Federal Employment Law Training Group
Training By Professionals For Professionals

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Introduction

I was a zoologist, then a psychologist before I fell into being a federal employment law attorney. And every now and then, I run across something from those two fields that has relevance in our work here at FELTG. For example, I recently read a study put together by a zoologist and an animal psychologist who studied wolf packs in the wild (Emily Almberg and Kira Cassidy, Pennsylvania State). They were interested in seeing whether the makeup of a pack relative to the sex of individuals had any effect on the success of the pack. Not surprisingly, they found that packs with more males than similar-sized packs were more successful in battles for territory. Makes some sense in that males of many species, including wolves, have greater size and muscle mass, relevant characteristics when it comes to physical aggressiveness. A single additional male meant a 65% increase in success for that pack. However, the finding that surprised me is that in fights between packs of equal size, the pack with an old wolf in it of either sex increased its chances of success by 150%. That's more than double the increased advantage brought by an additional male. So how is that relevant at FELTG? Come to our *MSPB and EEOC Hearing Practices Week* seminar November 2-6 and see how a couple of old wolves can help your pack be more successful. Hooowwwlll.

Wm B Wiley

William B. Wiley, FELTG President

UPCOMING WASHINGTON, DC SEMINARS

Absence & Medical Issues Week
September 28 - October 2

MSPB & EEOC Hearing Practices Week
November 2 - 6

FLRA Law Week
November 16 - 20

AND, IN SAN FRANCISCO

Legal Writing Week
December 7 - 11

WEBINARS ON THE DOCKET

Gender Stereotyping: Keeping it Out of Your Agency
September 17

Handling Within-Grade Increases: Eligibility, Denials and Appeals
October 22

Legal Writing for MSPB Practitioners
October 29

"You Can't Ask For That!" Additional MD-110 Revisions Regarding Discovery
By Deryn Sumner

Last month, I talked about the substantial revisions the EEOC made to Chapter 1 of MD-110 as to how agencies can and should avoid conflicts of interest between those who process complaints and those who defend them. There were other substantial changes as well, including a major one to Chapter 7 regarding what types of information agencies can seek in discovery about employees' medical conditions and tax information. The revised MD-110 includes an entire new subpart to subsection B. *Right to Seek Discovery*:

4. Requests for Private Information Should Be Limited

> Agency requests for the medical records of complainants should only occur to establish or challenge disability status or the right to reasonable accommodation in Rehabilitation Act cases, or when a complainant is asserting a claim for compensatory damages and has sought medical treatment for one or more stress-related conditions. In such instances, agency requests for medical records shall be narrowly tailored to the condition(s) and temporal scope at issue. As discussed in detail in Chapter 11, Section VII, complainants are not required to prove compensatory damages through medical records or other expert evidence. See Lawrence v. U.S. Postal Service, EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Dep't. of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)).
>
> Where a complainant is pro se, agencies must request the Administrative Judge's prior permission before making requests for medical information, and the Administrative Judge shall advise the parties of this provision at the initial status conference. The Administrative Judge shall also explain that a complainant should contact the Administrative Judge to request a protective order if the complainant believes agency counsel is seeking overly broad or intrusive medical records through discovery requests.
>
> Similarly, agency requests for wage information should only occur when the complainant is making a back pay claim and has received compensation for subsequent employment. Agencies are not authorized and must request prior permission from the Administrative Judge before making requests for production of a complainant's tax records except with respect to W-2 (earned income) and Schedule C (profit or loss) documents.

http://www.eeoc.gov/federal/directives/md-110_chapter_7.cfm#_Toc425745314

So a few things to discuss here. First, after the implementation of the ADA Amendments, complainants do not need to provide substantial medical information to establish that they are individuals with disabilities. The main purpose of the Amendments Act, signed into law more than six years ago now, was to reinstate a broad scope of protection under the ADA in favor of expansive coverage and without the need for extensive

analysis (I explain with a hint of exasperation, after just this month informing an EEO investigator that no, my client with a very obvious disability does not need to respond to 12 questions about how he is substantially limited in a major life activity). Gone are the days when agencies should be asking for extensive medical documentation in disability cases and the updated MD-110 language emphasizes that. Sure, there are still going to be some medical conditions that are transitory or minor, or don't substantially limit an employee in a major life activity, but those cases are typically the exception in my experience.

