Federal Employment Law Training Group
Training By Professionals For Professionals

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Introduction

Volcanoes, typhoons, earthquake; is this the beginning of the end? It's been a rough few months for those of us living on Planet Earth, and there's not any guarantee that it will get better soon. And on top of the atmospheric and tectonic catastrophes of recent days, just when there is doubt that it can get any worse, Drug Enforcement Administration Chief Michele Leonhart testified before a Congressional oversight committee that even though there are apparently misbehaving employees working in her agency, she is powerless to take any discipline EVEN THOUGH SHE IS IN CHARGE OF THE ENTIRE AGENCY. Oh, lordy. How did we get here? How has our profession of federal employment law gotten to the place that we let an agency head take the stand and testify to something that is absolutely so foolish that any junior high kid in America knows it doesn't make sense? "You run the place?" "Yeah, I run the place?" "And you can't fire bad employees?" "No, I can't fire bad employees." "Then you don't run the place, Sweetheart." You know this is wrong. I know this is wrong. And here at FELTG, we see it is our obligation to tell people this is wrong. Please, come to our training so we can all help save America from this craziness. Because when the next volcano/earthquake/typhoon hits, we want GOOD federal employees there to help us, not employees who are still on a 180 day PIP. - Bill

William B. Wiley,
FELTG President

UPCOMING WASHINGTON, DC SEMINARS

FLRA Law Week
June 1-5

Supervisory HR Skills Week
July 13-17

Employee Relations Week
July 27-31

AND, IN SAN FRANCISCO

EEOC Law Week
June 22-26

WEBINARS ON THE DOCKET

Understanding the Family Medical Leave Act: What Practitioners Need to Know - Parts I, II and III
May 28, June 25 and July 9

Overcoming Challenges in Penalty Selection: Relevant Lessons for Federal Practitioners
June 11

The Truth About Charges: Drafting Appeal-Tight Disciplinary Documents
July 23

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Supreme Court to Decide Federal Sector Case on Timeliness
By Deryn Sumner

Federal sector EEO law is such a small and strange part of the legal world. Even talking with attorneys who practice private sector employment law elicits such surprised reactions as, "the statute of limitations is only 45 days?" or "so after the judge issues a decision, it goes back to the employer to decide whether or not to accept it?" So it was validating to see a few weeks ago that the U.S. Supreme Court decided to hear *Green v. Donahoe*, Docket No. 14-613, to address a circuit split regarding when the timeframe for filing a claim of constructive discharge begins – the date of the last action by the agency that caused the employee to quit or the date the employee quit.

The petitioner, Mr. Green, worked for the U.S. Postal Service in Englewood, Colorado until his retirement in 2010. He filed an EEO complaint in August 2008, arguing that he was not selected for a promotion because of his race. He filed another formal complaint alleging retaliation in May 2009. Things went downhill from there, including his being investigated by the Office of Inspector General (IG) in December 2009 about an allegation that he had delayed mail, which is a federal crime. Although the IG concluded at the end of the interview that Mr. Green had not intentionally delayed the mail, his managers placed him on emergency off-duty status after the interview anyway. **[Editor's Note: This is a status unique to USPS that other federal agencies should consider adopting.]** A few days later, on December 16, 2009, Mr. Green and the Postal Service entered into a settlement agreement which provided that he would use leave to stay on the rolls until March 31, 2010, after which time he would either retire or accept a downgrade to a position 300 miles away. Mr. Green filed an EEO complaint alleging retaliation when the agency placed him on emergency off-duty status, but that was dismissed because he had entered into the settlement agreement. The EEOC's Office of Federal Operations upheld the dismissal. Mr. Green subsequently alleged by EEO counselor contact on March 22, 2010 that he was being constructively discharged by being forced to retire under the settlement agreement. He later filed in District Court and lost on summary judgment, in part because the District Court held his claim of constructive discharge was untimely because he did not contact an EEO counselor within 45 days of the December 16, 2009 settlement agreement, or the last action taken by the Postal Service alleged to be discriminatory.

