Federal Employment Law Training Group
Training By Professionals For Professionals

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Interesting Times; Important Decisions

And so, it begins. Soon, the leadership in our government will be headed by President Trump and Vice President Pence. The two of them in some fashion will nominate and appoint the 4,000 or so leaders of the various federal agencies. Without knowing any specifics beyond what I read in the comics, it's a safe bet that this new group will run things differently from the way that President Obama's leadership team did. Will it be better? Will it be worse? Your opinion is just as good an opinion as anyone else's opinion, so stick with it, regardless of whether some pollster tells you it should be something else. And when the New Order details start to emerge, remember the source for all the nitty gritty stuff you will need to continue to hold your workforce accountable, to treat employees fairly and expediently. Here at FELTG, we will be right on top of every change, every new process, every new case. Come to our seminars, read our newsletters, participate in our webinars. Stay an employment law winner because we like winners.

Oops, the phone's ringing. Excuse me a minute. "Hello. Mike Pence? How the devil are you, dude? Anything new happening? What's that? You want me to be a member of the MSPB? And also a member of the FLRA? And at the same time to serve as a commissioner at EEOC? And you want Deb to be the new Special Counsel and simultaneously serve as the General Counsel at FLRA? Gee, man. We'd like to help you guys out, but I'm afraid we just don't have the time. We've got a lot of important upcoming training to do. In fact, you may want to check out our website www.FELTG.com. In case you have a buddy who would like to come along, we're running a two-for-one White House special on some very interesting and relevant topics. You'll know them when you see them."

Bill

JOIN FELTG IN SAN FRANCISCO

Advanced Employee Relations
December 5-7

Managing Federal Employee Accountability
December 5-9

OR, HOW ABOUT SAN DIEGO?

Developing and Defending Discipline: Holding Federal Employees Accountable
February 28 – March 2

AND OF COURSE, WASHINGTON, DC

MSPB Law Week
March 13-17

Absence & Medical Issues Week
March 27-31

WEBINARS ON THE DOCKET

Preparing for the New Administration: Potential Impacts on the No FEAR Act and Prohibited Personnel Practices
November 17

The Interactive Process: Making the ADA Work for Your Agency
December 1

More FELTG Advice for our New President
By William Wiley

Here we go again, acting all uppity by advising the new administration without being asked. Well, somebody's got to do it, and if not FELTG, who else would dare?

Dear President-Elect Trump:

What took you so long?

While you've spent the past few years putting your name on all sorts of things, gallivanting around the country with your BFF Hillary Clinton, bragging about grabbing various body parts, we've been busy along with our readers trying to run the darned government. Now that your little holiday is over, welcome to the fight. So let's get you busy.

You may have heard that a lot of people (e.g., Congress, the media, the public at large) believe that a lot of federal employees (e.g. 7% of 2.1 million civil servants) are poor performers. Although we've had a system in place for nearly 40 years to fire non-performers, it doesn't seem to be working. I bet you'd like to know what's wrong with it, wouldn't you.

Well, you're in luck. Here at FELTG, we know everything civil service. And there's at least one thing wrong with the unacceptable performance system that you can fix by yourself on Day One without any help from that nasty old Congress.

Length of the PIP: As just about everybody in the world knows, if a federal civil servant is performing badly, regulations require that the immediate supervisor initiate a Performance Improvement Plan to allow the employee to demonstrate whether he indeed can perform acceptably. Neither the law nor the CFR sets a specific minimum length for a PIP, thereby leaving it up to the discretion of the agency to decide what is reasonable.

And therein lies your first opportunity. Some of your agency managers have set foolishly long PIP periods. Think of it this way. In one of the companies you own, if you hired someone to work for you who was supposedly qualified to do the work, and you gave him a couple of months to get used to the job, if he couldn't do it, how much longer would you give him to get better? Keep in mind, his salary is coming out of your pocket. You didn't hire a trainee, someone you have an obligation to train. You're not a charity. Seriously, how long would you keep him around?

Well, what if I told you that some of your managers have agreed to 90 days AS A MINIMUM?! That's right; there are perfectly valid union contracts around government, agreed to by agency leadership, that guarantee employees who have already been identified as failing, another 90-day minimum period of time to get up to speed. Those managers are spending YOUR MONEY (actually, taxpayer money that you have been allocated by Congress) in ways they don't legally have to, for reasons that make no sense. You should not allow that to happen.

