Federal Employment Law Training Group
Training By Professionals For Professionals

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Introduction

Once every six months I get a reminder email from an Amazon vendor that the water filter I previously ordered is now due to be replaced. So handy. I don't even have to think about it. Click REORDER, and the new filter shows up in a couple of days without my having to think about anything. So why don't we do that same sort of thing in employment law? In a recent report issued by MSPB's Office of Policy and Evaluation, OPE noted that the probationary period is highly misunderstood and underutilized. Why don't all agencies have an automated email reminder set to go out to every supervisor who supervises a probationary employee about two months before the probationary period expires? Something like, "Dear Supervisor: You supervise William Wiley. His probationary period ends in about two months. If in your opinion he is not performing at a successful level or is engaging in misconduct, click HERE." The excellent OPE report, discussed in an extended article below, concludes that agencies are not firing enough bad employees. Congress and the public in general think that we are not firing enough bad employees. A simple proactive system like this would help us address those concerns. Read on to see what else we recommend based on the report's elucidating findings.

– Bill

William B. Wiley,
FELTG President

UPCOMING WASHINGTON, DC SEMINARS

MSPB Law Week
September 14-18

EEOC Law Week
September 21-25

Absence & Medical Issues Week
September 28 - October 2

NEWLY ADDED! IN NORFOLK, VA

Advanced Employee Relations
September 15-17

WEBINARS ON THE DOCKET

Current Trends in Reasonable Accommodation: What to Emulate and What to Avoid
August 27

Gender Stereotyping: Keeping it Out of Your Agency
September 17

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

Meet **Rachel Schultz**, the FELTG Registrar. As Registrar, Rachel is an expert at juggling: she handles all of FELTG's open enrollment program and webinar registrations, takes care of creating, tracking and shipping DVD orders; manages invoices and accounts; conducts customer phone and email support; and coordinates training logistics - along with anything else that comes up.

Rachel has a Master of Science in Nationalism Studies from the University of Edinburgh, and a Bachelor of Arts in Sociology from Lee University. In her non-work time **[Editor's Note: Rachel has non-work time?]** she spends time with her husband and her two daughters, runs half marathons, and creates masterpiece meals in the kitchen.

Our Day of National Humiliation
By William Wiley

If Abraham Lincoln can call for a Day of National Humiliation, then I can, as well. Hey, old Abe didn't go to law school to become a lawyer; I didn't go to law school to become a lawyer – we are obviously cut from the same cloth.

So why am I calling for those of us in the field of federal employment law to spend a day being humiliated? Because I recently read the excellent report issued by MSPB's Office of Policy and Evaluation entitled, "Adverse Actions: The Rules and the Reality." The results of the study described in that report should cause all of us in this business to be humbled, humiliated, and ashamed. Here are three major findings for which there is absolutely no excuse, and for which we employment law "experts" are absolutely responsible:

1. **Document Drafting:** Supervisors reported that in 70% of cases, it took the employment law staff over SIX WEEKS to put together a proposed adverse action after the misconduct was discovered; 43% took over THREE MONTHS.
2. **Response Period:** Although the law says that a seven-day response period is adequate for an employee to respond to a proposed adverse action, in 93% OF CASES the deciding official extended that response time; in 2/3 of these extensions, that likely resulted in the proposed action being postponed with the government picking up the tab for the extra salary time.
3. **Burden of Proof:** Although the law says that an employee can be removed when the evidence of misconduct more likely than not supports termination, 90% OF DECIDING OFFICIALS mistakenly thought that the proof necessary to fire someone had to be at the exceedingly higher "BEYOND A REASONABLE DOUBT."

Of course, we here at FELTG have strong opinions relative to each of these problem areas.

Document Drafting: I am a slow writer. I average about an hour a page of wordsmithing for a legal document, and even then I make more typos than I would like (*res ipsa*). But still, that would never justify six weeks to develop a proposed adverse action. Here's the maximum it should be in most situations:

1. The supervisor collects evidence of the misconduct: coworker statements, emails, time keeping records, security tapes. Maybe a day of full-time effort. Maybe two. Remember, you don't need proof at the "beyond a reasonable doubt" level; only at the preponderance level (more likely than not).
2. The employment law practitioner drafts the charge, and with the assistance of the supervisor, does a *Douglas* factor analysis. Two to six pages of legally-sufficient documentation. Two to six hours max.
3. The practitioner collects the evidence to support the *Douglas* factor penalty defense documents: prior discipline, table of penalties, additional coworker statements, position description, past performance

ratings, organizational chart. Maybe a day? More likely four hours of full time work.
4. The practitioner organizes everything, prints out the letter, gets it signed by the supervisor, and attaches all the tabbed supporting material. Two hours.
5. The supervisor meets with the employee, presents the letter, and the employee is escorted from the building if the proposal is a removal. TOTAL TIME: Four to five days.

