Federal Employment Law Training Group
Training By Professionals For Professionals

FELTG Newsletter Vol. VIII, Issue 7 July 13, 2016

Way back in 1981, I submitted a paper for presentation at an upcoming conference. I was relatively fresh out of graduate school with a big Master's degree in Organizational Psychology, and I had spent the better part of three years trying to implement the annual performance appraisal program recently demanded by the newly-created Office of Personnel Management. My academic training plus my real-life experience was telling me that annual performance appraisal was a poor management tool and a waste of time for both managers and employees. In addition, I could tell that even with good employees, performance appraisal could easily demotivate. Therefore, I proposed that OPM abolish annual appraisal in a wonderful little paper entitled, "Just Say No to Annual Performance Appraisal" (a tip of the hat to Nancy Reagan who had just come up with that catchy phrase, "Just Say No to Drugs"; I knew that annual appraisals were a bigger problem than drugs in the federal workplace). And last year, I'm reading the paper and I see that the latest trend in business is to do away with annual performance appraisals because they don't work, are time-consuming, and often de-motivate (*Washington Post*, July 22, 2015, p. A-15). Hey, I can't help it if I've often been ahead of my time, a frigging genius in my own mind. So would you like to see into the future, know what is the right thing to do decades before your peers figure it out? Well then, Poopsie, you should keep reading this here newsletter and attending our seminars as the secrets of the employment law universe are revealed to you. Also, somebody please tell OPM that Wiley was right in 1981, and that the annual performance appraisal system it invented STILL should be abolished. It's never too late to get on board the FELTG wisdom-train.

Bill

COMING UP IN WASHINGTON, DC

MSPB Law Week
September 12-16

Absence & Medical Issues Week
September 19-23

EEOC Law Week
September 26-30

Making Performance Plans Work
October 5

OR, JOIN US IN HONOLULU

Managing Federal Employee Accountability
August 1-5

WEBINARS ON THE DOCKET

August 25:
Making Mediation Work for Your Agency: A Practical Approach

September 8:
Writing Effective Summary Judgment Motions for the EEOC

Vehicle Misuse, Wile E. Coyote, and Settlement Agreements
By Barbara Haga

If only our business had a list of rules that would always produce a successful result. If the MSPB had a checklist (for example, like a pilot has) of things that always had to be followed to ensure your case would be sustained, we would have many more practitioners ready to take on adverse actions, fewer hours of lost sleep over whether everything had been covered, and probably a need for far fewer FELTG classes and newsletters. **[Editor's Note: Of course, that would be a BAD outcome.]**

But alas, it isn't that simple. As I was preparing this column I reread the last one (it helps me avoid repeating myself). Reading about poor Mr. Hoofman, the Army Construction Rep who managed to get his government vehicle stranded on the sand pile, made me think of Wile E. Coyote.

Like Wile E. Coyote, Hoofman tried several different things to get that car back on the road, and unfortunately the efforts became more damaging to his long term career prospects as he went. First, he tried to rock it back and forth by switching the gears from forward to reverse. Then he walked to his apartment for liquid fortification. Later he walked back to the car and picked up two strangers along the way to help. The three of them were all in the vehicle and apparently again tried to rock it back and forth. Their efforts were unsuccessful and then the police arrived and you know the rest if you read the article or the case. (*Hoofman v. Department of the Army*, 2012 MSPB 107).

Looney Tunes had a list of rules for making Road Runner and Wile E. Coyote cartoons. You may read the full list here: http://time.com/3735089/wile-e-coyote-road-runner/. The universe for those two characters operated within certain principles:

Rule 1: The Road Runner cannot harm the coyote except by going "beep-beep."

Rule 2: No outside force can harm the coyote—only his own ineptitude or the failure of the Acme products.

Rule 3: The Coyote could stop anytime—if he were not a fanatic.

Rule 9: The coyote is always more humiliated than harmed by his failures.

And Rule 9 leads us to our next case. Only this time it wasn't Wile E. Coyote who was humiliated, it was a Federal agency.

Settlement Agreements Have to be Lawful

This could be Rule 9 on the Board's list of rules. It seems so basic. Sometimes we worry about things like language that is unclear – like exactly what was that clean record going to include and not include. We have to be ready to answer whether the person had time to consider the provisions of the agreement, whether they were represented, etc. to avoid anything that would look like duress or coercion. Obviously, agreements cannot be upheld if there is fraud involved by either party.