Here's how to fix it. On Day One, send a little memo to your OPM Director that says the following:

> Dear OPM: As soon as possible, if not sooner, amend 5 CFR Part 432 to state that agencies may establish PIPs for periods up to 30 days, and that exceptions must be pre-approved by OPM. Your Friend and New Supreme Commander (aka "The Performance President"), Donald J. Trump

Yes, some of our friends on the union side of the business will take offense at this mandate. By making this change to a government-wide regulation, you are taking the matter off of the bargaining table and preventing your unwise management negotiators from giving this away through negotiation. But with all due respect, and I certainly respect the role of the unions in the federal workplace, it is not their job to run the government. It is yours. And you can't run an efficient, effective government if you can't quickly deal with poor performers. So cowboy-up and on Day One send a message to all of us that you plan

for your managers to hold their employees accountable.

Because if you don't, some folks might start thinking that they should not have voted for the "You're fired!" guy. Wiley@FELTG.com

FELTG is Coming to San Francisco

Advanced Employee Relations
December 5-7, 2016

This three-day open enrollment seminar will cover the relevant things HR practitioners need to with a day on each:

- Leave abuse
- Performance accountability
- 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!

PLUS…

For supervisors and advisers, that same week, join us for:

Managing Federal Employee Accountability
December 5-9

Details also found at www.feltg.com.

Who's in Charge?
By Barbara Haga

Last December I wrote about several MSPB decisions that included "Christmas party" in the text. I thought it would be reasonable this year to follow up to see what other decisions had been issued in the last year or so. I expanded the search to include EEO cases and "holiday party." There was a lot to work within those results!

Who are these People?

In the case of *Margorie L. v. Department of the Army*, EEOC No. 0120142868 (January 8, 2015), the Army attempted to dismiss a complaint that included issues based on sexual harassment and reprisal. The events on which the sexual harassment charges were based took place at a holiday party. The holiday party took place on December 13, 2013. When you read the information below I hope you are thinking what I did – who are these people and how could this kind of behavior be going on at an official function today?

The complainant was an Environmental Protection Specialist. At the holiday party, a coworker introduced her to the audience at the event as a girl "who I know really likes to 'Ride 'em Hard.'" The coworker also hung a sign around her neck that said "Ride 'em Hard." The complainant asserted that agency managers were present at the event and no one intervened. There were photographs of her wearing the sign that were posted on the agency intranet. After the event the complainant stated that numerous coworkers continued to make comments to her such as she would get promoted because she liked to "ride 'em hard."

The Army dismissed the complaint. The agency's position on the sexual harassment issue was that it was a single incident and that it took immediate and appropriate corrective action when it removed the photos from the intranet. The EEOC reversed the decision dismissing the complaint.

In its most positive light I suppose one might think that the comments meant that she was tough on enforcing environmental regulations, but I think there's enough double entendre there that most of us would understand that this also could mean something quite different.

"That's just Cat being Cat"

Leevine "Cat" Williams worked as a Physical Science Technician at the Navy Drug Screening

Laboratory facility in Jacksonville, FL. The Navy removed him for conduct unbecoming with a list of specifications related to inappropriate contact with female coworkers. The main issues in the case, and the specifications that were ultimately sustained, involved his behavior at a Christmas party on December 19, 2014 and other interactions with a coworker named Christine Bastin.

At the party a picture was taken of a group of employees. Cat was standing behind the female coworker. Christine reported that he grabbed and fondled her left buttock. Cat testified that she was upset after the photo was taken and said to him, "Really, Cat, really?" Immediately after the photo was taken Christine was crying and upset. She reported to two coworkers what had happened and this information was shared with her supervisor who spoke to Christine personally.

After the party there was an investigation and several other employees gave statements about what they judged to be Cat's inappropriate conduct. One male coworker noted that he saw Cat's hand on Christine's waist while the picture was being taken and thought that was inappropriate. Another female coworker reported that some months earlier Cat had brushed up against her, had come up behind her at one point, and had licked her ear.