"But, Bill, I could never get things done this quickly in my agency because we require several levels of review and approval before an action can be initiated (whine, whine)." Then, you work in a bad agency. That's right. I said it. No pussy-footing around because I'm old and I am TIRED of this BS. I hear this stuff all the time:

- *I can't do anything until HR approves it.*
- *HR is OK with it, but now it has to go through legal.*
- *Legal says we have to run it by HQ.*

We have railed against multi-levels of review several times in this newsletter, in large part for the sophisticated legal reason that when an agency has many levels of authority, the appellant can attack each level on appeal, trying to find a racist, or whistleblower-repriser, or due-process-violator at any one of the approval levels. And when there are many links in the chain, it's a lot easier to find a weak link than when there are only one or two links. The Board's report points out the even more common sense reason to restrict the levels of review: it just takes longer. In my experience, reflected in the data collected by the Board, sometimes weeks and months longer.

If your agency requires multiple levels of review of an adverse action prior to proposal, it is a poorly run agency. I realize that I'm stepping on toes here, but it's the gosh-darned truth. If your front line managers and practitioners do not know how to take an adverse action, it is a failure of leadership because those front line people are not properly trained and supported. Thousands of times every day, pairs of commercial airline pilots make millions of life and death decisions without once calling HQ to ask for advice. In the middle of charging the basket, LeBron James doesn't stop to ask his coach whether he should take the shot. When thrown a question in a Presidential candidate debate, the candidates don't look too good if they say, "Wait a minute while I discuss the issue with my campaign team." And if your adult child has to call you to ask what to do with his utility bill, you indeed dropped the ball when it comes to being a parent.

I'll cut some slack for a developmental period. Everyone starts inexperienced, but through good training and coaching, should move up to an independently productive level. Also, I'll concede that there are some situations in which there has been some demonstrated slippage in ability, and a temporary injection of close hand-holding is necessary. However, every single policy statement issued by every agency head I have ever seen delegates the responsibility for taking adverse actions to front line supervisors, with the "assistance" of the agency's employment law practitioners. If your front line supervisors and employment law practitioners do not know how to take an adverse action independently within a reasonable period of time (*i.e.*, days, not weeks), it is a failure of leadership and policy if that cannot be done. And that's what the Board's statistics point out for us in bright colorful pie charts.

Response Period: In 1978, Congress said that seven days was enough of a time period for an employee to defend himself by responding to a proposed removal. So why give more time? Doing so doesn't strengthen the agency's case. Did you know that the Board has NEVER set aside an adverse action because the agency refused to grant the employee an extension of time to respond? If granting an extension does not improve your odds of surviving an appeal, and if the great leaders of our government passed a law that said seven days was adequate, then why, oh why, would an agency grant an extension?

- "I want to be fair to the employee." Well, Congress said that seven days is fair. Are you more powerful than Congress? They do get to make the rules, you know.

- "The employee's attorney needs more time." I once saw a prickly appellant's attorney accuse the deciding official of violating due process when he denied a request for additional time because the law allowed the employee to have a representative of his choosing, and he as the employee's representative of choosing was "too busy with other matters" to respond within the statutory time frame. As if the agency had to adapt to the attorney's schedule, delaying the removal action while paying the employee's salary. I was so proud of the deciding official when he told the appellant's attorney to pound sand.
- "I feel sorry for the employee." Fine. Then you pay the additional salary that an extension requires from your bank account, not from the government's budget. You weren't hired to feel sorry. You were hired to be efficient, effective, and fair.

I have no problem at all with extending the response period if it does not cost the agency very much additional salary. Four or five days beyond the statutory 30 days is fine. If the employee is in a non-pay status during the extension period (and blessed is the appellant's attorney who needs more time and offers that his client will accept LWOP during the extension), then weeks are OK. But if your deciding officials are granting extensions of time for responses that are costing the government money without a *very* good reason, then they are not doing what they are supposed to be doing. If you are not advising them that MSPB has pointed out how bad for our country this can be, then you are not doing what you are supposed to be doing, either. (Toes firmly stepped on again, I expect.)

Burden of Proof: Of the three agency shortcomings highlighted by MSPB's report, this is the one that hits hardest in the gut. I can forgive a line manager for not knowing the burden of proof, but I cannot forgive the employment law practitioners who advise that manager for allowing this to happen. 90% of deciding officials think that the proof burden is beyond a reasonable doubt? Good lord. One of the great gifts of the Civil Service Reform Act is the lower "preponderant" level of proof that is necessary for misconduct removals, with the even greater gift being the significantly lower "substantial" level for performance removals.

There are only two inexcusable reasons I can think of for this terrible mistake:

A. *The practitioner assisting the Deciding Official failed to brief the DO as to the proper burden of proof.* Every agency employment law practitioner in the country should have a standardized document that is routinely sent to a DO during the notice period explaining the burden of proof, the employee's rights to due process, and the other responsibilities that a manager has who is identified to make such weighty decision on behalf of the government. If you are not doing this, please start now.
B. *The HR specialist or attorney assigned to the case does not know the appropriate burden of proof.* Sadly, this is way too common in my experience. Oh, they mouth the words "preponderance of evidence," but then they refuse to "approve" a tentative adverse action because there is "not enough evidence" in their opinion to defend the action. The result is that the employment law practitioner requires more evidence than would be preponderant, thereby misleading the DO into believing that, "Well, gosh. Although I saw the guy do it myself, the HR office and lawyers keep telling me that is not enough, that I need videotape or other witnesses to be able to initiate a removal. Sounds as if they want proof beyond a reasonable doubt to me."