Mr. Green appealed the decision to the Court of Appeals for the Tenth Circuit. In a July 28, 2014 decision, the Court of Appeals agreed with the underlying District Court that his March 22, 2010 contact with the EEO office alleging constructive discharge was beyond the 45 day timeframe under the regulations. The Court reasoned that the employee's resignation could not be considered a "discriminatory act," and therefore cannot serve to start the clock for the 45 day timeframe. The Court found, "Green does not claim that the Postal Service did anything more to him after December 16, 2009, the day he signed the settlement agreement."

Mr. Green, through his attorneys and the Stanford Law School Supreme Court Litigation Clinic, petitioned for a writ of certiorari asking the Supreme Court to definitively rule as to whether the filing period for a constructive discharge claim beings to run when an employee resigns, as the First, Second, Fourth, Eighth, and Ninth Circuits have held, or at the time the employer commits the last act alleged to be discriminatory, as the Seventh, Tenth, and D.C. Circuits have held. The petitioner persuasively argued that the Supreme Court should use this opportunity to resolve the conflict, and posited that the minority circuits' holding is contrary to common sense, noting, "It makes no sense for the filing period for a constructive discharge claim to begin before the employee has resigned." The Supreme Court granted the petition on April 27, 2015.

My money is on the Supreme Court adopting the majority rule. The Commission's regulations at 29 CFR. 1614.105(a)(1) state that the employee must make counselor contact, in the case of a personnel action, within 45 days of the effective date of the

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action. It seems clear to me that the personnel action in a constructive discharge claim would be the resignation or retirement action. I'll be sure to update the FELTG newsletter readership when the Supreme Court issues a decision.
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Facebooking Your Way Right Out of a Federal Job
By Barbara Haga

This month I have decided to talk about something completely different (with all due respect to the cast of Monty Python). It seems to me that the world has changed rather significantly in the past few years where disciplinary action is concerned. This column won't have any of my usual references to medical standards, classification criteria and other such erudite topics. Instead I am going to focus on how it seems that discipline isn't private any more.

"Good" Old Days

When I started in this business over 30 years ago, misconduct and the subsequent disciplinary action was something that was known by the HR practitioner who was helping the manager with the case, and maybe the second line supervisor, the employee's representative, and not too many people beyond that. Most times, the employee was disinclined to share what was going on with coworkers, and we worked hard to make sure that even grievance meetings and delivery meetings were done in a way so that no one who didn't need to know would have a clue about what was going on.

We took every step possible to make sure that the decision on the discipline was made by the manager who was delegated that authority, thereby limiting the influence of higher level management. We never worried about whether some Congressman was going to call for strong action to deal with the misconduct nor did we worry about the action showing up in the newspaper.

Employees usually didn't share their information about their misdeeds until confronted by a manager or investigator. Often we found out the old fashioned way – police reports, coworker disclosures, etc. There was nothing posted on the internet about what they had been doing.

Well, the good old days seem to be gone.

It's an "Everything is Hanging out There" World

I don't consider myself an old fuddy duddy, but maybe I should. I don't understand the need/desire/inclination to share so many details about one's private life on Facebook, Twitter, or another social media outlet. I like my privacy. But, then I wasn't raised in an environment where this was the norm. If I had been maybe I would understand how cases like the one described below could happen.

This is a private sector case that illustrates just how much one employee was willing to share on Facebook. The employee worked for Panera Bread Company. After experiencing flu-like symptoms he went to the doctor; afterwards he posted the following on Facebook to his supervisor: "I went to an infectious diseases specialist today at 3 pm. What I heard was not good. He said there were strong indication [sic] this was viral, as in HIV. Not %100 [sic], but we re-tested for that and some other fairly nasty cohorts. I go back on March 24 to get the results and gameplan [sic]." Eventually he was diagnosed with HIV. He was terminated sometime later, which he alleged was in part because of disability discrimination (*Croy v. Blue Ridge Bread, Inc*., US Dist. Ct., Western Dist. Of VA, 3:12-cv-00034, 2013).

Who would post that on Facebook?

