar job grading standards identify physical effort and working conditions. See <http://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-federal-wage-system-positions/standards/6900/fws6907.pdf>. The Materials Handler standard includes the following which apply to all jobs in grades 4,5, and 6:

*Physical Effort: Grade 4 materials handlers are often required to stand on hard surfaces for extended periods of time, and to bend, stoop, and work in tiring and sometimes uncomfortable positions. They may lift and carry items that weigh up to 8 kilograms (40 pounds). The heavier items are moved with weight handling equipment or with assistance from other workers.*

*Working Conditions: At the grade 4 level, work is done inside or outside in areas that may be hot, damp, cold, drafty, or poorly lighted. Materials handlers are regularly exposed to the possibility of cuts, scrapers, bruises, abrasions, falls, and injury from falling stock or mechanized work areas. When working in hazardous materials areas, they may be subject to exposure from radiation, toxins, explosive hazards, or chemical fumes. Work may require*

*wearing protective clothing such as hardhats, steel toed shoes, rubber gloves, masks, and rubber aprons.*

### Unable to Perform

Smith was out of work for roughly 60 days from July to September 2010. When he returned to work he brought a medical report which indicated that he was suffering from a "very stubborn inflammation on his left foot." That medical report restricted him from working on ladders or scaffolding, working in a huddle-type position or over his head, carrying more than 10 kg (22 pounds), and walking "excessive distances." The doctor also stated that "if at all possible" Smith "... should not stand for more than 15 minutes at a time or walk for long periods of time." Smith was assigned light duty. In November 2010 the physician further restricted the employee from wearing safety shoes. Neither note gave a prognosis or time frame when Smith might return to full duty.

In December 2010 DLA requested medical documentation regarding the prognosis and estimated return to duty. That memo gave Smith FMLA information and warned that he could be subject to disciplinary action if he did not provide the requested medical information. Despite the warning, Smith did not submit the medical information, nor did he apply for FMLA. In January 2011 DLA ordered him to report for a fitness-for-duty examination under 5 CFR 339.301(b)(3) which applies when there is a direct question about an employee's continued capacity to meet the physical or medical requirements of a position.

Although the decision does not specifically identify when, it is apparent that Smith filed a worker's compensation claim about the foot condition at some point during the timeline discussed here.

Smith reported to the examination on February 1 as directed but it could not be completed because he did not bring his medical records with him. On March 14 a letter of instruction was issued requiring him to bring the existing medical documentation to the agency for evaluation of his ability to meet the job requirements. He was also told that further LWOP would not be approved if he did not submit the medical documentation. He did not comply.

Two orders to report for a fitness-for-duty exam were issued in May 2011. Smith failed to show up for either of the scheduled appointments claiming that he was ill (not for reasons associated with the foot condition). The agency proposed his removal on June 28, 2011.

**Board’s Analysis**

There were four charges in Smith’s removal notice. The first was failure to report to an agency-directed fitness-for-duty examination. The other three charges were failure to follow leave procedures, AWOL, and physical inability to perform the essential duties of his position. We could spend a lot of time of the other three but those have been addressed in other columns; however, I do want to note that last week FELTG sent out information suggesting that agencies rethink whether to treat AWOL and failure to follow leave procedures as separate charges.

The Administrative Judge (AJ) sustained the failure to report charge noting that because Smith’s physician had stated that he could not perform the duties of his position and the agency needed additional medical documentation to make an informed management decision about his working conditions and work status. The AJ also found that Smith’s failure to provide medical information as requested gave further support to DLA’s decision to order the fitness-for-duty examinations.

The Board found that the charge was proven in spite of Smith’s argument that he had provided sufficient medical information. The information Smith had submitted dealt with his injury and his work restrictions, but it did not address the prognosis, plans for future treatment, etc. Because there was an injury claim involved, the Board stated that there was authority under 5 CFR 339.301(b)(3) and also under (c) to require the examinations. [Haga@FELTG.com](mailto:Haga@FELTG.com)

***And They Call This Place an Adjudicatory Agency?***

**By William Wiley**



Here at FELTG, we know our readers like quizzes and hypotheticals. So here are three questions for you to take a shot at, thereby testing your knowledge of our business and your rationality of thought.