These three problems identified by the Board's report are no small matter. Taken together – or even in isolation – they fairly lead to the conclusion that it is oh so very hard to fire a bad government worker. And because of this unfair conclusion that is the direct responsibility of those of us in the field of federal employment law, Congress is seriously considering doing away with the most significant protections that a federal civil servant has. As many readers know, the House recently passed legislation that would allow DVA to fire employees

summarily without procedures, with the due process coming after removal before the Board in an abbreviated 45-day one-level appeal process. President Obama has threatened a veto if the bill reaches his desk, but you can bet your TSP fund that a President Trump or President Rubio will not issue a veto in similar circumstances.

Go look in the mirror. If you are an employment law practitioner in your agency, especially if you are in a leadership position from which you can establish policy and require training, and if you a) take longer than a week to initiate an adverse action, b) do not keep response periods close to the statutory limits, and c) fail to properly inform management officials of the correct burden of proof in cases before them, then you can consider yourself a participant in the potential dissolution of our civil service protections.

Hang your head in shame. You should be humiliated. Wiley@FELTG.com

Improper Intrusion of Agency Counsel In Updated EEOC MD-110
By Deryn Sumner

Earlier this month, EEOC issued a revised version of Management Directive 110 (MD-110). With the revisions, the Commission greatly expanded its discussion of the appropriate role of agency counsel in federal sector complaints processing, a pet issue of Ernie Hadley's and one he has been encouraging the Commission to address for years. The Commission has, through several decisions including *Complainant v. Dep't of Defense*, Appeal No. 0120084008 (September 8, 2014), *req. for recons. den.* Request No. 0520140438 (June 4, 2015) and *Rucker v. Dep't of the Treasury*, EEOC Appeal No. 0120082225 (February 4, 2011) admonished agencies for improper intrusion in the complaints process. With the release of this significantly expanded guidance, the Commission continues its focus on the issue.

Chapter 1 of the prior version of MD-110 dedicated about three paragraphs to explaining that agencies should avoid conflicts of interest or the appearance of such conflicts by preventing agency officials who work on EEO complaint processes from also working on the personnel side of things. The language in the prior version of the directive also stated that head of agencies "must not permit intrusion on the investigations and deliberations of EEO complaints by agency representatives and offices responsible for defending the agency against EEO complaints. Maintaining distance between the fact-finding and defensive functions of the agency enhances the credibility of the EEO office and the integrity of the EEO complaints process. Legal sufficiency reviews of EEO matters must be handled by a functional unit that is separate and apart from the unit which handles agency representation in EEO complaints."

The revised Chapter 1 of MD-110 goes into much more detail regarding how agencies should balance the obligation to "eradicate unlawful employment discrimination" with the "fiduciary obligation to defend the agency against legal challenges brought against it." MD-110 defines the term "agency representative" to include all employees who defend personnel policies and actions and specifically includes employees in the Office of General Counsel as well as non-attorney employees who serve as representatives and labor relations specialists.

MD-110 also speaks to the role of the agency during the investigation stage, stating:

> It is important to reiterate that prior to the issuance of the final agency action, the agency is responsible for the fair, impartial processing and resolution of complaints of employment discrimination. Because the agency carries this responsibility of impartially processing discrimination complaints, conflicts of interest can arise when agency representatives in offices, programs, or divisions within the agency with a legal defensive role play a part in the impartial processing. This does not mean that any involvement in the

EEO process by the Office of General Counsel or Office of Human Capital automatically creates a potential conflict, but instead refers to impermissible involvement in the EEO process by those employees or units of employees designated to represent the agency in adversarial proceedings. *See Complainant v. Dep't. of Defense,* EEOC Appeal No. 0120084008 (June 6, 2014) (finding that an agency representative should not interfere with the development of the EEO investigative record by "us[ing] the power of its office to intimidate a complainant or her witnesses"); *see also Rucker v. Dep't. of the Treasury*, EEOC Appeal No. 0120082225 (Feb. 4, 2011) (stating an agency "should be careful to avoid even the appearance that it is interfering with the EEO process."

While the information in the following sections illustrates the conflicts that may compromise the integrity of the impartial EEO complaint process, it is not intended to imply that agency representatives are a negative influence on the process. Many agency representatives provide meaningful contributions to the EEO in the workplace by educating managers and employees, consulting senior leaders with lessons learned from workplace disputes, and seeking to protect the agency by advising leadership to end a discriminatory practice as soon as it becomes apparent. This section focuses on the narrow occasions where the intersection of responsibilities creates a conflict affecting the impartiality of the complaint process.

MD-110 then reiterates that the EEO complaint program must be kept separate from the agency's personnel function and details circumstances where conflicts may arise, including where the head of an EEO office is named as a responding management official.

In the strongest aspect of the revised management directive, the Commission makes clear that the EEO complaint program must be kept separate from the agency's function in defending complaints, stating "only through the vigilant separation of the investigative and defensive functions can this inherent tension be managed." The Commission instructs that there must be a firewall between the EEO function and the agency's defensive function and that the EEO Director should be "provided with sufficient legal resources (either directly or through contracts) so that the legal analyses necessary for reaching final agency decisions can be made within the autonomous EEO office." The EEOC states that at minimum, agency representatives in EEO complaints "may not conduct legal sufficiency reviews of EEO matters" including "legal analysis made by the EEO office during the processing of EEO complaints, such as acceptance/dismissal of complaints, legal theories utilized by the EEO office during

investigations, and legal determinations made in final agency actions. The optimal situation is for the EEO office to have sufficient internal legal resources. However, when necessary and requested by the EEO office, legal sufficiency reviews conducted outside the EEO office must be handled by individuals that are separate and apart from the agency's defensive function."