Agencies can still seek the documents and records that complainants intend to use to support claims for compensatory damages, but, as the Commission points out, medical records are not required to receive such awards. Remember, the EEOC upheld an award of $100,000 in non-pecuniary damages to the complainant in *Fivecoat v. Dept. of Air Force*, EEOC No. 0720110035 (May 15, 2012) where she didn't seek medical treatment because of concerns over her security clearance.

It's also interesting to see the limitation on asking for information on wages in discovery. The Commission is correct that unless there's a claim for back pay, such requests are irrelevant. I will be interested to see if administrative judges are properly advised and do implement the requirement to discuss prohibitions on overly broad requests and the right to seek a protective order with pro se complainants. Compliments to the EEOC for protecting complainants from being required to hand over more documentation than is relevant.
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Once More: MSPB Wrong – FELTG Right

By William Wiley

Ya-HOOOO! Oh, yeah! Oh, yeah! Who's your daddy? WHO'S YOUR DADDY!

Why all the gleeful excitement? Well, once more FELTG's opinions about mistakes the Board has made have helped change the course of history. Several years ago, FELTG Brother Ernie Hadley wrote an article pointing out that an MSPB decision regarding discrimination relied on outdated EEOC precedence. Within weeks, the Board issued an amended decision correcting its analysis in line with Ernie's reasoning. Later, Ernie dragged himself down to DC personally and argued to the Special Panel that MSPB's interpretation of disability law was wrong. And lo and behold, the Special Panel agreed with him and reversed MSPB's decision.

As for this writer, my personal claim to fame was my position in a retirement annuity case, one in which I was the appellant. Although the Board held against me four times (two times before the judge and twice before the members) the Federal Circuit agreed with me in the first petition for review, and DoJ declined to defend the Board when I PFRd MSPB's second decision. Yes, that's right; MSPB's rationale for denying my annuity appeal was so unsupportable that the government didn't even defend it. It was a sweet day when OPM's check for a $70,000 overpayment showed up in my mailbox.

And last week's mail was almost as sweet. Thanks to several newsletter readers who took the time to alert me to the decision, I see that the Federal Circuit has sided with FELTG and declared that the Board was wrong when it held that a federal employee cannot not be reassigned geographically unless the employee wants to be reassigned. *Cobert [OPM] v. Miller*, Fed. Cir. No. 2014 (September 2, 2015).

When the court undid the harm caused by the *Miller* decision, it did so with gusto. It didn't just MODIFY or REMAND the Board's *Miller* decision, it REVERSED it. That's like saying the Board didn't just make a little mistake, the members really blew it. Read some of the court's language:

- "The Board erred as a matter of law in abandoning the two step approach" previously set forth by the court.
- "Thus, contrary to what the Board said in *Miller II*, we did not merely 'endorse' the *Ketterer* framework. Rather, in clear and certain terms, we made it the 'law of the

circuit.' *Ketterer's* approach thereby became law that must be followed by the Board and panels of this court until overruled by either the Supreme Court or by this court *en banc.*"

- "The Board's statement that 'the agency failed to present any evidence showing that its reasons for directing [Ms Miller's] reassignment to Anchorage were bona fide such as to support a finding that her removal for refusing to take the reassignment promoted the efficiency of the service,' is not supported by the record and is contrary to the AJ's unchallenged findings of fact."
- "Finally, it is beyond dispute that 'failure to follow instructions or abide by requirements affects the agency's ability to carry out its mission.' Ms Miller's refusal to accept reassignment thus bore directly on the efficiency of the service. In addition, 'to say that an agency must select a penalty other than removal when an employee unjustifiably refuses a reassignment is in effect to say that the agency cannot insist on compliance with a lawful reassignment order.' It was not improper **[Editor's Note: I wish that they had just said "*proper*"]** for the agency to remove Ms Miller after she refused to accept reassignment."