Occasionally there is an issue of a potentially unconscionable agreement: those agreements that are so one-sided that a court or the Board won't enforce their provisions. You know, when one side, in our world usually management, is holding most of the cards. Many years ago we had a Navy practitioner who got a little carried away in writing a last chance agreement and he added a provision that if the employee attempted to file an appeal with the Board later out of any alleged violation of the agreement he had to pay the Navy's costs to defend it. The Administrative Judge was none too amused with that one. That was my first exposure to the term "unconscionable."

There is another issue with settlement agreements. They have to comply with other relevant statutes, and that leads us to *Ross v. Department of Homeland Security,* DA-0752-15-0521-I-1 (2016) (NP). This non-precedential decision issued on June 24th is hot off the press.

Statutory Penalty for Willful Misuse

DHS suspended Ross for 30 days for misuse of a government vehicle. The charge was "Willful misuse of a Government vehicle for nonofficial purposes in violation of 31 USC 1349(b)."

Ross appealed and the parties settled. The agency agreed to rescind the 30-day suspension and substitute a 5-day suspension, and Ross agreed to withdraw the appeal. He later challenged the agreement in an appeal to the Board regarding one provision of the agreement relating to his leave status for a period of time relevant to the case. The Board never got far enough to look at that, however, because they found the agreement "not lawful on its face."

The problem was the charge. With that charge Title 31 requires a minimum 30-day suspension. There is no provision for anything less. By leaving the charge intact, DHS was unable to agree to a 5-day suspension. The settlement should have created a new charge, perhaps inappropriate conduct or failure to follow agency procedure, to avoid this problem.

This understanding of the minimum penalty required has worked to management's favor in other cases. In *Fields v. Veterans Administration,* 21 MSPR 176 (1984), there were numerous charges in the 30-day suspension, some of which were patient abuse, misuse of a government ID, willfully falsifying government records, and intentional unauthorized use of a government vehicle for other than official purposes. The AJ did not sustain most of the charges, but did sustain two – one of which was the intentional unauthorized use of the vehicle. Because not all of the charges were sustained, the AJ mitigated the penalty to a 14-day suspension. The agency petitioned for review and the Board sustained the 30-day suspension because of the Title 31 provision, writing, "Since the statute imposes a mandatory minimum penalty for appellant's offense, the Board lacks authority to reduce the penalty below a thirty-day suspension."

Mutual Mistake

Mutual mistakes have been found in other agreements. In *Farrell v. Interior,* 86 MSPR 384 (2000), the settlement agreement provided for payment of overtime hours at a rate that was contrary to law and thus had to be set aside. In *Shipp v. Army,* 61 MSPR 415 (1994), the agreement set a fixed amount of back pay with deductions only for taxes; the amount of back pay calculated did not take into account that the employee had received wages for another position during the relevant time frame so that amount had to be deducted. For the agency to pay the full amount would have violated the Back Pay Act. In *Miller v. Department of Defense,* 45 MSPR 263 (1990), the Board set aside a settlement agreement that provided for a year of administrative leave based on a Comptroller General advisory opinion which provide that the use of administrative leave to provide prospective compensation and benefits in the settlement of an appeal was lawful under the circumstances.

The Board found that the settlement agreement for Ross which allowed for a 5-day suspension was also invalid based on a mutual mistake. The appeal was remanded for reinstatement of Ross' appeal, so DHS would have to defend the 30-day suspension for willful misuse absent a new settlement agreement. **[Editor's Note: Even more reasons never to charge Willful Misuse of a GOV, as we teach in the FELTG MSPB Law Week; too much trouble for no real benefit.]**

With this, I am wrapping up the topic of vehicle misuse. So, that's all folks! Haga@FELTG.com

Here We Go Again
By William Wiley

I am so tired of this. Once more, we have an agency head that is being given bad advice by his employment law practitioners, thereby embarrassing himself and the civil service on Capitol Hill and in the press. Here's the

scenario that repeats itself every couple of months:

1. Agency employees do Bad Things.
2. Congress finds out about the Bad Things and summons the agency head to a Congressional oversight committee hearing to explain what's being done.
3. Agency head says he knows about the Bad Things, but can't do anything about it because of those pesky old civil service rules that keep him from disciplining employees.