The revised MD-110, although it does not go as far as some have argued for, forcefully states the Commission's position that agency representatives should not be involved in the early stages of EEO complaint processing, including acceptance and dismissal of complaints and the investigation, in order to be able to appropriately defend the agency later on in litigation. Advocates for employees should heavily rely upon the revised MD-110 in arguing against improper agency counsel intrusion on the process. And agencies should, of course, review the revisions to ensure programs are in compliance.

The revised MD-110 also sets forth a procedure for agencies to seek approval from the Commission to conduct pilot programs regarding formal complaint processing in chapter 1 and expands guidance regarding the value of ADR in chapter 3, among other changes. Sumner@FELTG.com

How DARE You Talk Badly About Indian Food!
By Deborah Hopkins

Last week, I traveled to Atlanta to teach a group federal supervisors about a topic that we're seeing more need for lately: identifying cultural bias. It's an interesting one because it relates closely to the EEO arena, yet it's also unique because culture is not a protected category under Title VII.

According to a study explained in the book *Everyday Bias: Identifying and Navigating Unconscious Judgments in Our Daily Lives*, by Howard J. Ross, grocery stores that played French music in the background sold more French wine, and when the music switched to German the sales of German wine showed a significant increase. The customers in these cases were making subconscious decisions based on the environment in which they were placed.

And so it is with humans. Everyone has bias. Everyone. From the moment a baby is born it is subjected to environmental factors that teach it how to think, speak and behave in various situations. We can do our best to teach awareness. For those who have open minds, certain biases can be overcome. But most of us will keep our biases until the day we die.

You can't file a grievance or an EEO complaint against someone because of what that person thinks. It is impossible to take legal action against what is going on inside someone's head. But, what we teach supervisors is that oftentimes the thoughts turn into actions, and once that happens we're getting uncomfortably close to Title VII illegal discrimination territory.

A case in point comes from *Thomas v. Secretary of Homeland Security*,
EEOC Appeal No. 0120083515 (2008), way back when complainant's names were still listed in the titles of EEO complaints. In this case, the DHS grooming code in the office required the complainant to cut off his braids because males were prohibited from having long hair. Thomas claimed that his braids were part of his culture and filed an EEO complaint based on race and national origin. The EEOC held that as a general rule, grooming codes do not constitute discrimination based on race or national origin because they do not involve immutable characteristics of either category. Thomas' braids were not tied closely enough to his national origin or race, and because the grooming code prohibited long hair on all males, it did not have a disparate impact on individuals of Thomas' race or national origin.

Let's change it up just a little bit though. If Thomas had braids that were required as a fundamental tenet of his religion, then he would ask the agency for a reasonable accommodation, and unless the

agency could show that allowing the braids would cause it more than a minimal burden on operations, the agency would need to make an exception to the dress code and allow Thomas to keep his braids.

Many of the common bases for bias are directly tied to Title VII: race, color, national origin, gender, sex, religion and disability status. People may also be biased by culture, socioeconomic status, personal experiences, political views, or a thousand other factors. As I mentioned, you can't take someone to court based on what goes on inside his or her head. But, bias usually reveals itself anyway. It may manifest as discrimination or prejudice through off-color remarks or ignorant comments, disparate treatment, or participation in cliques. Once employees notice the action, it's not a long shot to see how the treatment as a result of bias (whether conscious or subconscious) can form the basis of a discrimination complaint.

I don't have time today to discuss much more on self-identification of cultural bias, but I will give you one tip: whenever your reaction to something that a person says or does begins with "They" or "Those people," that might be a trigger that you've dehumanized that person and relegated him or her from an individual to a stereotype about a particular cultural group. Let me give you an example. You have an Indian employee who brings Indian food from home to the office, and when you walk by the break room and smell the aroma you think, "Yuck those people have the stinkiest food and the office is going to smell for hours," that is a good indication that there may be some cultural bias going on. (Indian food is my absolute favorite food in the world, so I don't know how ANYONE could ever think the words I just wrote in the example above.)

So, supervisors and federal employees beware. We'll be holding a webinar on the topic in the coming months, that will provide guidance on how to identify and deal with cultural bias.
Hopkins@FELTG.com

Webinar Spotlight:
Gender Stereotyping: Keeping it Out of Your Agency
September 17, 2015

Starting with *Macy*, in the past three years, we've changed the way we handle gender discrimination claims among federal employees. New legal decisions have further defined what qualifies as gender stereotyping and gender discrimination under Title VII.

FELTG's 90 minute webinar on the topic will explain how these recent decisions impact the world of federal employment discrimination claims related to gender stereotyping, and will provide you with tools to raise awareness in your workplace to help drastically reduce or even eliminate the gender discrimination claims that occur. Register today!