**Situation 1:** Take two hypothetical agencies. Let’s call one the EEOD and the other the MSPC. For the sake of our

**Program Spotlight:**

**[Leave & Attendance Management and Performance Management](#)**

May 5-8 2015  
Washington, DC

Expanding on the basics of employee relations skills, these four days will give you the knowledge you need to effectively design and manage performance standards and plans and measure performance, and to advise managers on individual cases related to leave, attendance, and more. In addition to a focus on relevant laws, regulations, policies, and legal cases, the course will include multiple workshop-type exercises to give the student practical takeaways they can use in the federal workplace. Varied instructional strategies reinforce learning outcomes, and a wealth of examples from actual cases, combined with practical advice regarding implementation of the programs, guarantees FELTG quality training by instructor Barbara Haga.

hypothetical, let’s say that each agency employs judges and that those judges do about the same thing, adjudicating claims by federal employees that they have been terminated unfairly by their supervisors.

Then, let’s say that over at MSPC, the judges schedule and conduct hearings within about three months of the appeal being filed and then issue decisions relative to those hearings in about 30 days after the hearing. In comparison, over at EEOD, let’s say that we find that it took the judge two years to schedule the hearing in a particular hypothetical case, and then it took three and a half years to issue a decision. If you’re looking for a more specific frame of reference for how long it took the judge to issue a decision after the hearing, that’s about 12,800 days, or roughly 43 times longer – longer than it takes most people to complete law school or Magellan to navigate the globe (August 1519 to September 1522).

**Question 1:** Would you say that there’s something terribly wrong with the way this case was adjudicated by the judge over at EEOD?

**Situation 2:** Using our two hypothetical agencies again, let’s say that as a matter of course each agency reviews the legal conclusions of their respective judges when appeals are filed challenging the judge. Over at MSPC, when your author hypothetically worked there, those reviews were completed on average in about 100 days. Then, let’s say that EEOD, in the same hypothetical situation described above, took over two years to consider the judge’s decision and issue a decision. More specifically, that’s about 800 days, double the normal

probationary period for first-time federal employees, or about as long as it is taking my son to get through a semester of undergraduate at the university. And that's SEVEN years after the employee initially alleged she had been terminated unfairly.

**Question 2:** Would you say that there is something terribly wrong with the way this case was adjudicated on appeal from the judge's decision? *Secondary Question:* If the decision of EEOD was to reverse its judge and to conclude that the employee was terminated unfairly, who do you think should be responsible for those seven years of back pay?

**Situation 3:** Let's say that our hypothetical EEOD is responsible for interpreting civil service and discrimination law, and that in doing so, it reached the following conclusions:

On her FIRST DAY on the job, the probationary employee left early due to illness, and remained away from work most of the rest of the week for medical-related reasons. When she requested advanced sick leave, her supervisor denied the request. In response, the employee went over the head of her supervisor and got the second-level supervisor to approve her request. Once the advanced sick leave was granted, without discussing the matter with her supervisor, the employee went to human resources to have it designated as advanced annual leave. Two weeks later, the employee requested leave for two days for a physician's appointment and some sort of training (perhaps related to her medical condition?). When her supervisor denied the request, the employee again went over the supervisor's head to get approval.

Three weeks later, the employee requested to leave work two hours early (apparently a request to be excused without a charge to leave) for a non-work related matter. When her supervisor denied the request, the employee again went over the head of her supervisor to her second level supervisor, claiming that the request to leave work early combined with her supervisor's denials of advanced leave constituted harassment and discrimination.