AAAUUUGGGHHH! We are going to lose our civil service if this claptrap keeps up. The latest episode was on the front page of the *Washington Post* a week or so ago and involved our friends at the National Park Service.

If you know any of the following people (or their advisors), please send this article along:

- Jonathan Jarvis, Director of the National Park Service
- Sally Jewell, Secretary of the Interior

The article described alleged sexual harassment and whistleblower reprisal at a specific national park and the testimony of senior Park leadership before Congress regarding the allegations. While not denying the misconduct occurred, NPS Director Jonathan Jarvis stated that no one had been disciplined "because civil servants have strong rights to appeal disciplinary proceedings, taking action against them is not easy."

Well, that's just wrong. Whoever briefed Director Jarvis regarding civil service discipline and appeals did not do a good job. OK, OK; maybe "not easy" is shaded just enough to be truthful. However, the idea that the civil service protections somehow justify not disciplining employees who deserve it does our entire federal workforce and those who serve in it a huge disservice. As my grandmother used to say, "It's a poor craftsman who blames his tools." If you don't know how to fire people from government, maybe go look in the mirror instead of in your tool box. The system has been in place nearly 40 years, and trained employment law practitioners use it every day to effectively and efficiently remove bad employees. If you were told otherwise, Director Jarvis, you were given incorrect information.

For over 15 years, FELTG has been honored to provide periodic how-to-discipline training for supervisors throughout the government, including the Park Service. On a personal note, it is tremendously rewarding to help a supervisor learn how to deal with a problem employee, removing the employee from service if that becomes necessary. So many supervisors are frustrated by the absence of good advice on how to take discipline quickly and effectively. Here at FELTG, we teach them the way to fire a bad performer in 31 days, and how to make it stick on appeal.

Last year, I was approached during a classroom break by an agency attorney who was attending one of our famous open-enrollment seminars in Washington, DC. She said that she knew that FELTG was teaching supervisors at her agency how to fire people, and that we needed to back off. In her opinion, I was making a mistake (and causing her problems) because I wasn't taking into consideration the "culture" at her agency. Since at FELTG we teach how to remove bad employees quickly and efficiently, I assume she meant that at her agency, the culture is not to take quick efficient discipline.

She identified herself as being with the general counsel's office at the National Park Service.

It's all starting to come together now.

Relatedly, I reviewed the judge's decision in a case referenced in the article, a case in which the Board found that the Park Service engaged in whistleblower reprisal. An element of that case was whether the whistleblowing appellant had a good-faith belief that an agency official violated a government regulation. Although the agency's Office of Inspector General specifically found that the agency violated government regulations, the agency argued to the judge that the appellant *did not* have a good faith belief in that fact. In analyzing

that claim, the administrative judge concluded, "I am, frankly, astounded by the agency's representations and arguments. Unless it did not read its own OIG report, I cannot fathom how it could make such assertions." *Carter v. DoI*, AT-1221-13-2153-W-1 (December 3, 2014).

Ouch. It's never a good day when a Board judge refers to your arguments as astounding and concludes that she "cannot fathom" how you could make such representations. Maybe there's more than a counter-productive "culture" going on with the Park Service. We are happy to help – give us a call. Wiley@FELTG.com

FELTG is Coming to Norfolk

Advanced Employee Relations
September 13-15, 2016

This three-day open enrollment seminar will cover the relevant things HR practitioners need to know about leave abuse, performance accountability, and discipline. Plus, hands-on workshops will allow you to leave with the tools you'll need to succeed.

Check out our website www.feltg.com for all the details, and register before space runs out!

Agencies: Bring the Right People to the Table to Talk About Settlement and Make Sure They Have Authority!