Misconduct Captured Electronically

Here are some other examples of employees who memorialized their misconduct on Facebook:

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Inappropriate Relationship. Jessica Shannon was removed in 2012 from her position as a Medical Administrative Assistant with the DVA based one two charges: (1) inappropriate relationship with a veteran; and (2) failure to follow policy regarding relationships that are not conducive to effective veteran care. Part of the evidence used to support the existence of the relationship came from Facebook posts.

In support of the finding that there was an inappropriate relationship, the administrative judge noted that in her Facebook conversations with the veteran, Shannon complained to him about work and the veteran gave her advice and support on how to care for her father and handle him emotionally when he was ill. Further, the AJ noted that a few days after a Facebook conversation in which the veteran told Shannon that he had missed her the past three days and that he was going to give her a massage with lotion and asked if she would give him a massage that night, the appellant engaged in Facebook conversations with the veteran from her home in which she told him that she was wearing only socks, a bra, and underwear. The AJ further found that Shannon knew the Facebook exchanges were inappropriate because she stated to the veteran that she hoped no one could read their Facebook messages. *Shannon v. DVA,* MSPB Docket No. SF-0752-13-0018-I-1 (2013).

Sick Leave Abuse. Part of a complex removal case about following police procedures included a discussion of a charge in earlier version of the proposed removal that involved a Facebook post. On February 7, 2010, which was Super Bowl Sunday, Hunter was assigned to work his scheduled shift but he requested sick leave for that day. The agency initially charged Hunter with making comments on Facebook indicating that he was not actually ill because of this posting: "Called in slick, oops I mean sick. Now I'm just relaxing alone at home, waiting for the big game. Superbowl [sic] Sunday!! Damn maybe it would be better if I have a Superbowl get together at my place. What youall [sic] think FB Fam???" *Hunter v. Navy,* MSPB Docket No. DC-0752-11-0325-I-1 (2011).

This kind of evidence almost makes discipline too easy. Check back next time and we will look at a characteristic of today's world that makes discipline harder. Haga@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.

Don't Sacrifice the Client Just to Make a Point
By Deborah Hopkins

I just finished up another semester of law school. It's been a long haul and perhaps the most challenging endeavor I have ever undertaken - especially because, in addition to attending law school, I work full time - but unless something goes terribly wrong, I'll be finishing up that JD in seven months and six days (not that I'm counting). FELTG is going to have a HUGE graduation party, and you're all invited. **[Editor's Note: Cash bar, gifts mandatory, adulation also mandatory.]**

You may know from other articles I've written this semester, that I have been enrolled in a legal clinic doing criminal defense work here in the Superior Court of the District of Columbia. Once my student bar application was approved and my student bar card came in, I was the one meeting with my clients, picking up clients from the cell block, talking to the judge on behalf of my client at arraignment and hearings, visiting my clients in jail, cross-

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examining government witnesses at trial, writing motions, preparing for trial, conducting trial, and everything else that goes along with being a criminal defense attorney. The only caveats: 1) My supervisor had to be in the courtroom during the hearings, and had to sign off on any filings I made with the Court, and 2) I am getting a grade for this work, in lieu of pay. (Oh, also, I guess I should say, 3) I haven't taken the bar exam yet.)

Today, I don't want to talk today about criminal law so much as I want to tell you a story of something that happened to me during this recent clinical experience, because I believe it has impact on those of us who have chosen federal employment law as our noble profession. It deals with the importance of negotiation.

You've probably heard the terms *positional bargaining* and *interest-based bargaining*, if not in detail, at least in passing. As a quick recap, in my own words, positional bargaining is when two parties who are opposed to one another fight to "win" and retain the position of victor, regardless of whether the outcome is what they truly need. In interest-based bargaining, the parties talk about what they want to get as a result of the negotiations, and they try to find a way for everyone to be satisfied with the outcome.

Toward the end of the semester, one of my classmates was working with a client who was charged with several misdemeanors. The pre-trial scenario started to get ugly: motions were flying back and forth, replete with personal attacks and accusations of violations of professional rules, attorney misconduct, and the like. Somehow the focus started shifting from the actual client and the client's case, to a brewing battle between the attorneys.