Discipline in the Public View – Credit Card Misuse
By Barbara Haga

In the past couple of months we've been looking at how attention from the public, Congress, and/or the media can impact disciplinary action. Sometimes that highlighting results in the passage of a law to deal with a particular form of misconduct. One example is the Government Charge Card Abuse Prevention Act of 2012.

The Act modified Chapter 19 of Title 41 regarding purchase cards and Chapter 57 of Title 5 regarding travel cards. The requirements related to travel charge cards include a list of agency requirements for management of the cards. The responsibilities include safeguards and controls such as records of cardholders and their limits, periodic review that travel cards are needed, training for cardholders and those with oversight over card usage, creditworthiness reviews for cardholders, invalidation of cards for those who leave Federal service, and direct payment to the card-issuing bank. The Act also established a requirement for agencies to use "… effective systems, techniques, and technologies to identify improper purchases."

In an interesting side note, apparently some members of the Congress were not happy with what was achieved as a result of the 2012 legislation. The Department of Transportation issued a report late last year on credit card usage available here: https://www.oig.dot.gov/sites/default/files/Travel%20Card%20-%20Audit%20Report%2009-18-14_web%20file.pdf noting that in a sampling of 2012 charges, employees charged $2.1 million for personal items and obtained more than $180,000 in unauthorized cash advances.

When DoD reported earlier this year that there were instances of travel cards being used to gamble and to purchase adult entertainment, that didn't sit well with some. The full report was issued after the news initially broke; the report is available here: http://www.dodig.mil/pubs/documents/DODIG-2015-125.pdf. A new bill was introduced on June 18 of this year to add additional tools to combat misuse. Saving Federal Dollars through Better Use of Government Purchase and Travel Cards Act of 2015 (S.1616) would set up an office in GSA to monitor expenditures and permit anti-fraud information sharing among federal agencies.

Preventing Abuse

The 2012 Act added little to the arsenal that agencies already had in their possession to deal with abuse. Agencies have been taking action on credit card misuse since the 1980s. In my estimation it isn't a case of not having the tools to deal with misuse; it is the issue of not paying attention and not taking action when abuse is identified. Just like we see with performance-based actions, the tools are there, but they may not be used when needed. The following case illustrates just how bad one of these scenarios was and that action was initiated.

Fast and Furious

(I should know better than to pick this title for a heading, but it so aptly describes this employee's use of his travel card.) The following are some of the specifications in a 2012 misuse case. The charge was "Pattern of Inappropriate Use of Your Government Travel Charge Card." The misuse took place July 9-27, 2012.

SPECIFICATIONS 1 to 15:

Having already received cash in the total amount of approximately $200.00 from an ATM withdrawal on July 9, 2012, using his government travel charge card, the appellant attempted to obtain unauthorized cash through ATMs with that card in the amounts of $303.50, $302.50, $503.00 and $102.50. He did the same thing on July 10 (one additional attempt), July 11 (4 additional attempts), and additional attempts on July 12, 13, 16, 17, 18 and 19, in various amounts ranging from $202.50 to $502.50. The agency noted that those extra attempts failed because of the limits on the operation of the government travel charge card.

SPECIFICATIONS 16 to 24:

On nine occasions within a period of less than one week from July 22 to July 27, 2012, the appellant transferred funds from his travel charge card to an account titled Milo's You Want It We Got It, totaling over $1,460.00. (The agency learned later that this was a personal account. It was his personal Square Card account with which he could swipe credit cards and accept credit card payments through a mobile phone application). The amount transferred by the appellant over 6 days exceeded his authorized per diem for that period by over $1,000.00.

I could go on, because there are 33 specifications cited in the decision. This case illustrates that at least one part of one agency was paying attention. The agency noted the unusual charges and the frequency and contacted the traveler while he was on travel because they thought the card had been stolen. The employee admitted that the charges were his. The travel took place in July and his removal was effective in October. Which agency was it that deserved the gold star for monitoring transactions and moving quickly to deal with the situation? The VA. *Pew v. Department of Veterans Affairs*, SF-0752-13-0060-I-1 (2014). The removal

was sustained by the Administrative Judge and affirmed by the full Board.

Join me next time for more on "Fun on Uncle Sam's nickel!" Haga@FELTG.com

Pretext and Per Se Retaliation in the Eyes of EEOC
By William Wiley

We all know the one-two-three *McDonnell Douglas* approach to analyzing a claim of discrimination:

1. The complaint proves he was treated differently,
2. The agency articulates a legitimate, nondiscriminatory reason for the differential treatment, and then
3. The complaint gets to try to prove that the agency's articulated reason for the treatment is a "pretext" for discrimination.

When I look up "pretext" in any of the many dictionaries on the web, I find that it is commonly defined as a false reason used to conceal a true purpose. In other words, it is a lie; an intentional deception. Not just a mistake or an accidental anything. It has to be done with the purpose to deceive. Therefore, in the *McDonnell Douglas* analysis, the complainant who has alleged that an act by management is based on race, sex, etc. must prove that whatever the agency is saying is a lie.