The troubling part of this case was in the documentation regarding the second specification. Christine had relayed a variety of complaints about Cat to her supervisor before the party. She reported that he would look her up and down and make kissy faces to her; she also told her supervisor that Cat had said that "she needed to get laid" and that she needed to "find a sugar daddy." When she reported these things to her supervisor, her supervisor said "it was just Cat being Cat." Christine's supervisor did offer to speak with Cat about his behavior and also explained that Christine could file a formal complaint, basically putting the onus on Christine if she wanted the supervisor to do something. Christine said that she did not push the matter because she was probationary and was afraid of losing her job.

The supervisor's reaction here is much too common. The supervisor had a duty to act to inform Cat that his behavior was inappropriate. From the other specifications in the action it appears that there was ample evidence that his behavior was out of line not just with Christine, so the supervisor could have had the discussion without mentioning what she said. Just because an employee doesn't want to be identified doesn't relieve the supervisor of responsibility for taking action to correct the misconduct. Once you know about it, it's on management to deal with it.

On another note, the agency's removal included several specifications about old incidents and other complaints that were not substantiated. There's a lesson in this case about what should have been included as specifications and what should have been left out. To wit, the judge found six of the eight specifications not sustained, upholding only those that related to the incidents discussed above. They had two good specifications with good evidence and recent misconduct. They muddied the waters with six that were weak –one didn't even have the name of the person complaining about Cat. Needless to say, with that many specifications not sustained, the removal was mitigated to a 90-day suspension.

It wasn't just the failure of six of the eight specifications. The judge's decision points up that the supervisor's failure to act had consequences down the road. I don't think I can say it any better:

> While the appellant's conduct toward Ms. Bastin at the Christmas party was troubling and warranted disciplinary action, there are several mitigating factors which must be considered. First in my mind is the extent to which the agency's failure to adequately address or correct the appellant's pattern of behavior toward Ms. Bastin during the several months before this incident contributed to his behavior at the Christmas party. It is unfortunately the case that despite the appellant creating an uncomfortable and unwelcome environment toward Bastin for several months, no one within the agency had told him that his

> conduct was becoming a serious problem and may lead to discipline if it continues. This vacuum of leadership was made worse by the agency's culture where workplace hug greetings among co-workers were an expected daily ritual and sexual banter was commonplace among co-workers. In my view, the agency's permissive, hugging culture, along with management's apathy toward "Cat being Cat" in the face of Ms. Bastin's complaints about him sent the appellant exactly the wrong message about what sort of conduct he could likely get away with in the future. While such agency missteps in no way excuse the appellant's behavior, especially at the Christmas party, such factors did send a confusing message to the appellant about acceptable conduct in the workplace and the impact of what he was doing toward Ms. Bastin. (*Williams v. Department of the Navy*, AT-0752-15-0550-I-1 (2016)

Lesson for Management

If you are a manager or supervisor you have some things to think about while you are making brownies for the party, wrapping the gift exchange package, or putting on your holiday finery. If you see something happening at a holiday get together that isn't appropriate, you need to step in to stop it. You don't need to be a jerk about it, but you do need to make clear that it is not acceptable and may not continue. It won't mean that an EEO complaint can't be filed on the matter, but it will help reduce the agency's liability in the case. That's the lesson from *Margorie L.*

If you haven't dealt with issues like those reported in the *Williams* case, it's not too late. Management needs to be able to show under *Douglas* that the employee knew or should have known that what he was doing was not acceptable. The Navy fell short there because they knew about the behavior and never told him it was not acceptable. In other words, when you don't enforce the rule, the rule doesn't mean anything.

If you work in an environment where inappropriate conduct has taken place previously, just remember that when people are partying, potentially with alcohol involved, the likelihood of it happening again is going to go up. So, get the word out to the group, or to individuals if there are just a few you worry about, that this year's holiday party is going to be different. Haga@FELTG.com

[Editor's Note: Thanks to Barbara for bringing *Williams* to our attention. To get the facts straight, Williams:

1. **Grabbed a woman's butt, and**
2. **Licked another woman's ear.**

Yet the agency could not fire him because it had never told him that such behavior was inappropriate? Also, there was a "hugging culture" within the office? Each of these acts is a battery, the butt-grabbing being additionally a criminal sexual assault here in the great state of California.

No wonder people get elected who think that civil servants cannot be held accountable. Yes, management could have done more, but the greater fault in this case lies with the US Merit Systems Protection Board.]