As we've talked about a few times in this space, in August 2015 the EEOC released a revised version of its Management Directive 110 (MD-110), which relates to federal sector EEO complaints processing. One change to MD-110 that not everyone has caught up to yet is the requirement for agencies to identify a settlement authority that is not named as a responsible management official or is otherwise directly involved in the case. The language in MD-110, Chapter 1, Section V. (emphasis added) states:

> The agency must designate an individual to attend settlement discussions convened by a Commission Administrative Judge or to participate in EEO alternative dispute resolution (ADR) attempts. Agencies should include an official with settlement authority during all settlement discussions and at all EEO ADR meetings (*Note: The agency's official with settlement authority should not be the responsible management official (RMO) or agency official directly involved in the case. This is not a general prohibition on those officials from being present at appropriate settlement discussions and participating, only that they are not the officials with the settlement authority*.) The probability of achieving resolution of a dispute improves significantly if the designated agency official has the authority to agree immediately to a resolution reached between the parties. If an official with settlement authority is not present at the settlement or EEO ADR negotiations, such official must be immediately accessible to the agency representative during settlement discussions or EEO ADR.

The Commission is clearly stating here that identified RMOs should not be the ones coming to the table with authority to try to settle cases. That makes sense and is something I recommended prior to the release of the revised MD-110. Managers who have been identified as alleged discriminating officials are too close to the

situation to view it objectively, to consider the employee's requests for settlement, and to respond in a way that addresses all the reasons why we here at FELTG teach that agencies should be open to settlement discussions, even if it is the agency's position that it did not do anything wrong. So make sure you are up to speed on the revised directive and identify someone outside of the RMOs and those directly involved to serve as the settlement authority.

And as a reminder, it is imperative that the individual identified by the agency to have authority to resolve complaints actually have that authority. The Department of the Air Force recently learned that lesson the hard way. *Luann L. v. USAF,* EEOC No. 0120161629 (June 23, 2016). There, the parties entered into a settlement agreement wherein the agency agreed to, in part, process paperwork to reflect that the complainant was detailed to unclassified duties at the GS-14 level for about 5 days and to thereafter temporarily promote her to a GS-14 position "until such time as the vacancy is filled or the Complainant is no longer performing the duties at which time the Complainant will convert to her previous position and pay grade."

After the complainant filed a breach of the agreement, the agency issued a final decision finding that the settlement authority who attended the mediation did not actually have authority and therefore was not authorized to bind the agency to these terms. The Commission did not find that argument to be persuasive and noted that an agency must present evidence to prove that the signatory to the agreement actually lacked the authority to agree to its terms. Here, as the agency did not present evidence that the settlement authority was not authorized to bind the agency to the terms of the agreement, the Commission remanded the matter to the agency for specific enforcement of the settlement agreement. Sumner@FELTG.com

Playing Favorites in Selections and Promotions: Not EEO, But Still a Bad Idea
By Deborah Hopkins

I love it when I teach a webinar and after it's over, participants email questions as follow-up. Here's one that I got after last week's webinar on *The Latest Developments in LGBTQ+ Discrimination: What Agencies & Employees Need to Know*.

Dear Attorney Hopkins:

Can you speak on the discrimination implications for a selecting official who chooses someone for a job based on a personal dating relationship - can applicants who did not get selected validly claim that this is sex discrimination (e.g. you have to be heterosexual, or you have to be a female)?

And here's the FELTG answer:

Thanks for the question. I hope this helps:

The EEOC's stance is generally that isolated incidents of sexual favoritism (for example, a selecting official choosing someone for a position because of a dating or sexual relationship) have an adverse impact on both males and females, so they are not considered sex/gender discrimination under Title VII. In addition to EEOC, the courts have widely rejected claims that isolated incidents of sexual favoritism based on consensual romantic relationships create a hostile environment for others in the workplace. *See Miller v. Aluminum Co. of America*, 679 F. Supp. 495, *aff'd mem.*, 856 F.2d 184 (3rd Cir. 1988). If the relationship and romantic behavior is voluntary, the "hostile behavior that does not bespeak an unlawful motive cannot support a hostile work environment claim." *Id.* at 502.

In cases where coercion is used, though, we enter in to sexual harassment territory either as a tangible employment action (formerly *quid pro quo*) or a hostile work environment analysis. *See*

EEOC's Guidelines on Sexual Harassment, Section 1604.11(l), which state that when submission to unwelcome sexual conduct is made "either explicitly or implicitly" a term or condition of an individual's employment, a violation will be found.