In a nutshell, the court said to the Board members, you can't just make up law. You have to apply the law that exists. And that's exactly what we said in our articles in the FELTG newsletter. You may be members of a Board for which I have a great deal of respect, but you are bound by the law, nonetheless. You might think that it's a good idea that employees not be reassigned against their will, but that's what the government has had the legal right to do since its creation.

On behalf of the American public, thank you Federal Circuit for a righteous decision, thank you to those who argued on behalf of the government in this case, and shame on the Board members who thought that they were free to make up the law. To those who represented the unions and the appellant in this case, you did exactly what you are supposed to do: advocated righteously for the position of your clients, and I will never criticize that.

But I will stand fast as we try to do here at FELTG in our criticism of oversight agencies who make decisions that are not good for America, whether it be the deletion of employee names from agency decisions, or the nonsensical decisions of an agency that create an ineffective government (don't get me started on comparator employees).

Our client is the American public and in its service, we apply the law of the land. This time, the American public came out a winner, with a civil service that has to do what it's told, where it's told to do it. I could use another check for $70,000, but for now, I'll settle for this wonderful decision.
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Discipline in the Public View – Credit Card Misuse II
By Barbara Haga

In this sequel to last month's column we are going to examine two cases where the agency had problems with charges related to credit card misuse.

Whose Nickel was it?

In *Allen v. U. S. Postal Service*, 466 F.3d 1065 (Fed. Cir. 2006) the agency charged Allen with misuse of agency funds. The Federal Circuit disagreed with that characterization.

Allen was selected for a lateral reassignment within USPS. The selection entitled him to receive relocation benefits for his move from Ohio to New Mexico. He was given a $2,500 cash advance for miscellaneous expenses and a Citibank credit card which was to be used for temporary housing and other official travel-related expenses. The card agreement, which he signed, required that payments be made within 25 calendar days from the billing statement closing date. He began using the credit card in September 1999.

He charged over $6,000 to the card that fall. He did not submit timely claims for reimbursement; in fact, he didn't submit his first claim until November 1999. He was issued a check for nearly $4,700 in February 2000 (some of the reimbursement was taxable income so some of the payment went to the IRS). Allen did not deposit the check into his bank account until six weeks later, on March 24, 2000. Allen's wife then immediately wrote a $4,700.00 check to Citibank, which cleared his checking account on March 30.

While he was charged with misusing the Postal Service's funds, the Federal Circuit had a different take:

> It is important to understand that Allen's card expenditures involve funds loaned by Citibank, not by the Postal Service. Although it is true that Allen was eligible for the GICC only by virtue of his Postal Service employment, this does not change the underlying financial mechanisms at play. As the card's outstanding balance stood unpaid in violation of the cardholder agreement, Allen could only have been misusing Citibank funds. Thus, the proper starting place for analysis of the charge of misuse of Postal Service funds is the point at which Allen first came into possession of Postal Service funds: the issuance of a reimbursement check on February 11, 2000.

The Court held that Allen misused Postal Service funds representing the difference between the reimbursement amount and the payment made which came to roughly $600. In June 2000, Allen submitted another payment to Citibank in the amount of $400.00. Thus, beginning in June, Allen was misusing Postal Service funds in the remaining amount of $208.16. This misuse continued until final payment was remitted in September 2000. The Court's decision states, "… *we hold that the charge of misuse of Postal Service funds is only sustainable in part, in the amounts of $608.16 for the three months between March and June 2000 as well as $208.16 for the three months thereafter."*

Allen was also charged with not paying the Citibank bill as required by the cardholder agreement. That charge was sustained by the Court and the removal was affirmed on that charge and the portion of the first charge discussed above.