EEOC Survives Motion to Dismiss in Federal Court on Claim of Sex Discrimination
By Deryn Sumner

In a decision issued on November 4, 2016, the U.S. District Court Judge in *EEOC v. Scott Medical Health Center* denied the defendant's motion to dismiss the case and credited the EEOC's argument that claims of sexual orientation discrimination are claims of sex discrimination under Title VII. As we've talked about several times in this newsletter, the EEOC first articulated this argument in a decision issued by the EEOC's Office of Federal Operations, *Baldwin v.*

Department of Transportation, Appeal No. 0120133080 (July 15, 2015).

The defendant's motion to dismiss centered on two arguments: first, that the EEOC's lawsuit was untimely and that the EEOC failed to meet administrative procedural requirements prior to filing. The District Court addressed each requirement in turn and found that the EEOC had complied with the necessary procedural requirements and timely initiated the lawsuit.

The defendant's second argument was that the lawsuit failed to state a claim because Title VII does not prohibit discrimination on the basis of sexual orientation. Considering the EEOC's response in opposition, the U.S. District Court judge distilled the argument to be "whether, but for Mr. Baxley's sex, would he have been subjected to this discrimination or harassment. The answer, based on these allegations, is no." The complaint alleges that the employee's supervisor subjected him to verbal slurs based on his sexual orientation and made offensive statements and asked highly intrusive questions of the employee regarding his sex life.

The District Court Judge's decision addressed the prior Supreme Court precedent and noted the recent district court decisions in other jurisdictions before concluding, "That someone can be subjected to a barrage of insults, humiliation, hostility and/or changes to the terms and conditions of their employment, based upon nothing more than the aggressor's view of what it means to be a man or a woman, is exactly the evil Title VII was designed to eradicate. Because this Court concludes that discrimination on the basis of sexual orientation is a subset of sexual stereotyping and thus covered by Title VII's prohibitions on discrimination 'because of sex,' Defendant's Motion to Dismiss on the ground that the EEOC's Complaint fails to state a claim for which relief can be granted will be denied."

The EEOC's argument that sexual orientation claims are claims of sex discrimination under Title VII continues to be successful in district court litigation. It remains to be seen if these efforts will be sidelined in the coming months by the incoming administration and Congress.
Sumner@FELTG.com.

Agency Legacy Mistake; Board Misplaced Mitigation
By William Wiley

Back in the early '80s we employment law practitioners were working to try to figure out just what the new laws regarding removing unacceptable performers were all about.

One of the unanswered questions from the Act was this: If an agency is confronted with a poor performer, must it use the new 432/PIP procedures to remove him or was it free to use the old 752 "adverse action" procedures that effectively pre-dated the Civil Service Reform Act of 1978 (CSRA)? OPM took a shot in the dark and concluded that 432 procedures *must* be used and that going forward agencies were precluded from using adverse action procedures for performance problems.

I was a relatively new GS-11 Employee Relations Specialist at the time, working for the Naval Hospital in San Diego. One case I was wrestling with was that of a pediatric nurse who was non-performing in ways that could get patients killed. For example, she was not consistently monitoring intravenous injection sites to make sure the needle stayed in the right place. You don't have to have much of a medical background to appreciate that if the needle in a baby's arm gets twisted out of the vein, the IV fluid will go into the baby's arm tissues, causing swelling and perhaps resulting in loss of the arm or even the patient.

I remember calling the local OPM office for help. Back then (probably around 1981) I thought that OPM must have all the answers because the CSRA had put that agency in charge of advising us lowly HR officials at the various agencies around government. I explained the situation to them and they advised that I had to PIP the nurse and give her another 30 days or so to improve. I asked how many baby arms I should allow to be lost before we found her to be unacceptable during the PIP?

They then advised that I should assign a more qualified nurse to follow her around to make sure that when she made errors, there was someone there who could correct them before any babies died. I went and looked in my Spare Nurse Locker, and you know, there just weren't any spare nurses in there.

Three things were burned into my brain at that moment:

1. OPM does not know all the answers.
2. Legal interpretations that defy common sense are usually wrong.
3. Agencies absolutely must be able to use adverse action procedures to fire someone who's past performance is so bad, immediate removal without a PIP is warranted.