Back to your question. Take a look at *Paul v. GSA*, EEOC No. 01992256 (EEOC OFO 2001), where the EEOC rejected a male complainant's claim that he was subjected to sexual harassment when a female employee was awarded a position because she had a romantic relationship with a senior agency official, who was a male. This was one isolated incident of preferential treatment without coercion, and while EEOC acknowledged it was unfair, the incident did not create a hostile work environment for either male or female employees.

Another case on point is *Roy v. USPS*, EEOC No. 01A50021 (EEOC OFO 2004), where a complainant alleged sex discrimination after she was denied a promotion, and she claimed that the selectee's sexual relationship with the selecting official was the reason for her promotion. In this case, EEOC also said it might be unfair but it's not EEO, because there was no evidence indicating sexual coercion or a pattern of sexual favors in the workplace.

One word of caution, though: an agency with a common practice of granting favorable treatment based on dating relationships might create a hostile work environment. (See EEOC's Policy Guidance on Employer Liability under Title VII for Sexual Favoritism, https://www.eeoc.gov/policy/docs/sexualfavor.html). If sexual favoritism is widespread in a workplace, the fact that one case was voluntary and consensual would not defeat a claim that it created a hostile work environment for other people in the workplace. *Miller v. Aluminum Co. of America*, 679 F. Supp. At 502. This analysis is determined on a case-by-case basis.

So maybe, if it happens once, there's no EEO problem. But aside from EEO, we have another issue. If "choosing" the romantic partner is for a promotion or a selection, then doing so based on a personal relationship (whether it's sex-based or not) is a non-merit factor, and this constitutes a prohibited personnel practice under 5 USC 2302(b)(6). (http://www.mspb.gov/ppp/ppp.htm). So, while there may not be EEO trouble there might be OSC trouble – and believe me, unless you're a sadist you do NOT want trouble with OSC. But, anyone who observes this type of non-merit personal relationship favoritism can report it to the US Office of Special Counsel at www.osc.gov. The OSC then would be responsible to decide whether to investigate this type of claim and taking appropriate action.

If you're interested in this topic and you weren't able to attend, check out a related webinar FELTG is hosting on July 20 called *New Developments under Title VII: Sexual Orientation and Gender Stereotyping*.
Register here: https://feltg.com/event/webinar-series-eeo-counselor-and-investigator-refresher-training/?instance_id=164. Hopkins@FELTG.com

Congrats, Deryn Sumner!

FELTG would like to recognize and congratulate Deryn Sumner on her recent promotion to Partner at the Law Offices of Gary M. Gilbert & Associates, PC.

EEOC's Office of Federal Operations Certifies First Federal Sector Class Action of 2016
By Deryn Sumner

On June 1, 2016, the EEOC's Office of Federal Operations certified what appears to be the first federal sector EEO class action of 2016 in *Candice B., et al. v. Dep't of Homeland Security*, EEOC No. 0120160714 (June 1, 2016). The Commission reversed the agency's final action which had accepted the administrative judge's denial of class certification. Instead, addressing the four requirements for class complaints (commonality, typicality, numerosity, and adequate representation (although that was only summarily addressed)), the Commission certified a class of women challenging the Department of Homeland Security's push-up

test requirements as being discriminatory against women seeking to become permanent Customs and Border Protection Officers.

In October 2009, the Department of Homeland Security implemented new physical fitness standards for Customs and Border Protection Officers, which included push-up requirements. The cut-off scores were the same for both male and female applicants and the tests came in three stages of the employment process. (For you fit FELTG newsletter readers wondering how you would stack up, applicants had to complete 12 push-ups in a minute to pass the first fitness test, 17 push-ups in a minute to pass the second, and 24 push-ups in a minute to graduate from the Federal Law Enforcement Training Center (FLETC)).

The class agent passed the first two tests and started basic training at FLETC. However, she was unable to pass the third test and the Agency terminated her during her probationary employment. She sought EEO counseling, alleging discrimination based on sex. After she filed a formal complaint, received an investigation and requested an EEO hearing, she filed a Motion for Class Certification, which the administrative judge denied. The administrative judge found the class agent did not meet the requirements of typicality, commonality, and numerosity required for class complaints.