While accessing the agency's confidential disciplinary personnel records, the probationary employee showed another employee that employee's personal disciplinary record, without authorization or a work-related purpose. In part because of this incident, the supervisor disabled the employee's access to her government email account because he was considering terminating her during

probation. Two weeks later, the supervisor terminated the employee during probation because of her improperly accessing the personnel record, her going over his head to request leave, and her aggressive manner since employment ten weeks earlier.

Two months later, upper management decided to rescind the probationary removal and returned the employee to her position. After being reemployed for A WEEK, the employee left the office on approved leave as she was pregnant. When she did not return as scheduled 16 weeks later, her supervisor charged her AWOL. Prior to her return, she had requested to be reassigned to another supervisor or allowed to telework, but both requests were denied. As best I can tell from the hypothetical record, she worked 10 out of about 45 weeks before she was finally terminated. Upon receiving notification that she was being carried AWOL, the employee quit.

**Question 3:** What would you say if EEOD were to conclude that this is "clear" evidence of sex discrimination (as the leave requests were related to the appellant's pregnancy, a condition commonly found only in women) (☺) and that the supervisor's "dubious" rationale for the termination is "unworthy of belief," "clearly not supported by the evidence," and put forward to conceal a motive to discriminate based on sex (even though the judge found just the opposite)? Would you say that EEOD is so smart that it should be in charge of adjudicating all the claims of discrimination in government, or would you say that EEOD has no business being in this business?

Still not sure of the answer? I've got more. What if I told you that EEOD also concluded that the hypothetical facts above (one incident of leave denial, one charge of violating agency policy regarding sensitive personnel records, a denial of a request for reassignment, a denial of a request to telework, and being carried AWOL) were so onerous as to create an intolerable situation for the employee, thereby converting her resignation into a constructive discharge and entitlement to seven years of backpay, plus reinstatement and reassignment to a different supervisor (and no doubt attorney fees are on the way). Do you still think that EEOD should be in charge of claims of discrimination?

And just a couple of more findings by EEOD in our hypothetical situation:

1. When the agency cancelled the first probationary termination, although there is no record evidence as to why it did so, it was because management concluded that the termination was based on sex/pregnancy discrimination.
2. When an agency orders a reluctant employee to give a truthful statement; that somehow reflects poorly on management and is an indicator of discrimination.
3. Disabling a government email account is suspicious unless preceded by progressive discipline or a warning.

Hypothetical decisions like this one are exactly what is wrong with the way EEOC decides cases. This is an employee who obviously believes that a federal job empowers her to do whatever she feels she wants to do, regardless of what her supervisor wants her to do. She did not even finish her first day on the job before absenting herself most of the week, and then had the audacity to demand advanced leave to cover her absences. As soon as her supervisor tried holding her accountable, in the face of her asking to be excused from work for two hours for reasons not related to her job, she goes over his head and claims harassment and discrimination. Yes, she was pregnant. But none of our laws grant her any special benefit because of that (perhaps they should, but they don't). There is not a shred of evidence that non-pregnant employees who did what she did were treated any differently. Can you imagine a supervisor tolerating a non-pregnant probationary employee who:

- Doesn't show up for work,
- Goes over the supervisor's head when she doesn't like his answers,
- Accesses a confidential data base for non-work-related reasons,
- Refuses to return to work after being given 14 weeks of approved leave, and
- Demands advanced leave, reassignment, and telework when she is unhappy?

A decision like this would be terrible. It would encourage employees to ignore the requirements of their job, and then jump into the discrimination complaint system to roll the EEOC dice. And because every now and then those dice come up with a quarter of a million dollar award, more employees are encouraged to file complaints and conclude that they have an entitlement that the law does not provide.