Not long after that, the Federal Circuit Court of Appeals and the U.S. Supreme Court agreed with me. Although they did not mention me by name, I am certain that they were thinking of my pediatric nurse when they ruled that yes in-deed-dee, an agency certainly can use adverse action procedures to fire a bad performer. *Lovshin v. Navy*, 767 F.2d 826 (Fed. Cir. 1985), *cert. denied,* 475 US 1111 (1986). But there is one caveat: an agency cannot fire someone for poor performance using adverse action procedures if, under the employee's performance plan, the performance would have been acceptable. In other words, an agency cannot say that 40 widgets per week is the minimum acceptable level of performance for 432 purposes, then order the employee to produce 45 widgets per week, and THEN remove the employee under 752 for "Failure to Perform Duties" or some similar charge label when only 42 widgets are produced.

Common sense to me.

Thirty years later, DVA fired a GS-7 Supervisory Program Specialist using adverse action procedures (no PIP) based on the following charges, all of which smell a lot like poor performance:

- Failure to Properly Perform Duties
- Failure to Perform Supervisory Duties
- Failure to Perform Duties in a Timely Manner

The bottom line to these charges was that the employee was responsible for placing DVA patients waiting for a medical appointment into available appointment slots, a process known as "slotting." The Deciding Official testified that slotting should be accomplished at a rate of 98 to 100% of the time. Unfortunately for DVA, the employee's performance standard said that slotting was unacceptable if it fell below 85% efficiency. This mistake, plus some failures of proof caused the judge to set aside the removal and replace it with a demotion from a GS-7 Supervisory Program Specialist to a GS-5 Medical Support Technician.

I think I'm going to start using the term "legacy mistake" for agency procedural errors like this. It's been a quarter of a century since the court laid down the *Lovshin* Rule. We've been teaching this legal point in FELTG's fantastic *MSPB Law Week* program for about 15 years. It's one thing to make a procedural error in an untested area of law. It's a substantially different situation when we make a mistake that has been a mistake for 30+ years; a legacy mistake indeed.

So the agency made a mistake in this case. Well, so did the Board. Not necessarily a mistake in law, but a mistake in the reality of the federal workplace. When the Board found removal to be excessive, it replaced it with a demotion to a Medical Support Technician. Help me here; how does the Board know that the agency has work for a Medical Support Technician to do? Maybe all of its Medical Support Technician positions are filled and all the Medical Support Technician work is getting done. Does the Board expect the agency to run a RIF to vacate an existing Medical Support Technician position so that the appellant can be placed into it? Alternatively, does the Board think that the agency should just have the demoted employee sitting around waiting for more Medical Support Technician work to come in to be done? When the Board mitigates a removal to a demotion without evidence that there is lower-graded work to be

done, it's messing with the position management authority of the agency. Yes, if an adverse action penalty is too severe, the Board should be able to mitigate it – but not by interfering with the agency's decisions as to how to run an efficient workplace. Wiley@FELTG.com

COMING TO SAN DIEGO
Developing & Defending Discipline: Holding Federal Employees Accountable
February 28 – March 2

Holding federal employees accountable for performance and conduct is easier than you might think. Join FELTG for this three-day program as we discuss:

Tuesday - Accountability for Conduct and Performance, Part I: Accountability and supervisory authority; discipline and misconduct theory and practice; penalty defense and due process; discipline procedures and appeals; psychology of performance appraisal; performance-based removal procedures.

Wednesday - Accountability for Conduct and Performance, Part II: Completing a performance action; team workshop; mentoring programs; handling the absent employee; union considerations; understanding the federal supervisor's personal liability in employment actions.

Thursday - Defending Against Discrimination Complaints: The Supervisor's Role: The role of EEO in the federal government; defining protected categories: race, color, national origin, religion, sex, age, disability, genetic information and reprisal; theories of discrimination; agency defenses; what to do if you're a Responding Management Official in a complaint; what happens if you're called as an EEO witness.

This class meets OPM's mandatory training requirements for federal supervisors found at 5 CFR 412.202(b). Registration is open now!

Clearing Up Some Confusion on Accommodating a Disabled Employee's Commute
By Deborah Hopkins

Reasonable Accommodation for disabilities is (still and always) a hot topic. In response to my article in September's Newsletter (Is it Just Me, or is Reasonable Accommodation Becoming Trickier?) I received a follow-up question. So let's continue the discussion.