Charge the Right Thing! (Pun intended)

In *Johnson v. Treasury*, 15 MSPR 731 (1983), the Court did not disturb the mitigation of a removal to a downgrade to a nonsupervisory job. Johnson was a Supervisory Criminal Investigator, GS-14 with the IRS. He was removed based on the charge of 37 specifications of misuse of a government credit card. (There had been another charge related to misuse of a commercial telephone credit card, but that charge was withdrawn prior to the hearing.)

The charge related to misuse of the credit card stemmed from Johnson using government property (his government credit card) for an unauthorized personal purpose. That action, purchasing gasoline and other services for his personal vehicle, was not authorized by the IRS Handbook. Although the gas purchased with the card was mostly used for official business, it was the IRS position that he was not authorized to use the card in this manner. The Board noted that Johnson was not charged with accruing any financial gain as the result of his conduct.

One of the problems in the case was proving that Johnson should have known that he was violating an agency rule. The Board wrote

> The record indicates that appellant was not specifically on notice that his conduct was in violation of any agency regulations. Although the Motor Vehicle Management Handbook states that an employee

> is to be reimbursed for expenses incurred in connection with the use of a privately owned vehicle, there is no agency rule or regulation stating that the use of a government credit card to purchase gasoline and other services for one's private vehicle used on official business was prohibited.http://www.cyberfeds.com/CF3/index.jsp?contentId=43791&repository=cases&topic=Main - FN_4_1

The testimony of the deciding official and proposing official didn't help since they testified that they never discussed the proper use of a government credit card with Johnson and the deciding official "assumed" that Johnson knew how a government credit card was to be used.

Webinar Spotlight:
Handling Within-Grade Increases: Eligibility, Denials and Appeals
October 22, 2015

If you are looking for detailed information on WIGIs, join FELTG's Barbara Haga on Thursday, October 22, for the 90-minute webinar on the topic. During this session, Ms Haga will give you a primer on WIGIs, complete with detailed references to relevant MSPB decisions.

She'll also discuss eligibility for WIGIs, when a WIGI decision may be delayed, properly handling the notice of an acceptable level of competence determination and the reconsideration decision, and successfully defending the appeal.

Register your site today and get ready to assist supervisors and managers at your agency to properly act on WIGI determinations.

The Board noted that while the IRS may have been able to charge Johnson with offenses more serious than that for which he was charged, he was, in fact, charged only with misuse of the government credit card. The Board recognized his position as a supervisor and a criminal investigator required that he be held to a high standard of conduct, but found that other *Douglas* factors argued for mitigation. He had 18 years of service, he had been an exceptional criminal investigator, and he had no prior disciplinary record. And then, there was that problem about being on notice that his conduct was in violation of any agency regulations.

More on credit cards next time. Cha Ching!!
Haga@FELTG.com **[Editor's Note: These cases are classic examples of routine agency mistakes that we have been teaching about for nearly 15 years: inaccurate charging and Element 2 in all disciplinary actions – Putting the employee on notice of the rule that has been violated. Come to our seminars. Learn this business. There are no excuses for basic mistakes like these.]**

Hearing Practices: Suggestions from an MSPB Administrative Judge
By Deborah Hopkins

A few weeks ago Ernie and I taught a weeklong onsite training course on hearing practices at an agency in Washington, DC. As part of that program we were honored to have MSPB Administrative Judge (AJ) Nicole DeCrescenzo responded to questions by the group about best practices - and things to avoid - at MSPB hearing. Judge DeCrescenzo also discussed some things to consider before the hearing, while the agency is still in the process of taking an appealable employment action for poor performance or misconduct.