The complainant appealed and the Commission found the requirements for class certification were in fact met, based on the evidence provided by the complainant. Addressing commonality and typicality together, as is often done in the analysis, the Commission found that the complainant was challenging an agency policy, which contained qualifications standards that disparately impacted women. The prospective class members had a common injury in that if they failed the push-up tests, they would be barred from permanent employment and each female applicant was required to perform the same test. Addressing numerosity, the Commission referenced evidence in the record that over a two-year period, over 2,100 women performed the push-up tests and over 350 failed them, finding that number to be sufficient to constitute a class. The Commission found the criteria for class certification was met and remanded the complaint to an administrative judge, noting that the judge "shall afford the class agents the opportunity for any additional discovery necessary to ensure the class maintains certification." Sumner@FELTG.com

A Collection of Odds and Ends
By William Wiley

Every now and then a case comes along that contains a bunch of good learning points, but does not actually cut much new grass on the lawn of federal employment law jurisprudence. Here are some things we learn and are reminded of in the judge's decision in *Carter v. DoI*, AT-1221-13-2153-W-1 (December 3, 2014):

- A Letter of Counseling is a "personnel action" and can be the basis for a claim of whistleblower reprisal IF AND ONLY IF it contains a threat of future discipline. No threat of future discipline, no personnel action, and therefore no viable whistleblower reprisal claim.
    - Of course, if you issue a Letter of Counseling without a threat of future discipline, even though there is no viable claim of reprisal, that does not stop an angry employee from forcing you to defend yourself all the way through discovery, a hearing before an administrative judge, and an appeal to the three Board members. SO DON'T USE THEM! THEY ARE WORTHLESS AND HAVE TO BE DEFENDED!
- Ordering an employee to direct all complaints through the chain of command is a form of whistleblower reprisal and the agency is automatically liable. Therefore, to avoid a reprisal finding, IT'S ok TO order the employee to use the chain of command, but

specifically tell the employee that he is still free to take any concerns he has regarding wrongdoing to the Office of Special Counsel, the Office of Inspector General, the EEO office, Congress, or to any law enforcement organization.

- An inappropriate touching by a coworker is not a "personal action" for the purpose of claiming whistleblower reprisal. However, a reprisal claim can be made regarding an agency's failure to discipline the whistleblower toucher.
- If a supervisor has shown a lack of candor (e.g., fails to tell the truth) during an OIG investigation, a judge is likely to disbelieve any future statement that the supervisor makes in a related appeal before the Board.
- Arguing to a judge that a putative whistleblower could not have had a good-faith belief in the facts underlying her disclosure will cause the judge to say nasty things about you if the agency's own IG found those facts to be true (see article above).
- Knowing that an employee is giving statements to an IG investigator suffices to establish that the supervisor had knowledge that the employee is a whistleblower even if the employee never says to the supervisor, "Hey, boss; I'm a gosh-darned whistleblower."
- If a supervisor gives a whistleblower a lower performance rating than the employee received the previous year before the whistleblowing, the supervisor will have to give a good reason for the lowered rating or else be found to be a whistleblower repriser.
- If an agency has a five-level performance rating program, and it defines the Fully Acceptable level, but not the Minimal level of performance for an employee, it cannot rate the employee Minimal if the employee is a whistleblower or it will be guilty of whistleblower reprisal.
    - Hint: Go to a Pass-Fail system and you will have one less problem with claims of discrimination and reprisal. Unless, of course, you can articulate a reason why you think five levels is better. Hint: You cannot.
- If a critical element has several subparts, the agency should state how an overall element rating is derived based on the independent evaluation of each of the parts. For example, after the several components of the element are listed, the performance plan should say something like, "A rating of Minimal on any two or more of the subparts of this element warrants an overall rating on this element of no better that Minimal."
- The supervisor's testimony at hearing as to the appellant's performance should be consistent with, and certainly no lower than, the appellant's most recent official performance evaluation.
- If on several occasions you grant a whistleblower administrative leave for something, and then you decide to stop, you'd better have a darned good reason (otherwise known as proof at the clear and convincing level).