Civil rights discrimination is not only illegal, but an abomination. Thank goodness the federal workplace has protections for employees who are the victims of such mistreatment. However, decisions like this, if they were not hypothetical, undermine not only the discrimination complaint process, but the ability of federal managers to get the job of government accomplished efficiently and fairly. *Complainant v. Air Force*, EEOC No. 0120131447 (FEB 13, 2015). [Wiley@FELTG.com](mailto:Wiley@FELTG.com)

### ***Is Consistency at the Commission Too Much to Ask?***

**By Deryn Sumner**



There are a few areas in life where I know I'll never be able to fill Ernie Hadley's shoes. For one, I don't even own a car, much less a super cool Karmann Ghia. And most importantly, I don't think I'll ever be able to rant about the Commission like he does. But I hope you'll indulge me as I try. Some of you who solely represent agencies may disagree, but the federal sector EEO complaints process can appear like a line of hurdles that exist to trip up employees trying to exercise their rights:

- There's a deadline of 45 days to initiate EEO counseling, much shorter than the 180 – 300 days private sector employees have.
- After counseling, you have 15 days to file a formal complaint.
- Once you receive the Report of Investigation (ROI) you better request a hearing in 30 days or your only option is a Final Agency Decision (FAD).

The Commission has consistently held, with only very few exceptions, that if you miss any of these deadlines by even a day your case is toast. In order to excuse late contact with an EEO counselor, you better be ready to submit medical documentation showing that you were completely incapacitated during that timeframe to excuse your lateness.

Given all of these hurdles, it can be frustrating when agencies are not held to the same standards. Sure, some agencies have been held accountable for failing to complete investigations within 180 days. The Commission took some strong steps towards addressing that problem with *Cox* and *Royal* and the cases that followed. But I can tell you definitively, not every agency is being sanctioned for not completing investigations in a timely manner. It often falls to the discretion of the administrative judge and the results vary. Further, a few decisions in the past year from the Commission have caused me to wonder whether agencies will ever be held as accountable for regulatory deadlines as employees.

Early last year, the Commission dismissed two appeals filed by complainants in *Complainant v. DoJ*, EEOC No. 0120140494 (February 21, 2014) and *Complainant v. DHS*, EEOC No. 0120123438 (January 15, 2014), because it found that the complainants did not file an appeal promptly after the respective agencies failed to timely issue final actions.

Let's look at the information given by the Commission in its decisions. First, our Department of Justice employee received a decision from an administrative judge on May 1, 2013 dismissing her complaint of discrimination without a hearing. The decision ordered the agency to issue a final action within 40 days, as it is required to do by Section 717 of Title VII of the Civil Rights Act of 1964. The agency did not issue a final action within 40 days. In fact, by November 25, 2013, the agency still had not issued a final action. So the complainant, desiring I'm sure to move things along even if the agency did not, filed an appeal to the Commission that day. It's unclear whether the agency ever issued a final action, or had by February 21, 2014 when the Commission issued its decision. However, the Commission did not fault the agency and instead found the complainant should have filed an appeal within 30 days after the AJ's decision became final, or July 17, 2013 (about a month after the agency should have issued a final agency action). Finding the complainant did not provide "adequate justification of an extension of the applicable time limit for filing her appeal," the Commission dismissed the appeal outright.

In a case with a similar situation, the Commission dismissed an appeal filed by the Department of Homeland Security employee. Although she proffered she never received the agency's final action and subsequently filed an appeal, the Commission dismissed the appeal and held she was barred by the doctrine of laches (i.e. untimeliness) because she should have filed within 30 days after the expiration of the 40 day time frame to issue a final action, even though to her knowledge and belief, the agency failed to timely issue a final action.

Okay, so now we know that based on these decisions there's yet another hurdle for complainants to meet. If an agency does not issue a final action within 40 days of receipt of an AJ's decision, nothing will befall them, but the complainant better be sure she files her appeal timely or it won't even be considered.

But what really puzzled me was the Commission's holding earlier this year in *Complainant v. DVA*, EEOC No. 0120142459 (January 13, 2015). Under the Commission's regulations, agencies must issue FADs within 40 days. (Note: Under 29 C.F.R. 1614.109, a final action notifies the complainant as to whether the agency will implement the decision of the AJ and contains

appeal rights and a FAD consists of findings on the merits of each issue in the complaint). Although past complainants have tried to obtain sanctions when agencies failed to timely issue FADs, to my knowledge sanctions have never been granted and the Commission usually only gently reminds agencies of their obligations in the decisions.