So, here's where I came in. I assumed the role of negotiator, and I called the prosecutor to see if we could talk about the case and come to some type of resolution outside of a trial. His immediate reaction was to shut me down and say that there was no way the government would consider a plea and that the government had a point to make and wanted a judicial order on the record. (That was his position; it really did not have much to do with the client or the charges in question.) I kept the conversation open, though, and asked a lot of questions to find out why he wouldn't consider a global plea. I can't go into detail because I am held to a standard of confidentiality, but suffice it to say that after several minutes of conversation I learned what the government was really upset about, and it wasn't anything the client allegedly did or did not do; it was about some things that were written in one of the motions that had been filed. (That was his interest; the things he didn't like as they were written in the motion.) This is not the forum where I'll expound on why it's inappropriate that a client's life (and freedom, since misdemeanor convictions carry possible sentences of jail time) was potentially impacted because of personal disputes between attorneys, but my conscience requires me to at least acknowledge that I see it, and I don't like it.

Back to the story. Throughout the course of several days, my negotiations with the government continued. Finally, we came to an agreement on a universal plea that satisfied my client, and also satisfied the government. Had we stuck to our positions, we would never have gotten to the point where our interests entered the conversation. But, because the right questions were asked and answered, the outcome of this scenario was about as win-win as it can get in criminal court. That, folks, is a real-life example of interest-based negotiation.

The same concepts apply when negotiating in the federal government, whether it's the terms of a settlement agreement, mediation in an EEO complaint, a collective bargaining agreement, or any of a number of other scenarios. If you want the best outcome, look for the interests of the parties involved.

For more detailed training on the topic of negotiation, including word selections and the questions to ask during interest-based bargaining, register for FELTG's *FLRA Law Week*, next held June 1-5 in Washington, DC, and instructed by the world-class duo Bill Wiley and Sue McCluskey. We hope to see you there! Hopkins@FELTG.com

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[Editor's Note: As a result of Deb's experience, we have decided to develop and offer a full week open-enrollment seminar built around the techniques of negotiating settlements and collective bargaining agreements in the federal government. Keep an eye out for it on our upcoming calendar of courses for 2016. You may think your job is as an HR specialist, agency attorney, or union representative, but actually it is as a negotiator.]

Give Me That Old Timey Magna Carta
By William Wiley

Questions, we get questions. And we do our best to answer them when we have a chance. This month, we focus on a question we received from one of our favorite readers, a question I bet that a number of you have:

> It's been our longstanding practice when proposing disciplinary action to develop a 'comparator worksheet' that summaries past cases involving arguably similar misconduct to help determine the proposing official determine what penalty to propose. Our proposals include among the pertinent *Douglas* factors that the official has considered penalties imposed in similar cases. The proposing and deciding officials have access to the document that summarizes our comparator cases; however, we don't treat it as part of the official case file (i.e., we don't give it to the employee w/all of the supporting documentation) although we do provide it upon request of the union that represents many of our employees.
>
> It's not really an aggravating factor, since it just helps define a range of penalties imposed in the past…. But now we're wondering: Is it a due process violation not to provide that comparator worksheet to employees as part of the official case file?

And our FELTG answer, worth every penny you pay for it:

As for your question, you have two authorities with which you're dealing:

1. The *Douglas* decision says that the proposal letter must contain all the "aggravating factors" relative to penalty "enhancement."
2. 5 USC 7513(e) says the agency must provide the employee "supporting material" upon which the action is based.

The comparator worksheet that the proposing official considers may or may not be a true "aggravating factor." However, it is definitely "supporting material" to which the employee has rights.

Now, consider the concept of due process. Although the idea of due process began with the Magna Carta of 1354, it began to take specific reference to federal sector employment law with *Sullivan v. Navy*, 720 F.2d 1266 (Fed. Cir. 1983). In that decision, the court held that a deciding official who considered factors not in the proposal letter violated due process, thereby warranting reversal of the removal. As you know, a violation of due process is a CONSTITUTIONAL violation, not just a run of the mill statutory or regulatory violation, and thereby it is not subject to the "harmful error" rule. In other words, violate due process and you automatically lose the case, just like if a cop violates *Miranda*, the perp is set free even if all the evidence otherwise says he's guilty.