Here are a few of the takeaways, in no particular order of importance:

1. **Work with what you've got.** The judge cautioned against coaching a witness out of their ordinary comfort level or pattern of speech. It's important to be aware of the balance between "looking good" in front of the judge and still being yourself. As agency counsel or appellant's

representative, you don't have to smooth all the edges of a witness. Let people be who they are and speak the way they would normally speak. Anything else may affect credibility.

2. **Credibility.** Speaking of credibility, the judge identified the *Hillen* factors, which comprise the specific things judges look for in determining how credible the witness is. Judge DeCrescenzo explained that demeanor is the least reliable of these factors, and her last resort when determining credibility. However, with regard to demeanor, she made some observations about preparation of witnesses to testify before an AJ:

- Does the witness speak naturally, or does the witness seem to be scripted?
- There can be *too much* eye contact. An AJ is a trained professional fact finder. There are attorneys who routinely prepare witnesses to look a jury in the eye. For herself, Judge DeCrescenzo observed that this coaching does not communicate credibility, and instead be merely distracting, or even off-putting.

3. **Settlement.** The judge answered the often-asked question: Why do AJs push settlement? Judge DeCrescenzo explained that the simple answer is that a negotiated settlement is more likely to produce an effective result. Negotiated settlement provides both parties with choice, and choice is generally recognized as preferable to the absence of choice. After a hearing concludes and a decision is rendered, one party is going to be devastated with the outcome. There are no guaranteed wins before the MSPB, even if a case seems fail-proof. Each side needs to establish a real, genuine settlement position. Even if a party believes they have no intention of settling a case, there is a result that they want to guarantee. Therefore, it follows that in every case, there must be something the party would agree to in order to settle the case. Knowing what that is helps a litigator realistically evaluate the case for the client. Judge DeCrescenzo emphasized that such evaluation is a core responsibility of the advocate.

4. **Discovery.** Most AJs want to be as uninvolved in discovery as possible, and they trust that the parties are acting in good faith and are complying with discovery requests. Motions to compel frustrate a judge and wear on the judge's patience, and every judge has developed practices to decrease their level of involvement in discovery disputes. Judge DeCrescenzo prefers to handle any discovery disputes via oral conference rather than by written motions and responses. Not all judges prefer this method, so it's important to inquire about your AJ's preferences early in the process.

5. **Ask relevant questions.** Know the elements of your charges and legal issues, and what evidence will meet those elements. Ask questions that speak to the elements of the charges or the affirmative defenses. This is especially challenging for *pro se* appellants who have no litigation experience, but you might also be surprised how many seasoned representatives don't follow this basic rule.

6. **Transcripts.** The AJ does not automatically get a transcript of the hearing. If you order a transcript - a good idea especially if there are major disputes in material facts. If either party orders a transcript, the AJ will get one as well.

Just some things to think about.

By the way, registration is open (but is filling up quickly) for the limited-enrollment workshop *MSPB & EEOC Hearing Practices Week*, slated for November 2-6 in Washington, DC. Join us before it's too late!

The Right Way for Management to Respond to Reports of Co-Worker Harassment

By Deryn Sumner

Here at FELTG, we teach supervisors how to react to reports of harassment to avoid liability down the road. The supervisor in *Complainant v. Dept. of Army*, EEOC No. 0120130622 (August 28, 2015), did such a good job in responding to an employee's report of sexual harassment, I hope for our sake he or she attended one of our courses. This case highlights a textbook example of what steps should be taken after an employee alleges a hostile work

environment, to be able to establish an affirmative defense.

A female employee reported that her male co-worker subjected her to sexual harassment when he engaged in inappropriate sexually-based conduct in the workplace, including that he liked when she walked in front of him and when he sniffed in the direction of her breasts. The employee reported the comments to her supervisor but asked that he keep it "off the record." The supervisor responded by stating that the conversation would need to be "on the record." The supervisor also, after receiving the report, reassigned the male co-worker to another location and instructed him not to contact the complainant. The supervisor then reported the allegations and the agency "immediately" initiated an investigation. The very next day, the supervisor held an all-hands meeting and reminded the staff that workplace harassment is not permissible. All of these swift actions appear to have worked as the record reflected there was no further harassment reported, either from the complainant or any other co-workers.