Which brings us to the decision in EEOC No. 0120142459. There, the complainant filed an appeal to the Commission on June 24, 2014 after the AJ dismissed her request for a hearing in May 2014. On October 21, 2014, the agency notified the Commission that this appeal was premature because it had not yet issued a FAD. The agency also didn't submit a complaint file in this communication. So what happens in this instance? The Commission dismisses the appeal as premature but tells the agency, "given the amount of time that has passed since the Administrative Judge dismissed the hearing request, we are directing the Agency to issue a final decision on the complaint at issue." The Commission then proceeds to give the agency another 60 days from the date on which the January 2015 decision becomes final to issue the FAD it should have issued back in June 2014.

Lesson learned here, I suppose, is that regardless of whether an agency timely issues a final action, complainants must file appeals within 30 days of the deadline the agency should have acted by issuing a final action. But if complainants file appeals before an agency has gotten around to issuing a FAD, the appeal may be dismissed as premature. Either way, don't expect the Commission to hold agencies accountable for regulatory deadlines to the same degree as complainants. **[Editor's Note: And they call this place an adjudicatory agency?]** [Sumner@FELTG.com](mailto:Sumner@FELTG.com)

#### Program Spotlight:

##### [FLRA Law Week](#)

June 1-5, 2015

Washington, DC

This week of federal sector labor relations training takes the participant soup-to-nuts on every issue involved in the foundations of employee and union rights, as well as the changes we might be seeing in the future.

Join William Wiley and Sue McCluskey, both noted labor attorneys with years of experience working at the FLRA, for all you need to know to succeed in the realm of federal labor relations.

<http://www.feltg.com>

## ***Want to Try a New Approach to Progressive Discipline?***

**By William Wiley**

As has been the case with the Board for several decades, with rare exception, MSPB gives great weight to the strength of progressive discipline as a strong aggravating factor in agency defense of a removal action. The principle in play is that a federal agency should not have to tolerate an employee who does not respond to discipline. Remember, discipline is intended to correct behavior (we think), not to punish a misbehaving employee for the sake of retribution. If a reprimand and a suspension do not convince an employee to obey workplace rules, then the dude should go look for work elsewhere.

Classic progressive discipline involves three steps:

1. Reprimand for a first offense,
2. Suspension for a second offense committed within a year or two of a Reprimand, then
3. Removal for a third offense committed after a prior suspension.

Our most recent Board has emphasized a couple of factors that take the clarity out of this three-step process:

- Later misconduct following a prior suspension or reprimand is downgraded in severity relative to progressive discipline if the later misconduct is unrelated to the previously-disciplined misconduct, *e.g.*, *Suggs v. DVA*, 2010 MSPB 99.
- The greater the length of time that has passed since the prior discipline, the less the value of the prior discipline in supporting the progressive discipline concept, *e.g.*, *McFarland v. DoT*, 107 MSPR 449 (2007).

In other words, if the prior suspension was for a different act of misconduct or happened more than a couple of years ago, a second suspension might be warranted instead of a removal, even though there has been a prior suspension. That usually means that reprimand/suspension/removal becomes reprimand/suspension/longer-suspension/removal. There may be one out there, but I do not remember a case in which the Board found a removal to be too severe if there had been two prior suspensions. So our nice three-step process becomes a muddy four-step process in consideration of these additional factors, but no worse.

Although progressive discipline is a powerful management tool for holding employees accountable, it comes with a significant price. Each of those prior

disciplinary acts (reprimand, suspensions) has to be defended by the supervisor who takes the action, perhaps in a discrimination complaint, a grievance under the collective bargaining agreement, or with our whistleblower-protecting friends over at the US Office of Special Counsel. Whichever redress forum the employee takes involves a lot of time, frustration, and always the possibility of an un-dotted "i" causing the darned discipline to be set aside. Although of superior value, the price of defending prior progressive discipline is high.