Proving what motivates someone is hard to do. He can swear under oath why he did something. If there's no evidence to the contrary, then you have no basis on which to reach a different conclusion. That doesn't mean he's NOT lying; it just means you cannot fairly reach the conclusion that he IS lying without evidence to counter-balance the sworn statement. An allegation is not evidence. Neither is a feeling. I once asked an employee why he concluded that his supervisor was discriminating against him because of his age, and he responded, "Because I can feel it in my bones." Yeah, well I feel a lot of things in my old bones these days, but that doesn't make those feelings evidence.

So here are the facts and timeline from *C. v. SSA*, EEOC No. 0720140001 (June 2, 2015):

> April 20: The second-level supervisor (I'll call her "Seconds") met with numerous employees in the office. Many of those employees told them that their first-level supervisor (I like the nickname "Firsty") was a bad supervisor. In fact, things were so bad that there was talk about which employees had permits to carry concealed weapons. The Federal Protective Service conducted a full-blown investigation. To reduce the friction in the office, Seconds reassigned Firsty to a non-supervisory special-projects position to be effective on May 8.
>
> April 26 and May 7: Firsty files EEO complaints accusing Seconds of discrimination.
>
> May 8: Seconds allows Firsty to change the effective date of the reassignment from May 8 to May 21.
>
> May 21: Seconds finds out that Firsty has not yet changed offices as is required by the reassignment. In addition, according to a call from someone physically present in the office (Seconds is not), Firsty appears to be continuing to act as a supervisor. Seconds then cancels Firsty's reassignment to the special-projects position.

Subsequently, Firsty files another EEO complaint alleging that the cancellation of the reassignment was in retaliation for the filing of the previous complaints. Seconds articulates her reason for cancelling the reassignment as the events that occurred on May 21; that Firsty had not complied with the order to be out of her office and in the reassignment position by that date.

EEOC determined that Seconds was lying because:

1. She did not check with anyone else to confirm that Firsty was still in her office acting as a supervisor on May 21.
2. Firsty eventually moved out of the office later in the day on May 21.
3. Firsty had accused Seconds of discrimination just a couple of weeks before.

Folks, this is an indefensible conclusion for EEOC to reach. Seconds happens to be an attorney (a judge, in fact) who has sworn under oath that the reason she withdrew the reassignment was because of Firsty's foot-dragging in vacating her supervisory position. She understands the significance of lying in this situation better than would most individuals. She is trying to take care of a powder keg situation that is so scary, the federal police are involved. There are employees who are concerned for their lives.

Yet, EEOC determines in hindsight that she made a mistake by not asking others to validate what she had been told by the caller. There was no evidence that the caller should have been disbelieved. There is no evidence today that the caller was mistaken. May 21 happened to be a Monday the year this all happened. If you tell someone to be in their new office on Monday, you would expect a conscious obedient employee to pack up the old office on Friday and move out to be in the new office by Monday morning. When you find out that she has not done that, it is fair to conclude that the employee is not doing what she was told to do, especially irritating when the reassignment date was delayed at the employee's request.

I am not defending Seconds' decision to cancel the reassignment based on what happened on May 21. Maybe she over-reacted, maybe she didn't. But by jingles, what she did was not so outlandish as to lead to a conclusion that she (a senior government manager attorney/judge) was lying under oath (thereby committing the felony of perjury) when she gave that as the reason. If her motivation was to retaliate against Firsty for the EEO complaint filed April 27 and May 7, why did she accommodate Firsty on May 8 by allowing the reassignment date to be delayed? This is a classic example of EEOC disagreeing with an action taken by a management official, and turning that disagreement into a conclusion that the management official is lying. That's not the law.

Separately in this case, and to me equally unbelievable, is a finding of "*per se* retaliation" by EEOC on the part of Seconds. "*Per se*" means intrinsically; of itself. In everyday words, it means that whatever was done is automatically considered to be retaliation, without any additional analysis or factual findings necessary. If I were to reassign an employee because the employee filed a discrimination complaint accusing me of a civil rights violation, then that's per se retaliation. The act (reassignment) was motivated by a protected status (someone who has previously filed a discrimination complaint). If I were to say to an employee, "If you file any more EEO complaints against me, I'm going to give you a low performance rating," that would be per se retaliation. The act (threatening a lower performance rating) was motivated by a protected status (the employee previously filed a discrimination complaint). However, if I were to say to an employee who has previously filed a complaint, "If you don't work harder, I'm going to fire you," there indeed is an act (the threat to fire), but no retaliation because my motivation is to get the employee to work harder.

In this case, Seconds was confronted with a bunch of employees who disliked Firsty and who had previously filed EEO complaints accusing Firsty of civil rights discrimination. So Seconds says to our friend Firsty, "This is the way these people are. They are not going to change. They're going to keep filing EEO complaints. What do you want me to do? It's easier for me to get rid of you than to deal with them." To be retaliation, this statement must be motivated by a desire to retaliate against Firsty because of Firsty's previous filing of an EEO complaint. To be "*per se* retaliation," it has to be intrinsically so, standing alone, automatically a violation of Firsty's rights to participate in the EEO process. This might be a harsh statement for Seconds to make; it might even be foolish or bad management. But it IS NOT on its face connected in any way to an improper motivation. On the basis of these two unfathomable findings of

discrimination, the Commission ordered SSA to pay Firsty $171,888. Not a cheap date.