The gravamen of due process is that the employee has the right to know what's going on so that he can defend himself. If the Deciding Official (DO) is considering things not in the proposal letter, the employee cannot be expected to defend himself regarding those things unknown. The same concept, to my mind, would apply if the proposing official were considering things unknown to the employee. For example, if the proposing official (PO) thinks that the employee's one hour AWOL is

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comparable to a comparator's 40 hour AWOL, and thereby selects the penalty of removal given to the 40-hour-AWOL-employee, should not the employee be entitled to argue that one hour is not the same as a 40-hour absence?

On the other hand, the case law finds due process violations when the DECIDING OFFICIAL relies on things unknown to the employee, not the PROPOSING official. The concept is that the DO is making the decision based on the proposal letter. If the information in the proposal letter is sufficient to support the removal decision, it is irrelevant what other information might have been floating through the mind of the PO when he drafted the proposal letter. By statute, you have to provide that other information to the employee only "upon request." If he didn't ask for it, that's on him, not the agency.

But with all of this, I am an exceedingly conservative practitioner. I don't like to leave anything to chance or create potential areas of attack by the employee on appeal if they are unnecessary. Yes, you could retain the "comparator worksheet" in a separate file and give it to the employee only upon request (by the employee's representative or to the employee if she is unrepresented). However, you have left yourself open to a challenge as to whether the employee actually requested the supporting material and a challenge as to how much time the employee had to consider the material once you gave it to him. Why go through these challenges? The employee has the right to the documents; the concept of due process can easily be applied to the proposal letter. If you do NOT include the comparator worksheet with the proposal letter, you create yourself an unnecessary risk of losing that you could have easily avoided. As there is no downside to providing the comparator worksheet, if I had one and the PO relied on it, I would *ABSOLUTELY* include it with all other supporting material when I issued the proposal. You don't necessarily lose if you don't, but you create an unnecessary risk in a business that is already risky enough.

Separately, though, I would ask myself why (oh, why) do you develop a comparator worksheet to begin with? You have no obligation to do so as the agency. The proposing official has to be penalty-consistent within her span of knowledge, but has no obligation to expand that span of knowledge. *See Ly v. Treasury,* 2012 MSPB 100, *Hamilton v. DHS*, 117 MSPR 384 (2012). If HR already knows about the comparators, it has to tell the DO about it *if* the DO asks for it. *See Chavez v. SBA,* 2014 MSPB 37. However, there is no obligation for HR to collect that information, or for the DO to request it. Therefore, if you have the comparator worksheet and give it to the PO, he's locked into that range of penalties. If you do not develop a comparator worksheet, the PO is not locked in to a pre-decided penalty range.

Admittedly, the Board is not crystal clear on the concept of PO and DO knowledge of comparators. In some cases, MSPB holds the DO accountable for comparators without any statement as to whether the DO had knowledge of the other penalties administered to the other comparator employees; *e.g., Raco v. SSA,* 2011 MSPB 87. However, where DO and PO lack-of-knowledge was a factor, the Board has consistently come down on the side of concluding that the DO needed knowledge, and without it, he is not bound to comparators.

Wiley-Way® Bottom Line: I would definitely give all supporting material to the employee as an attachment to the proposal letter, including the comparator worksheet. Separately, I would step back and make a policy decision as to whether I want to develop a comparator worksheet.
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Chief Administrative Judge Mary Elizabeth Palmer to Represent the USA in International Bridge Competition
By Gary M. Gilbert (guest contributor)

FELTG pays a special tribute to EEOC Chief Administrative Judge Mary Elizabeth Palmer, who will a member of one of two teams representing the USA in international competition in the 2015 Venice Cup, one of the most prestigious competitions for

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contract bridge players. The Venice Cup will be held this cycle in Chennai, India, Sept. 26-October 10, 2015. It is called the Venice Cup because it was donated by Italy when Venice hosted the inaugural contest.