So, what did the Agency do correctly here? Well, first, the supervisor correctly told the employee that her reports of sexual harassment could not be kept "off the record." Reports of workplace harassment should not be treated like secrets between friends in middle school. Second, the supervisor did not reassign complainant to separate her from the alleged harasser, as that could be perceived as punishing the victim at best and retaliating against her for reporting harassment at worst. As the EEOC's *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* states, "Examples of such measures [to effectively investigate complaints] are making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation." You can read the complete *Enforcement Guidance* at http://www.eeoc.gov/policy/docs/harassment.html

Third, the supervisor instructed the male co-worker not to have any further contact with the employee. Fourth, the supervisor immediately reported the harassment to the appropriate people and the agency launched an investigation into the allegations. The agency also acted appropriately in both having an anti-harassment policy already in place and providing training about reporting harassment in the workplace to the employees. We know this because the Commission's decision states the complainant acknowledged she knew of the policy and how to report harassment. And just in case any employees were not aware of the policy, the supervisor gathered his staff for a staff meeting the very next day after receiving the report and reminded everyone that harassment would not be tolerated.

The Commission doesn't reach a conclusion as to whether the comments and actions taken as a whole were unwelcome or were sufficiently severe or pervasive so as to constitute sexual harassment. And ultimately, it doesn't matter. As a result of the rapid response to the complainant's allegations, the agency avoided any liability for the co-worker's inappropriate conduct. Sumner@FELTG.com

Yeah, I'm Talkin' to You
By William Wiley

If you know any of the following people, please send them this open letter. All three are agency representatives who work for HUD, apparently in the Boston area:

Eric Batcho
Eric Levin
Kimberly Lenoci

Dear Eric x 2 and Kimberly,

You came THIS CLOSE || to losing *McCook v. HUD*, MSPB No. SF-0752-14-0389-I-1 (August 3, 2015)(NP) because of an uneducated mistake made by whomever it was that drafted the memo that proposed McCook's removal. Don't feel too bad because it's a mistake that I hear about agencies making even 35 years after we were supposed to know better. But it's a mistake that need not be made in the future, and the three of

you are in a much better position to fix things than am I.

The proposal letter that HUD gave to McCook did not have the 12 *Douglas* factors analyzed. As everyone knows who has been to the fabulous FELTG seminar *MSPB Law Week*, we recommend strongly that the proposing official attach a *Douglas Factor Worksheet* to the proposal memo so that the employee knows all the aggravating factors relied upon when selecting the penalty of removal (rather than some lesser penalty). The *Douglas* decision mandated that be done way back in 1981. The Board today enforces that requirement as an aspect of due process, the obligation that the agency has to notify the employee of everything it is relying upon to take the action. And as every practitioner who is old enough to read should know, violate the Constitutional right to due process and you (the agency) automatically lose.

As recommended by some of my colleagues, the deciding official did a complete a thorough analysis of the *Douglas* factors in the decision letter, relying to some degree on all 12 in reaching the decision to fire the employee. On appeal, the *pro se* appellant claimed a due process violation because he was not told what penalty factors would be considered in the proposal letter. And in my Wiley-World© of employment law, he had a darned good argument.

So watch how hard the Board had to work to let HUD off the hook regarding a violation of the employee's due process when it did not attach a *Douglas Factor Worksheet* to the proposal:

1. The proposal letter referenced the agency's *Adverse Actions Handbook*. The *Douglas* Factors are discussed in the handbook. Therefore, close enough for government work.
2. Although the deciding official relied on *Douglas* factor 8, notoriety, and the proposal letter made no mention of notoriety, the Board found adequate notice because the proposal letter mentioned "considerable concerns" regarding the appellant's ability to perform in his "important position." The members reasoned that the employee should have figured out that the deciding official might draw "an inference" from the description of the charge to know that notoriety was a factor.
3. Yes, the deciding official improperly considered *Douglas* factors 3, 4, 6, 9, 10, 11, and 12, factors that were not mentioned even by inference in the proposal letter. But, ah HA! The unrepresented appellant did not know enough to argue in his closing brief to the judge that his due process rights were violated. Therefore, he cannot raise that argument in PFR to the Board.