But there might be a way around this, a way you could invoke progressive discipline to reach the point of removing an employee without having to take and defend two or three prior disciplinary actions to get there. And the idea comes from a somewhat recent trend in Board case law.

For years, the US Postal Service has had a disciplinary action defined in its nation-wide policy manual as a "letter of warning in lieu of a time-off suspension." According to the manual, such letters are proposed by the immediate supervisor; the employee is given ten days to respond, be represented, to see all the materials relied upon, and a higher-level management official then makes a decision (sound familiar?). The employee has the right to grieve the letter to a higher level official, and barring relief in the grievance process, the letter stays in the employee's OPF for two years and counts for the purpose of progressive discipline, just as if the employee had actually been suspended. See section 651.6 of the USPS policy manual.

Although these letters have been around for years, as a psychologist, I never really liked them. There is a benefit to an employee of requiring him to suffer the discomfort of a suspension. The loss of pay in a suspension acts as a negative reinforcer to get the employee to avoid future misconduct. Although these warning letters save the employee money, they also deny him the benefit of an important motivator. I always thought that a psychological principle of progressive discipline was the benefit of using increasingly stronger motivational tools.

However, that presumed psychological principle does not seem to be one that the Board finds to be valuable. In a recent decision, MSPB upheld a removal in a case in which a primary Douglas factor appears to have been the appellant's prior disciplinary record: two letters of warning in lieu of a 14-day suspension and a third letter of warning in lieu of a 7-day suspension, all within the previous 2 ½ years. Even without the beneficial motivational effect of taking away the employee's money



as a negative reinforcer, MSPB found removal warranted because of those warning letters. *Powell v. USPS*, 2014 MSPB 89.

As I've said in this newsletter so many times before, what I think is worth what you are paying for it ... nothing. However, if *the Board* thinks it, we should all pay attention. And MSPB thinks that a suspension is not a necessary step in progressive discipline to justify an ultimate removal.

So how about this: we never again suspend anybody. Instead, we propose a suspension – say 14 days- hear the employee's defense, then offer the employee a letter of warning in lieu of a suspension in his file if he'll waive any grievance/complaint rights. I am hard pressed to imagine a situation in which an employee would not take this kind of offer. If he accepts it and engages in no future misconduct, everyone benefits; no lost pay for the employee and no lost time from work for management. However, if he accepts the offer and later breaks a workplace rule, then you have a nice prior suspension-like action in the file allowing you to invoke the concept of progressive discipline without ever having to defend any prior discipline in a redress procedure.

As a purist, I like the negative reinforcement aspect of a suspension. However, as a realist (having given up on the concept of purity many decades ago) if it's good enough for the United States Postal Service and the US Merit System Protection Board, it's good enough for government work and for me. How about for you?

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## **“Job-Related and Consistent with Business Necessity”: The Mantra for Post-Employment Medical Inquiries**

**By Deryn Sumner**

The tragic event of the Germanwings crash last month initiated conversations in the media about how much an employer can and should know about an employee's mental and physical health. Those who have attended FELTG's webinars on the topic know that under the Commission's guidance and regulations how much an employer can ask depends on the stage of the employment process [We are taking reservations now for our next [Absence & Medical Issues Week](#) which will be held SEP 28 thru OCT 2 in DC]. The information lawfully available to an employer differs depending on whether the person is simply an applicant for a position, an applicant for which a conditional offer of employment has been made, or the employee receives an offer of employment and comes to work for the employer. For our purposes here, let's focus on the timeframe after an employee is working for the agency. The mantra is that an employer can only send an employee to a medical examination or make a medical inquiry if the reason is job-related and consistent with business necessity. These limitations apply to all employees, regardless of whether or not they qualify as disabled under the Rehabilitation Act. It is best practice to limit those who actually view the resulting information to the Employee Relations folks who are trained in what to do with it. However, supervisors can be informed about work restrictions and needed accommodations and health care professionals, such as the Federal Occupational Health employees utilized by many agencies, can view the documents to weigh in regarding whether the employee is fit for duty or to provide an opinion on requested accommodations.