The facts in this case are not nearly as interesting to a practitioner as are the above learning points, but here they are anyway. The appellant was upset because she had been reporting agency violations of regulations to an IG, and in response the agency had been (allegedly) mistreating her. Specifically, she claimed that the agency did the following to her because she is a whistleblower:

1. Oral counseling
2. Written counseling
3. A physical assault
4. Failure to remedy a physical assault
5. Delay in approving her leave share request
6. Denial of administrative leave to seek EAP counseling
7. Lowered performance rating, from Superior to Fully Acceptable
8. Harassment in the form of:
    a. Anti-whistleblowing emails from coworkers
    b. Whistling at her by coworkers
    c. Coworker declining to talk to her

When she took her claims to the Office of Special Counsel, that office dismissed her complaint, finding no basis for her allegations. Then she and her attorney took the case to the Board's administrative judge. In a 20-page decision, including 17 footnotes, the judge found that two of the ten alleged acts of reprisal occurred. As a remedy, the judge ordered that the agency grant her in the future all the medically necessary administrative leave required to remedy her assault, and provide her all the benefits she should have received if properly given a Superior performance rating.

Your tax dollars at work. Wiley@FELTG.com.

Equal Pay for Equal Work: Recent Federal Sector Equal Pay Decisions
By Deryn Sumner

Although claims of unequal pay occur less in the federal government than in the private sector, thanks to the published salary scales issued by OPM, they do still occur. As a reminder, EPA claims can be filed by either male or female employees. In order to succeed on a claim, the complainant must establish that she or he works in a job requiring equal work, skill, effort, and responsibility, under similar working conditions and within the same establishment as an employee of the opposite sex, but for less compensation. Assuming that showing is made, an agency avoids liability by establishing that the distinction in pay is based on a reason other than sex, such as seniority, a merit system, a system by which pay is determined by quantity or quality of work, or some other differential.

In *Heidi B. v. Dep't of Health and Human Services*, EEOC No. 0120152308 (June 3, 2016), the agency was unable to overcome an allegation of an EPA violation where the complainant worked as a GS-0201-12 HR Specialist and alleged she should have been paid at the GS-13 level, as a male HR Specialist was. The agency argued that an audit revealed that the complainant "did not have the extent of independence and latitude in her classification work which would have been commensurate with performing duties at the GS-13 level of pay. Thus, the Agency argued Complainant did not establish a prima facie case under the EPA." The Commission disagreed, noting that audit did not compare the duties the complainant performed as compared to the identified male employee, nor did the record support that the male comparator's job involved more responsibility. Therefore, the Commission found the complainant established a *prima facie* case. The Commission then concluded that the agency failed to establish any defense to the claim.

Compare that to the result in *Vaughn C. v. Dep't of Veterans Affairs*, EEOC No. 0120152918 (June 23, 2016). There, the complainant was a GS-11 Clinical Applications Coordinator (CAC) and during a conference call, became aware that a white, female CAC in another location was paid as a GS-12. The Commission did not bother to address whether the complainant established a *prima facie* case and assuming that he did, found that the VA established that the female comparator was required to perform additional and more complex duties, which established a factor other than sex in the salary discrepancy.

EPA claims require a clear step-by-step analysis to both bring and defend against. During the investigation and in discovery if needed, be sure to identify the comparators, get the information about the position itself (don't just rely on the position description), and address each element of both the *prima facie* claim and the affirmative defenses. Sumner@FELTG.com

The majority opinion began its analysis by reviewing the Commission's regulation at 29 CFR 1614.105(a)(1), which states, "An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." The Court did not find that regulation helpful, noting that the reference to "matter" does not identify whether that means the employee's actions (here, an employee's resignation) or the employer's actions (here, the settlement agreement).

Looking to Black's Law Dictionary and other canons of interpretation, the Court concluded that the "matter alleged to be discriminatory" in cases alleging a constructive discharge claim includes the date of the employee's resignation. The Court provided three reasons for this holding: (1) that in a constructive discharge claim, a resignation is part of the "complete and present cause of action" necessary before the 45-day time limit begins to run; (2) the regulation at 29 CFR 105 does not contain any language that is contrary to this idea; and (3) a catch-all of practical considerations, which the Court identified as not making it difficult for a layperson to invoke the protections of the civil rights statutes, to support this conclusion.