In an unrelated, but equally troubling "*per se* retaliation" decision, EEOC recently held that it is improper for an agency to discipline an employee for sending complaining emails to the head of the agency if those complaints contain allegations of discrimination. Even though the employee had the EEO complaint process available to him, as well as his chain of command, and there was no evidence that these avenues of complaining were inadequate, EEOC concluded that he could not be stopped from bothering individuals up and outside his chain of command if he wanted to complain that he was being discriminated against. Just think about this for a moment. EEOC is saying that an agency cannot protect its senior managers from complaining emails if the complaints mention discrimination. Unrestricted, unfettered, unlimited access to the email accounts of all the managers in an agency by all employees who feel they have been discriminated against. What a world. *C. v. Treasury*, EEOC No. 0120122603 (May 8, 2015).

I admit that sometimes I am confounded to the point of tears by an EEOC decision. That is so in these cases. I cannot understand how the Commission could have reached such untenable conclusions. Its cases like this that make me wish I were smarter when it comes to discrimination law.

Or, that EEOC were smarter when it comes to common sense. Wiley@FELTG.com

Hearing Practices: Opposing Motions for Summary Judgment
By Deryn Sumner

As promised, this month we're going to discuss how best to respond in opposition to motions for summary judgment. Remember, motions for summary judgment can be filed by either side, although they are most often filed by the agency, so practitioners should know how best to oppose such motions even if his or her practice involves defending the government. As always, before you start drafting check all case management orders for deadlines, page limitations and any special requirements for service. The best time to finalize your certificate of service is well before the afternoon of the deadline when you're tired of looking at the darn filing.

Last month I shared the mantra for moving for summary judgment: material facts are not in genuine dispute and there are no credibility determinations at issue which would require a hearing. So, of course, opposing such a motion requires just the opposite approach. A strong opposition motion will clearly highlight the evidence in the record that makes granting a decision without a hearing problematic. Administrative judges already face overloaded dockets; disposition of a case on summary judgment only to have the EEOC's Office of Federal Operations vacate the decision and remand the case for a hearing, often several years later, because of an improper grant of summary judgment just adds to their already heavy workloads.

I will often start drafting an opposition motion by printing out a copy of the motion for summary judgment and marking with a pen whether each statement of fact as proffered is in dispute or not. If I come to the end and I haven't disagreed with the presentation of facts, then I have a problem, but that very rarely happens. Look for characterizations of events that favor the moving party. Highlight statements of fact that are not supported by the underlying source document. If the moving party makes conclusory or unsupported statements, point that out. With these disputes in hand, you can then turn to outlining and drafting your motion. Sometimes the moving party will fail to include a complete or undisputed statement of facts. If so, you will likely want to draft your own, making sure there are proper citations to the record. Just as with filing a motion for summary judgment, in opposing it, the bulk of your time should be spent on the facts. The facts drive the argument that things are not as simple as the other side presents them and a hearing needs to be convened in order to make factual conclusions in favor of one party or the other.

As we talked about last month, the goal here is to make things as easy as possible for your audience. Every fact should include a citation to the Report of Investigation or other document that you will include with your opposition motion as an exhibit. Tab your exhibits or use electronic bookmarks if filing electronically.

If credibility is at issue, point that out and argue that the administrative judge needs to hear testimony in person to decide who is telling the truth. Many discrimination cases come down to deciding what version of events is closer to the truth (as it usually falls somewhere in the middle). If the administrative judge needs to observe and make credibility determinations in order to decide what happened, then a hearing is required.

It doesn't hurt to cite to cases where the EEOC Office of Federal Operations vacated issuances of summary judgment and remanded cases for hearing. Point out similarities between the moving party's motion and what caused the Commission to remand the case in those instances. Each year, dozens of cases are remanded because of improper resolution of factual disputes in the moving party's favor or where credibility determinations require a hearing. Just as in filing any motion before the judge, keep your arguments concise and clearly written. Make your best case as to why the judge should hear your case now, and not have to deal with it several years later after a painful remand. Sumner@FELTG.com

How the DO Should Handle Douglas is Counter-Intuitive
By William Wiley

We so love good questions here at FELTG. They give us faith in Our Great Country to know that so many federal employment practitioners want to do a good job. And if we can FELTG-help with that, we are honored.

Recently, a quizzical reader asked,

> *How do you ensure that the* Douglas *Factors analysis of the Deciding Official does not look like a rubber stamp of the analysis done by the Proposing Official? Should the proposing official simply set up the factors without including an opinion on how to apply it and then leave that extra sentence or two for the Deciding Official? This doesn't seem possible for introducing aggravating factors, but might be a good strategy for simply laying out past performance.*

And our FELTG-response, based on nearly a thousand years of thinking Deep Thoughts about federal sector employment law:

FELTG: The answer to this question is counter-intuitive. The Proposing Official (PO) has an obligation to weigh and notify the employee of the relevant Douglas factors relied upon when he selected the proposed penalty. The Deciding Official (DO) has an obligation to weigh the *Douglas* factors. That weighing of the *Douglas* factors by the DO can be the identical assessment given to those factors by the PO and still be perfectly legal. In other words, there is no requirement for the DO to assess the factors differently from the PO; instead, she's supposed to rely on the PO's initial assessment and identification. In the ideal situation where it is true, I have the DO address the *Douglas* factors as follows:

> "In selecting the appropriate penalty in this situation, I have considered the analysis of the relevant *Douglas* factors attached to the proposal, and your response to the proposal. I concur in the *Douglas* factor assessment conducted by the Proposing Official, and conclude that the appropriate penalty in this case is removal."