Judge Palmer is among the most tenured and respected administrative judges with the EEOC, having served more than 25 years. Prior to becoming a judge, she was a lawyer in private practice. The American Contract Bridge League notes on its site that Judge Palmer is "Admired in the bridge world for her judicial temperament."

Judge Palmer formed a partnership with Lynn Deas in 1981, and they have notched innumerable victories over the years. The pair played in their first World Championships in 1982 and finished 2nd in the World Women's Pairs. They have been on three victorious World Championship teams as a pair (1987, 1989, 2002), and in addition to their victories in team events, they finished first (2010), second (1982), third (1994), and fourth (1990) in the World Women's Pairs.

Everyone at FELTG wishes Judge Palmer and her team the best of luck in the Venice Cup this fall.

Webinar Spotlight:

Special three-part FELTG Webinar Series

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

Thursday, May 28, 1:00 - 2:30 p.m. eastern
Thursday, June 23, 1:00 - 2:30 p.m. eastern
Thursday, July 11, 1:00 - 2:30 p.m. eastern

If you need to understand FMLA from A to Z in order to advise employees about their rights, assist managers in responding to FMLA issues, or to ensure that your adverse action case will withstand the scrutiny of the MSPB, then this webinar series is custom-made just for you. FELTG instructor Barbara Haga will clarify all the things you always wondered about FMLA. You'll even get to ask your questions - and get answers - in real time.

Join us for one session, or join us for all!

Hearing Practices: Preparing Witnesses to Be Deposed
By Deryn Sumner

We continue our discussion about best hearing practices with some pointers on preparing witnesses for depositions you defend. Many of these tips can also apply to preparing witnesses to testify at a hearing although some the elements, such as the administrative judge's presence, change the dynamics a bit.

People are understandably nervous about being deposed. Try to help alleviate that worry by making sure they are clear on the logistics. Tell them who you expect to be present and explain that a court reporter will record or transcribe the proceedings. Arrange for a time and place to meet prior to the deposition so you can go into the room together.

The first pointer I give every single time is to tell the truth. Full stop. I tell the witness not to worry about whether what he or she is saying is hurting the case or helping the case. The consequences of failing to tell the truth are far worse than what a witness truthfully explains. The second tip I give every time is to listen carefully and only respond to the question asked. If the question can be responded to with a yes or a no, then the response should be a yes or a no. An oldie but goodie test is to ask the witness to if he knows what time it is. Most people will look at their watch (or these days, their cell phone) and tell you the time instead of responding with a yes or a no.

Remind them that they should not discuss their testimony with anyone else. Explain about objections. Almost always you will only be noting an objection for the record and still instructing the witness to respond. There are very few exceptions to that (and a note for you: if you are going to object and instruct a witness not to respond to a question, you better have a good argument ready to give to the administrative judge if he or she is called to rule on it during the deposition).

Also, give the witness some tips to make the court reporter's life a bit easier: Wait for the questioner to finish asking the question before responding,

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even if it is obvious what the question will be. Speak clearly and don't put your hands in front of your mouth when responding. Respond audibly instead of shaking your head yes or no. Yes, it's okay to ask for a break. You will have to answer any questions on the table before taking that break though, so don't use it as an excuse to figure out your answer.

Tell the witness that the deposition is not intended to be a memory test. If the witness doesn't remember an exact date, that's okay - especially given the length of time EEO complaints can take to get from allegation to discovery. If there's a document that could help refresh the witness's recollection, it's okay for the witness to ask to be shown a copy. Let him know that you have the opportunity to clarify any of their responses before the deposition closes.
Tell the witness that yes, he can and should review any documents given to him during the deposition before he responds to questions about it. No, he shouldn't be obnoxious and read it at a much slower pace than he normally would. Let him know that only prolongs how long he is going to be in the hot seat. You can tell the witness that he can take notes if he wants to, but the questioner has a right to a copy of the notes so he should think about whether or not he actually wants to do so.

And the final pointer I give to witnesses: tell the truth. Yes, it is so important it warrants repeating.
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Pretend It's Your Money
By William Wiley

Let's go on a voyage of imagination for a few minutes. Pretend that instead of being a nice safe civil servant manager trying to run the government, you are out here in the wilds of free enterprise as we are here at FELTG, with never a guaranteed paycheck and conscious of every nickel you spend because those nickels are the source of food and shelter for you and your family. In other words, instead of running a federal agency spending tax dollars, you run your own company and spend your own money.