Justice Sotomayor delivered the opinion of the Court. Justice Alito filed a concurring opinion and Justice Thomas issued a dissenting opinion. The Court vacated the grant of summary judgment and remanded the case for further proceedings. And thus ends, for now at least, the excitement of the Supreme Court delving into the quirky EEO federal sector process. Sumner@FELTG.com

The sun is setting on your chance to join us for training in Honolulu. Register before it's too late!
Managing Federal Employee Accountability
Honolulu, HI August 1-5
Ala Moana Hotel and Conference Center

In Case You Still Believe in Santa Claus
By William Wiley

Ah, the innocence of youth. Magical beings enter your home and leave gifts, mom and dad are asexual, and our political leaders are making rational decisions based on a careful assessment of the evidence and argument. Sadly, as adults, we find out that real life is a little different.

Let's take a recent case in point. First, I want to establish that I am not taking a position on who is right and who is wrong in this case; *i.e.*, were the whistleblowers mistreated and the civil service abused by these agency managers. The point of this piece is to point out that how Congress (and the media) reacts to things may not actually be warranted given all the facts.

Here are the high points (or low points, depending on your point of view) from a recent series of articles about the "downfall" of top agency officials at a large federal agency. Based on both facts and allegations in the media, we read:

- **Awards**: One specific top agency official received a $10,000 bonus (more or less) on nine occasions in about a one-year period. That's an additional $90,000 above his annual salary of about $180,000.
- **Reassignments**: That same top official allegedly forced transfers to punish agency employees who spoke out about security lapses and agency mismanagement.
- **Demotions**: After reporting security violations, an agency employee had his pay reduced two grades.

Here at FELTG, we may not know anything more than what we read in the papers, but we do claim a fair amount of knowledge regarding civil service law. With that in mind, here's how the above three allegations look to us:

- **Awards:** Employees don't award themselves. Awards almost always are recommended by the employee's supervisor and then approved at some higher

management level. I don't think it's even possible for an employee to refuse an award. At least, I've never seen it happen. So why fault the "top agency official" who was on the receiving end of a bunch of suspicious cash awards? Shouldn't somebody be looking into whoever it was that recommended and approved the awards instead? I can't tell if the "top agency official" is a good guy or a bad guy, but I can sure tell that he is not able to award himself.

- **Reassignments:** Employees who speak out on matters regarding security lapses and gross mismanagement are legally defined as "whistleblowers." It is illegal to transfer most any federal employee in reprisal for that person blowing the whistle. Most every federal agency provides annual mandatory training regarding this right. To stop an improper transfer, all the employee has to do is call (800) 872-9855, describe a situation that is possibly whistleblower reprisal (not prove that it actually is, but just that it might be), and the Office of Special Counsel is empowered to intervene to obtain a stay of the transfer. Therefore, if there actually was an improper transfer, either the employee did not call the toll-free number, or he could not convince OSC that he was possibly the victim of reprisal.

- **Demotions:** Most federal employees have the right to challenge a demotion by filing an appeal with MSPB. Those few who are excluded from MSPB's jurisdiction have the right to challenge demotions through an internal neutral review process involving several management officials. Employees are routinely notified of these rights at the time the demotion is implemented. Therefore, if there actually was an improper demotion, it was either approved by several agency officials – the majority of whom must have been bad people – or upheld by the bad MSPB, or the demotion was not challenged.

Once more, here at FELTG we are not taking a position on who is right and who is wrong in this scenario. It is even possible that these employees hold some sort of unique appointments in an unusual agency and that one or more of these analyses are off the mark. However, the odds are that we've correctly described the "real" facts. Hopefully, we've shown that there is a world of difference between reality and what our legislators choose to believe is bad about our civil service system. If there are truly mistreated employees in this scenario, our system has safeguards in place to protect them and undo the harm they have suffered. If there is fault in an employee receiving bonuses, the fault cannot be in the employee because those awards were approved by a higher authority.

Goodness knows we are quick to point out failings and shortcomings in our oversight systems. However, when others see failings where there are none, we have to speak to those, as well. We love our civil service, even though on occasion we disagree with those who oversee parts of it. Wiley@FELTG.com

Webinar Spotlight:
Making Mediation Work for Your Agency: A Practical Approach
August 25, 2016

Most cases settle before ever going to hearing, and one of the most effective tools to resolving federal employment law disputes without litigation is through mediation.

This 90-minute webinar will cover:

- What mediation looks like in the federal government
- The necessary steps to effectively prepare for mediation
- Why there are so many myths about mediation – and the truth about them
- And more!

Registration is open now and is only $270 for your site. Won't you join us?