> Dear Ms Hopkins,
>
> I read your guidance on reasonable accommodation with great interest (as always), and saved it for future reference.
>
> However, I was surprised you did not address the possibility that the arrangement to work from office A had been made to facilitate a shorter commute. In my experience, a request to work from Office A instead of B, usually has a lot more to do with a preferred commute than a disability related to the duties of the position.
>
> At my agency, we have had two recent "commute-driven" requests for reasonable accommodation, supported by quite flimsy medical documentation. In considering these cases, I had been working under the assumption that (irrespective of their medical documentation) we do not accommodate HOW someone gets to work, but just the duties of the position once they arrive....
>
> Would you mind adding your comments on our responsibilities with regards to commuting?
>
> Thanks.

Here's my response (not legal advice – just my thoughts).

Hello FELTG Reader,

Thanks for the follow-up question.

Let's tackle the documentation issue first. If an employee refuses to provide medical documentation related to a disability, then the employee has essentially waived his right to reasonable accommodation (RA) because he has failed to participate in the interactive process. *See Akbar v. U.S. Postal Service,* EEOC No. 0120081202 (EEOC OFO 2011).

Now on to the commute question. There's some conflict when it comes to commuting and reasonable accommodation; the courts generally say that employers are not required to accommodate issues related to the employee's commute but EEOC "precedent clearly has established that a request for telecommuting or a shorter commuting time because of a disability triggers an Agency's responsibility under the Rehabilitation Act." *Complainant v. HUD,* EEOC No. 0720130029 (EEOC OFO 2015). In this HUD case, the EEOC said the agency denied the complainant RA when it refused to allow him to telework and/or work one day a week in an office nearer to his home than the office to which he was assigned. In this case the EEOC said that commuting is a major life activity, and that because of the complainant's spinal condition the agency was required to accommodate his physical inability to commute the longer distance to the office.

Contrast that with the case Bill discussed in March (Accommodating the Disabled Commuter), where the complainant was requesting the agency provide him with a car and driver – an accommodation that directly opposed what Congress has said about commuting being a personal expense. *Gerald L. v. DVA*, EEOC No. 0120130776 (2015). In that case the EEOC reiterated that, and said the VA was not responsible to get the employee to and from work. In addition, the complainant had to be at the physical location to perform the essential functions of his job. This is fairly different than the HUD case above, where the complainant could perform the essential functions of his position in a different location, and never asked the agency to pay for a driver.

I agree that sometimes (too often, probably) the request for a different work location is tied more to convenience than actual disability, but it needs to at least be considered as a potential accommodation during the interactive process – after you get medical documentation.

So no, you do not need to accommodate the method of how the employee gets to work but you do need to consider whether they HAVE to be at the worksite to which they're assigned. The conservative line of action here would be, after receiving appropriate medical documentation, to consider each employee's requests and consider whether they can perform the essential functions of the position from home or perhaps at a closer office. If they can, that solution would be a potential reasonable accommodation – but if other accommodations are available the agency is free to choose another option. As long as you have a legitimate, nondiscriminatory reason (a business-based reason) that the employee needs to be at the main worksite, and can show that if they are not there it creates an undue hardship, you don't have to grant the request for a different work location as an accommodation.

I hope this helps - as you know each RA request is a unique situation and must be looked at independently. Please let me know if you have any other questions.

Let's keep the discussion going! What's next? Hopkins@FELTG.com

OFO Misconstrues Standard for Grant of Summary Judgment
By Deryn Sumner

Although most decisions issued by the EEOC's Office of Federal Operations affirming grants of summary judgment by administrative judges are worthy of no more than a simple skim, the recent decision of *Juanita K. v. Department of Homeland Security*, EEOC No. 0120143236 (October 21, 2016) caught my eye because, based on the limited information provided in the decision, I think the Commission got it wrong.

The facts, as presented by the EEOC in the decision, are as follows. Ms K. worked as a Voluntary Agency Specialist for FEMA. (After some Internet sleuthing, it appears a Voluntary Agency Specialist is the interface between FEMA and volunteer organizations after national disasters occur). After the Agency did not reappoint her to her position, she filed an EEO complaint alleging race, age, and sex discrimination, and retaliation. After the Agency completed an investigation and the complainant requested a hearing, the administrative judge granted summary judgment in the Agency's favor. The administrative judge found that there were no material facts in genuine dispute and the Agency had established legitimate, non-discriminatory reasons for its actions. As we know, summary judgment is only appropriate when there are no material facts in genuine dispute and the factfinder should construe the facts in the non-moving party's favor when considering these facts.