Now, imagine that you have an employee who draws a salary from you every couple of weeks, which means you are paying that person from your own pocket in the hope that the person's efforts will develop income for your company to offset that salary, plus leave a little left over at the end of the day as profit for you. That's how business works: you hire employees, you pay them to produce work for you (an expense), and your company remains solvent as long as there's at least a little bit more income (profit) than there are expenses. Many of us learned this basic principle of enterprise in Junior Achievement, Girl Scouts (those cookies are absolutely addictive), or selling illegal drugs on the street corner - you know who you are.

And now, let's say that you are studying the financial books one weekend, and you come to realize that one of your employees, Ed, is being paid more than he is bringing in. Your business is sales and thereby very easy to calculate income relative to employee. Poor Ed, for whatever reasons, simply is not bringing in enough bacon to cover his salary payments. You have to do something about Ed, or the mathematics of running a business will eventually shut you down.

Being an agreeable sort, hoping that there is good somewhere in every human being, you decide to give Ed a last chance to prove he actually can do his job, that he can bring in more profit than required to cover the expense of his salary and benefits. So now comes the Big Question: *Knowing that every dollar you are going to pay Ed during this opportunity period comes out of your pocket, how long are you going to carry him on your payroll to see if he can improve?* Keep in mind that if you finally decide that Ed has to be fired, relevant local law requires that you give a fired employee a 30-day gift of salary as a separation package. You are already on the hook for 30 days of pay no matter what you do.

So how long do you give him? A week? A couple of weeks? Maybe a month? If you go with a generous 30-days, keep in mind, that the $10,000 a month salary you are paying him for this opportunity period would look very nice as a deposit into your health savings account. Or, as a down payment on

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that new car you've been considering. Or, as payment for that well-deserved two week vacation you've been putting off. I can't answer for your imaginary business, but in my real-world business, giving a poor performing employee more than 30 days to get better just would not make economic sense. I need that vacation.

OK, wake up. Back to reality, the reality of your being a manager (or management advisor) in a federal agency. If 30 days is the outer limit in a private sector business, and if the law allows you to set an improvement period for a poor performer at 30 days, why (oh, why) would you spend more of the tax payer's money to provide a longer period for improvement, aka a longer Performance Improvement Plan (PIP)? But I see it all the time. Just last month while out on the road teaching classes for agencies, on two occasions a day apart, two different employment law practitioners, who I happened to have great respect for, expressed unsolicited disagreement with our advice here at FELTG that PIPs be set at 30 days.

One stated that he always recommended that PIPs be 90 days because his agency's minimum appraisal period was set by agency policy at 90 days. Well, a minimum period of time on standards prior to a rating of record being issued has nothing to do with a minimum period of time for a PIP. By the time the employee is PIPed, she's already been on her standards the agency's minimum period for rating. Nothing in law, regulation, case decisions, or common sense directs us toward the conclusion that a new initial rating period is necessary to determine satisfactory performance in a poor performing employee.

The other commentator simply blew off the idea of a 30-day PIP by saying that just wasn't enough time. Well, why not? Individuals are hired because the selecting official believes that they can do the job. The employee believes he can do the job or he would not have applied. We have to give a newly hired employee a "warm up" period of about 60 days before we can initiate a PIP anyway. Why (oh why) do we need to give even more time? We are not talking trainee positions. These are not situations in which we need to teach an employee what to do. These are government jobs for which the agency is giving the employee good government money (your tax money, by the way) to do acceptable government work. If he cannot demonstrate acceptable performance in a month, then he should be relieved of his duty and another citizen given the opportunity to prove that she can earn a government pay check.