Please, folks. Learn the law. Apply it properly. We're THIS CLOSE || to losing the civil service protections that have been in place for over a century. We have to do a better job as a profession. HUD won this appeal, but only through the grace of the Board's creative analysis of a terribly flawed proposal letter. Had this appellant not been seen as a fundamentally bad guy with three counts of felony stalking and two felony counts of making criminal threats, I doubt the Board would have worked this hard to find that due process was satisfied.

Attach a *Douglas* Factor worksheet to the proposal letter. And come to the darned classes. Keep America strong. Wiley@FELTG.com

EEOC Hearing Practices: Crafting Coherent Prehearing Submissions
By Deryn Sumner

So the Administrative Judge (AJ) considered any motions for summary judgment, found some genuine facts in material dispute or credibility determinations that needed to be made, and determined that the case should go to a hearing. Or, perhaps, the AJ long ago set a deadline for filing prehearing submissions, hasn't ruled on any pending motions, and hasn't responded to requests for a status conference to discuss the pending motions. Either way, it's time to draft a prehearing submission.

What's the first thing I'm going to recommend? The same thing I say almost every month! Read the

orders for any formatting requirements, page limits, and service requirements. I've seen prehearing submissions have many different requirements over the years. Some administrative judges want a complete statement of facts with citations to the record, or the expected testimony, to support each fact. More and more judges are requiring specific information about the types of damages the complainant is seeking, including exact numbers and recitation of specific cases to support a claim for non-pecuniary damages.

When you identify witnesses, be specific and detailed in the proffer. Including the same description for each witness ("Mr. Smith will testify about the issues raised in this complaint") is a good way to get your witnesses denied for lack of relevance or duplicative testimony. Explain who each witness is, how she or he relates to the case, and what specific testimony he or she is expected to provide. Unless otherwise specified, plan on drafting between one to two paragraphs for each witness. Identify those witnesses who are no longer federal employees and whether or not they have agreed to voluntarily appear to testify. (Unlike the MSPB, the EEOC does not have subpoena authority).

If the AJ requires you to provide the applicable legal standards, consider finding some particularly on-point cases with similar fact patterns as part of your submission. If it's a really good case, you can recycle it as part of any closing submissions or arguments.

Pay attention to any specific requirements for exhibits. Does the AJ want them provided now, or just exchanged with the other side prior to the hearing with a copy brought to the hearing? Should you identify them by letter or number? Even if not required, it's always a good idea to paginate documents. Binders have a way of exploding during hearings. I like to use a program like Adobe Acrobat to insert a footer with the case name and number and identifier for each exhibit. If you plan to use deposition transcripts at the hearing, either to impeach credibility or refresh recollection, most AJs seem to prefer that you bring copies for everyone, but don't overwhelm your submission by including complete deposition transcripts in your prehearing submission.

Some administrative judges also require the parties to identify whether settlement discussions have taken place and even what roadblocks exist to settling the case. Be prepared to demonstrate that discussions have occurred in good faith to avoid the ire of the AJ.

Finally, to the extent you can within the requirements set by the AJ, use the Prehearing Submission as an opportunity to set forth the case for hearing. Explain what the issues are, what facts your side will present, who will be used to present them, what documents in addition to the ROI will be introduced, and what legal standards apply. Never turn down an opportunity to frame your side's story for the AJ to read and consider before the hearing. Sumner@FELTG.com

I Feel Sorry for EEOC
By William Wiley

Last month, Deryn gave us a well-written article explaining the new MD-110 changes that EEOC recently promulgated. One of the major areas of clarification in that document dealt with the role of agency counsel in the EEO complaint process. Essentially, EEOC is requiring agency heads to have two separate law offices that might well have different and competing views of the legal theories and evidence regarding an employee's claims of civil rights discrimination.