So what does job-related and consistent with business necessity actually mean? Well, according to the Commission's "Enforcement Guidance on Disability Related Inquiries and Medical Examinations Under the ADA," an employer has the burden to show that it has a reasonable belief based on objective evidence that because of a medical condition the employee cannot either perform an essential function of the job or the employee poses a direct threat in the workplace. If either of those circumstances exist and the employer has conducted an individualized assessment into the circumstances, then the employer should be in the clear to either request medical documentation to show that the employee can in fact perform the work without risk of harm to himself or others, or send the employee to a medical examination to get a professional opinion on that. The Guidance tells us that if an employer knows about an employee's medical condition, has observed performance problems, and can reasonably attribute those problems to the medical condition, then the

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standard is met. The Commission has addressed many EEO complaints about these inquiries, usually involving whether the agency had a reasonable belief that the employee posed a direct threat in the workplace. In *Complainant v. TVA*, 0120121877 (November 14, 2014), the Commission found the agency was justified where the employee had an abrupt change in behavior that caused him to be “insubordinate, disruptive, and threatening with his supervisors and during staff meetings, and his behavior towards his coworker was threatening and harassing when he allegedly locked her in his office and made sexually crude comments.” Yup, seems pretty clear cut that medical documentation was appropriately requested to show the employee did not create direct threat in the workplace. But, in *Complainant v. TVA*, 0120093256 and 0120111968 (February 20, 2015), the Commission found the agency failed to conduct an individualized assessment as to whether the employee, who was blind in one eye and had monocular vision, could safely perform the job duties as a foreman without posing a direct threat. As the agency did not complete this assessment and instead made conclusions based on perceptions of his inability to safely perform the job, it was liable for disability discrimination. This individualized assessment into the job-related reason consistent with business necessity for making the inquiry is key in preventing liability.

A few final notes. If the agency does end up with medical records of an employee, they must be kept in separate files and treated as confidential under 29 C.F.R. 1630.14(c)(1). This means not on a shared drive that other employees can access, not stuck in a folder alongside of performance evaluations and SF-50s, and not at home in the supervisor’s closet (and yes, that did happen). Also, compensatory damages (and attorney’s fees) are available in these types of claims so make sure your agency is properly storing medical records.

**[Editor’s Note: As we have said many times in our courses and newsletter, keep in mind that OPM places even greater restrictions than does EEOC on an agency’s ability to order an employee to undergo a medical examination.]** [Sumner@FELTG.com](mailto:Sumner@FELTG.com)



## ***Hearing Practices: Protecting Confidential Information with Protective Orders*** By Deryn Sumner

You’re representing an agency and need medical documentation from a complainant in discovery to see if she meets the definition of “disabled” for purposes of a Rehabilitation Act claim. Or maybe she is asserting entitlement to a high amount of compensatory damages and you need to know about potential intervening causes of harm or any evidence of nexus between the agency’s actions and the harm claimed. Alternatively, you’re representing a complainant and need information on how similarly situated employees were disciplined for similar conduct as compared to your client, or other personnel information about these co-workers. In both instances, the other side is balking at providing the information because of concerns of improper dissemination. Who will see these documents? What will happen to these documents after the case is over? In these instances and many more, this problem can be addressed by the entrance of a protective order into the administrative record.

EEOC Administrative Judges have the authority to issue protective orders under Management Directive 110, Chapter 7, Section III.D. As the “Administrative Judge’s Handbook” states:

During the course of discovery, one of the parties may move for a protective order. A protective order may limit disclosure, dissemination, or reproduction of information obtained through the discovery process. The Administrative Judge may grant a protective order to shield a party or person from annoyance, embarrassment, or undue burden or expense or provide an alternative means for resolving a discovery dispute. In addition, the Administrative Judge may grant a protective order to protect proprietary, fiduciary, classified, or privileged information. The Administrative Judge may also sanction a party for violating a protective order.