Ms K. appealed the final action adopting the grant of summary judgment. And on reading the Commission's decision, it seems like Ms K. had evidence of pretext. Here's what we know, directly from the Commission's decision:

> Here, according to the Agency, Complainant was not reappointed because Complainant exhibited conduct which was not "conducive" to the workplace, including communicating with coworkers in a tone that was "rude and demanding" and "threatening." This is a legitimate, nondiscriminatory reason for the Agency's action.
>
> In an effort to identify a genuine issue of material fact, Complainant points out that when she asked why she had not been reappointed, her supervisor initially stated that "staffing needs" made reductions in force necessary, never mentioning any problem with Complainant's conduct. As Complainant characterizes it, her supervisor's explanation was "inconsistent with the rationale she latter supplied to allegedly support the non-reappointment." The Agency acknowledges that its initial explanation for its action was false. It explains that the Agency official who gave this explanation was not candid about the true reasons for not reappointing Complainant because she wished to avoid a confrontation with Complainant. Complainant argues that the inconsistency between the Agency's first explanation and what it now claims is the true reason for its action creates a genuine issue of material fact precluding summary judgment.

So the Agency admits that it initially gave the complainant a false reason for not reappointing her to the position and later gave her a different reason. Sounds like pretext to me, and a fact that should at least get Ms K. to a hearing. But the Commission disagreed, stating:

> Complainant's position is not well taken. The fact that the Agency initially gave a false explanation does not necessarily provide support for a finding of discriminatory animus. As the Supreme Court observed in *Reeves v. Sanderson Plumbing Prods. Inc.,* 530 U.S. 133, 148 (2000) "[i]f the circumstances show that the defendant gave the false explanation to conceal something other than discrimination, the inference of discrimination will be weak or nonexistent" (internal citations omitted). Here, the only evidence as to motivation shows that the Agency gave a false explanation in an effort to avoid a confrontation with Complainant, whom Complainant's colleagues regarded as rude, demanding and threatening. The inference of discrimination is nonexistent. No genuine issue of material fact requiring a hearing is presented.

Now again, I don't know anything about this case beyond what is contained in the five-page decision from the Commission. And I'm not saying that Ms K. can ultimately establish that the Agency did not reappoint her because of discrimination. But based

on what is in this decision, I do think this was a case where a hearing would be appropriate so the judge could make credibility findings, rather than simply dismiss the case on summary judgment. The Commission appears to take at face value that Ms K. was in fact "rude, demanding and threatening" without requiring an actual showing. I think the Commission got this one wrong. Sumner@FELTG.com

Webinar Spotlight:
When the OSC Knocks on Your Door: Crucial Information for Agency Representatives
December 8, 2016

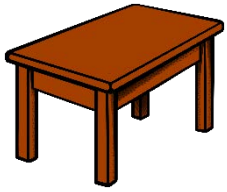
There's no feeling in the world like getting a call from the Office of Special Counsel (OSC) – and we aren't talking about warm, fuzzy feelings. It's something we hope you never have to experience, but it's so important that Bill Wiley wants to spend 90 minutes with you so he can prepare you for exactly what you need to know in case the call comes in.

During this session, Bill will describe the two most common types of disclosure investigations you'll likely be involved in: whistleblower disclosures, and Prohibited Personnel Practice investigations. After that, he'll discuss:

- OSC's investigative authority
- Formal and informal stays
- Prosecutions by OSC
- OSC interviews: what to expect
- Successfully navigating settlement discussions

He'll also describe some of the legal tactics OSC uses, so you can be prepared to answer anything they might bring up. This is critically important for all agency attorneys and reps, especially as whistleblowers continue to receive higher levels of Congressional protection.

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



Tables of Penalties Can Be Deadly
By William Wiley

Questions, we get questions. And here's a good one from a longtime reader who is wrestling with an age-old problem: What to do with an unhelpful Table of Penalties.

> Dear FELTG Rock Stars-
>
> I'm another "loyal reader" and dealing with a charge issue. My question is, from my table of penalties, there isn't an official charge that includes the term "lack of candor." Do I just write up the analysis under the table's charge "Misrepresentation, falsification, exaggeration, and concealment or withholding of material fact in connection with an official Government investigation, inquiry or other administrative proceeding"?
>
> Thanks for your time. I asked my boss if I could attend one of your FELTG training sessions, and he said no because it was too expensive. In my opinion, my boss is short sighted. This employee is a really bad actor. Your class would have helped me tremendously.