What MD-110 mandates is obviously an awkward situation. What if you personally needed legal advice, hired two different law firms, and one gave you advice just the opposite of the other? Would you hire a third to referee between the two? An agency head wants to know if there has been a violation of the civil rights laws in the agency's workplace. Having competing analyses does not help with that determination.

And that's why I feel sorry for EEOC. Congress has created a situation in which the Commission has no decent alternative but to require agency firewalls in

its legal offices. The more rational approach would be for there to be funding for an independent investigation of discrimination complaints so that an agency would not have to investigate itself. But that would require $$$, and our friends on the Hill don't like to spend $$$. That leaves EEOC with the job of doing the best it can with what it has. So now we know (thanks in large part to Deryn) that attorneys and others who defend management actions cannot be involved in the EEO complaint process.

However, I'm left with two confusing issues after reading everything I could about the MD-110 changes:

> **Advice to Supervisors**: It's now clear that management representatives cannot be involved in evaluating EEO complaints for legal sufficiency. No problems there. But can management representatives (legal and human resources specialists who defend the agency) advise management officials during the complaint investigation process? Is MD-110 violated if an attorney from the general counsel's office reviews and makes recommendations to a supervisor regarding the supervisor's statement provided to the EEO investigator? I remember that before these changes were issued, the word was that EEOC felt that sort of "involvement" was improper. The changes recently made do not address this situation squarely, and in my experience, it is a common situation that needs to be addresses.
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> **Secrecy of Complaint Investigations**: Now we have a big fat wall between the EEO folks in an agency and the legal/HR management representatives who advise relative to discipline. Let's say hypothetically that the EEO team conducts an investigation and settles a matter with a complaining employee. And let's say that during the investigation, the facts establish that a particular supervisor is a sexual harasser. Does MD-110 prevent the EEO crew from telling the management representatives that there is a bad supervisor out there who should be disciplined or perhaps fired? Rumor has it that there is a belief among the EEO staff at some agencies that whatever is discovered in the investigation process is to be kept secret on the EEO side of the firewall. Can that really be the intent of MD-110, that a bad supervisor is to be sheltered from discipline that might rightfully arise from misconduct discovered during the investigation of a discrimination complaint?

To its credit, EEOC has taken a step forward in a difficult area relative to the role of agency counsel in the EEO complaint process. However, to my mind, it still has a way to go if it really wants to provide day-to-day guidance for those of us out here trying to make the government work.

Another EEOC Note: The Commission recently announced that it now understands the stupidity of deleting complainant names from its decisions, as Brother Hadley has eloquently pointed out on many occasions to anyone who would listen. To undo its folly, EEOC has said that instead of referring to the alleged victim of discrimination as "Complainant," it will in the future generate a gender-specific *nom de plume* generic name for the complaint.

Good lord almighty. From silliness to foolishness. Adding fake names does NOTHING to resolve the underlying problem. Civil servants are PUBLIC employees. They are paid from PUBLIC funds. Therefore, the PUBLIC has a right to know who has filed complaints, who has committed acts of discrimination, and who were the witnesses to the illegal acts. If people don't want their names in a public database, then let them go work for a private-sector company. If you work for the fed, you work for me (and you and you) and we have a right to know what you're doing. So man-up or woman-up and be proud of who you are. As long as you do the right thing, you have reason to be proud.

And EEOC, just wait until your new gender-specific random-naming process results in someone who identifies as male being given a female-gender name. My goodness, will the lawsuits fly. I really do feel sorry for you guys. Gals. Whatever. Wiley@FELTG.com.