An effective protective order should meet several goals. First, it should provide a clear definition of what information and documents are subject to the protective order and how they will be identified. The easiest way to identify such documents is with the use of a footer proclaiming it as CONFIDENTIAL or SUBJECT TO PROTECTIVE ORDER. You can use programs such as Adobe Acrobat to easily insert such a notation. Second, the protective order should clearly indicate who is allowed to see the documents subject to it. For

example, attorneys assigned to the matter and their support staff would necessarily be included. The complainant needs to be able to view the documents in his or her own case to assist the attorney with case preparation. A witness may be required to view the documents in order to respond to questions during a deposition. Finally, the protective order should spell out what happens to the document once the case concludes after a settlement or appeals are exhausted. The documents so identified can be destroyed or returned to the other side for destruction. Either way works as long as the protective order clearly spells out what should be done at the end of a case and who is responsible for doing it. Once you have worked out acceptable language to both sides, submit the protective order to the administrative judge and request its entrance into the record. Used appropriately, protective orders can give those involved peace of mind that documents are not being disseminated inappropriately, while still allowing for the exchange of information each side needs to make their case. [Sumner@FELTG.com](mailto:Sumner@FELTG.com)

### ***Tsarist Arrogance*** By William Wiley

If you've worked in federal employee relations for more than a few months, you know this guy. Doesn't come to work, doesn't call in to request leave, claims to have a serious medical condition. You never see this in the private sector because if you don't show up for work at Wal-Mart, you get fired. Quickly. But for reasons that have stupefied me for years, there are some federal employees who for whatever reasons feel that they really don't have to show up to keep their federal jobs. A recent decision from MSPB sadly reinforces this misconception.

The employee was a federal supervisor who decided to stop showing up for work on occasion and who didn't bother to call in to let anybody know he was going to be a no-show. Think how disruptive to the operations of an agency this would be in just about any federal agency. When he said he had a medical condition causing him problems, the agency asked him several times to provide medical documentation from his physician. He didn't do it. Finally, after several months, the agency decided it just could not take it anymore and removed the employee based on a lot of AWOL and several instances of failing to request leave for his absences.

On appeal to the Board, the employee finally produced medical documentation to show that he suffers from Major Depressive Disorder and that his condition caused some of his absences, but importantly not the AWOL absences on which the agency based the removal. The

judge noted that the agency did not have evidence of the appellant's medical condition at the time the deciding official made the decision to remove, and thereby could not have considered his mental state as a mitigation factor under *Douglas*. And Board Member Robbins agreed that removal was warranted. However, Board members Grundmann and Wagner concluded that removal was an unreasonable penalty given the appellant's mental condition, and mitigated the removal to a 30-day suspension. *Bowman v. SBA*, 2015 MSPB 18.

Think about that for a moment. The employee's absences were harming the agency so the agency removed him. The Board majority says that what the agency should have done instead was suspend the employee for 30 days, thereby causing even more harm by denying itself the services of the employee while he is suspended for a month. Good grief. Since 1912, the discipline of a federal employee must support the efficiency of the service. If any of you readers can explain how suspending someone for a month as punishment for extensive AWOL makes our government more efficient, you are a gifted rationalizer.

Hopefully, this exercise in Board-Member supremacy is one of the last we will see for a while. Vice Chair Wagner who voted in the majority to mitigate this removal has now left the Board (and moved over to the US Office of Special Counsel). With luck, her replacement will have a better understanding of how important it is that federal employees show up for work.

Are you looking for a promotion? Do you have common sense? Apply now: 1600 Pennsylvania Avenue, Washington, DC. Member Robbins needs another vote. [Wiley@FELTG.com](mailto:Wiley@FELTG.com)