So the next time you are trying to decide how long a PIP should be, ask yourself this simple question: *If the money to pay this guy's salary was coming out of my kid's college fund, how much money would I pay him to give him a chance to prove he can do the work?*

If your answer is more than 30 days, you are either much more generous than am I, or your kid must have one significantly huge college fund. If so, maybe send that kid to a few of our FELTG seminars instead. We could use the business, plus that kid of yours would learn a vital skill, and get free coffee. Try to beat that with a degree in fine arts. Wiley@FELTG.com

The Latest from The Commission On The Rights Of Transgender Employees
By Deryn Sumner

Although this case came out last month, it has generated a lot of discussion, both during the webinar Bill and I presented last month, and in other arenas, so I thought it was worth discussing here in the newsletter. The case is *Complainant v. Department of Army*, EEOC Appeal No. 0120133395 (April 1, 2015) and it was issued by the Executive Secretariat which means it was circulated among the Commissioners prior to being issued. The case continues what the Commission started in *Macy v. Department of Justice,* EEOC Appeal No. 0120120821 (April 20, 2012), which found that a transgender employee could bring a claim under Title VII as it was discrimination based on sex. In this 2015 case, the complainant, a transgender woman, alleged disparate treatment when she was confronted about her use of the women's restroom, and harassment when her third-line supervisor referred to her as "sir," particularly

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when he was angry or frustrated with her. The complainant discussed her gender transition plan with her supervisors and initially agreed to use a single-stall restroom until after she had completed surgery to allow her co-workers to "become accustomed" and "not feel uncomfortable" with the change. However, when this single-stall restroom was out of commission on three occasions, the complainant used the women's restroom. Her supervisor confronted her stating that she was making people uncomfortable and that she had to continue to use the single-stall restroom until she could show proof of having undergone the "final surgery." The agency issued a Final Agency decision finding that it articulated a legitimate, non-discriminatory reason for its actions. Namely, the agency determined, the complainant had previously agreed to use the single-stall restroom and, in the agency's view, the comments made by the supervisor were not sufficiently severe or pervasive to constitute harassment.

The Commission's decision is well-researched and worth a read. It quotes extensively from the *Macy* decision and states that as the agency acknowledged that the complainant's transgender status was the sole motivation for preventing her from using the women's restroom, there was direct evidence of discrimination on the basis of sex. The fact the complainant previously agreed to use the other restroom until she completed her medical procedures to fully transition was not a defense. As the Commission stated, eloquently, "This case represents well the peril of conditioning access to facilities on any medical procedure. Nothing in Title VII makes any medical procedure a prerequisite for equal opportunity (for transgender individuals, or anyone else). An agency may not condition access to facilities -- or to other terms, conditions, or privileges of employment -- on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual's gender identity." Addressing the concern about co-workers being uncomfortable by the complainant's transition, the Commission cited District Court decisions about customer and co-worker preference and stated, "Allowing the preferences of co-workers to determine whether sex discrimination is valid reinforces the very stereotypes and prejudices that Title VII is intended to overcome." Regarding the harassment claim, the Commission found, upon review of the record, that the third-level supervisor intentionally addressed the complainant as "sir," and that he would often laugh or smirk in front of others when saying it. The Commission found these actions were related to sex and sufficiently severe or pervasive to be actionable harassment. Further, as the agency was negligent in permitting the harassment to occur, it was liable and could not assert an affirmative defense.

The Commission vacated the FAD and remanded the case for a supplemental investigation on remedies, and ordered that the agency immediately grant the complainant "equal and full access to the common female facilities," and to provide 8 hours of training to all of the civilian personnel and contractors, as well as 16 hours to the management officials, with a focus on gender identity issues. The Commission is clearly focused on advancing the rights of transgender employees in the workplace and I expect we will see future decisions based on the well-reasoned precedent set by this decision. Sumner@FELTG.com

FELTG Instructor Spotlight:

Katherine Atkinson Dave is Associate Counsel with The Law Offices of Gary M. Gilbert & Associates, and is admitted to practice in the state of Maryland, before the United States District Court for the District of Maryland, and before the United States Court of Appeals for the District of Columbia Circuit.

Ms Dave provides training to federal employees on wide-ranging topics including substantive areas of discrimination law, legal writing, and disciplinary actions.

Contact FELTG for a list of specific courses Ms Dave can bring onsite to your agency.

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