And here's our FELTG somewhat-snarky response:

Hi there, Loyal Reader-

I wonder what your boss thinks a single bad federal employee cost the government each year? We'd be happy to put on training for half that amount.

As for your question; no, no, no. Do NOT under any circumstances try to squeeze a Lack of Candor charge into a table of penalties that does not use that charge. Lack of candor is the brass ring in discipline charging these days, much-much better than charging falsification or any of that other stuff. Lack of Candor does not require you to prove an "intent to deceive" as you would have to prove with the charges in your table. Intent is difficult to prove

and we avoid charges that require a proof of intent whenever we can.

The key is that you are not obligated to reference a charge in your table of penalties when you discipline an employee. See *Farrell v. Interior*, 314 F.3d 584 (Fed. Cir. 2002). The Table is a guide, not controlling policy. So you simply draft the proposal letter like this: "Charge 1 – Lack of Candor" without any reference to the agency's Table of Penalties. Then, use the rest of the *Douglas* Factors to justify and defend whatever penalty you select. When you get to *Douglas* Factor 7, you say this, "The charge in this case is not identified in the agency's Table of Penalties." Mic drop … you're done.

Hope this helps. Wiley@FELTG.com

Appendix Q to MD-110 Lists Exactly What Agencies Need to Provide to Prove Compliance
By Deryn Sumner

We've talked a few times in this space about the changes the Commission made to Management Directive 110 in August 2015. One new addition we haven't yet discussed is the addition of Appendix Q, a chart that provides examples of the types of evidence an agency should provide to establish proof of compliance with the different types of relief commonly ordered in Commission decisions. As someone who represents both employees and agencies in federal sector EEO complaints, I know firsthand how compliance issues can linger long after the Commission has ordered the agency to implement remedies. Both sides are more than ready to move on, but are stuck in a back-and-forth to ensure everything has been implemented and finalized. Even though the Commission orders the relief to be implemented, there is often room for disagreement on the details.

Take for example, back pay. A standard order from the Commission regarding back pay reads as follows:

> The Agency shall calculate the amount of lost wages, including interest, for the time periods of February 13, 2006 to August 2006; and September 2007 to January 18, 2009. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due Complainant, pursuant to 29 C.F.R. § 1614.501, no later than sixty (60) calendar days after the date this decision is issued. The Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. The Agency shall provide Complainant with its specific reasoning and calculations on how it reached this amount of back pay. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. The Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision.

This specific language comes from *Michelle G. v. Department of Navy*, Appeal No. 0120160822 (October 20, 2016), although it reads like many back pay orders. There are lots of potential areas of confusion in such an order: what if the employee worked in a position with overtime, shift differentials, or would have received a step increase during the time period in question. Often the agency issues a check for a lump sum to the complainant without an explanation as to how the agency arrived at that amount. If he or she cannot figure it out or cannot get a clear explanation from the agency, the only option is to file a petition for enforcement. And the most common remedy issued by the Commission in ruling on such

petitions for enforcement is to order the agency to provide a detailed accounting of how it calculated the back pay.

Appendix Q attempts to reduce the number of compliance actions by providing a list of documents that an agency should provide for each type of compliance action. For back pay, there are four types of documents listed:

- Computer printouts or payroll documents delineating gross back pay before mitigation and interest, and
- Copies of any cancelled checks issued; or a copy of a print screen showing an electronic funds transfer.
- Narrative statement by an appropriate agency official of total monies paid. An appropriate agency official must be one to know with reasonable certainty that the payment was made. (Last resort)
- Documentation must include total monies paid, to whom, and when.

To look at another example where compliance issues crop up, in order to establish compliance with an order to provide training, Appendix Q states that the agency should provide:

1. Attendance roster at training session(s) or a narrative statement by an appropriate agency official confirming training hours, course titles and content, if necessary.
2. Course description providing some indication that the training was appropriate for the discrimination found or commensurate with the order.

Agencies should utilize this Appendix to put everyone on the same page regarding how an agency is implementing a Commission order. You can access Appendix Q here: https://www.eeoc.gov/federal/directives/md-110_appendix_q.cfm. Sumner@FELTG.com

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