Agencies lose cases every month because the DO considered something not in the proposal letter or the response, thereby violating due process. If the DO were to do an extensive reassessment of the *Douglas* factors separate from the analysis conducted by the PO, the chances are significant that due process will be violated. Therefore, I try to restrict the DO's assessment to a close review and affirmance of the PO's assessment whenever

possible. One additional factual statement or opinion added in a separate *Douglas* analysis can jeopardize the entire removal.

I have heard others in this business, individuals who I sincerely respect for their knowledge of the law, speak to the value of an extended *Douglas* factor analysis being done by the DO. The crux of those arguments seems to be that a bare bones analysis as I suggest here creates high risk and are problematic on appeal. Without responding point by point, I would offer this three-step analysis:

1. Count the number of decisions in which the Board sets aside a removal due to an abbreviated DO analysis.
2. Now, count the number of decisions in which the Board sets aside a removal action for violation of due process due to the DO saying something that was not in the proposal letter.
3. Then, decide which is the greater risk.

According to public statements made recently by MSPB Chair Grundmann, Congress is moving in a direction that would strip our civil service of the due process protections that have been its foundation for over 100 years. In large part, that is because of the perception that it is currently too hard to fire bad employees. Calling for an extended *Douglas f*actor assessment by the DO is one of those hurdles that unnecessarily makes it more difficult to fire a misbehaving civil servant. We practitioners need to be working hard to make it easier to terminate those who deserve it, not harder. The future of the civil service may depend on it.

In the exceptional case in which a DO feels compelled to do a big independent *Douglas* analysis, I recommend sending it to the employee for a response prior to final issuance, to avoid a due process challenge. Due process violations scare the freaking pants off of me.

Hope this helps. Wiley@FELTG.com

My Inconsistent Experiences With The EEOC's Pilot Program
By Deryn Sumner

In the last few months, I have represented complainants or agencies at over a dozen of the "initial status conferences" that administrative judges are convening as part of the EEOC's pilot program. The purpose of the pilot program is to explore how the ever-growing number of formal complaints can be processed more quickly and effectively. And my main takeaway from representing clients during hours of these calls is that every judge is approaching them differently and the effectiveness greatly varies.

Sometimes the administrative judge wants the complainant on the line, others don't appear to care. I've had calls be simply perfunctory and last only five minutes and others last over an hour and a half. On some calls, I'm only asked how long I need to complete discovery. However, I've also attended some where I am asked to extensively detail why my client should even get to conduct discovery and justify, one by one, each interrogatory, document request, and request for deposition.

Honestly, the entire process has been frustrating. As someone who hates talking on the telephone, I've spent far more time doing so than I would like. I worry about *pro se* complainants and their ability to articulate what they need in discovery when faced with an administrative judge who seems to doubt there is ever a need to supplement the record. Although I've appeared before some judges enough times to know how the call is likely to go, I can't rely upon that and therefore thoroughly prepare for every call. That means having discovery requests in final form prior to the calls. I suggest that you be similarly prepared.

On the plus side, there do appear to be more substantive discussions of settlement in the earlier stages of cases. Some judges have been amenable to delaying discovery to allow these discussions to occur and several have dedicated time to convene several calls with the parties to gauge how these discussions are progressing. In

many cases, these early discussions allow for the parties to get on the same page regarding the framing of the accepted issues and what will be focused on in discovery. Depending on the administrative judge, some of the calls have resulted in a pro se complainant being more fully advised of the process and his or her responsibilities, which may reduce some energy spent trying to obtain complete discovery responses down the road.

However, and I speak only for myself here, these conferences have taken away some of the autonomy I've enjoyed in the less formal administrative process. Having to justify why I should be able to seek information crucial to proving my client's case can be trying. Being asked to explain how I intend to show pretext when I only have the benefit of a thrown-together Report of Investigation I did not control, and with, "Well Judge, I need some more information in discovery to be able to fully establish that argument" not taken as enough of a response, makes me downright tired.

I've heard that the EEOC is continuing to consider how the pilot program should be changed over time. There are positive aspects of the program, as I mentioned above, but I'm not convinced these revised procedures will result in the faster or more effective processing of cases.
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Test Your Mathematical Skills: Which Number is Larger?
By William Wiley

Sometimes here are FELTG we get a little preachy. Do this, don't do that; acting like we know everything. Well, in this short article, we invite you, the reader, to decide what would be the better way to go.

Assume you have a non-performing employee. On the left side below, you can see the timeline an agency recently followed in taking a removal action. On the right side below, you see the FELTG Wiley-Way® approach to the same problem employee. Take a look at each technique and then decide for yourself which is the better way to go for a stronger, brighter America:

***Appleberry v. DHS*, Fed. Cir. No. 2014-3123**	**FELTG Wiley-Way®**
December 6, 2012: 90-day PIP initiated *May 23, 2013*: PIP closeout letter issued 3 grievances filed subsequently, dates unclear: 1. Invalid standards 2. Bullying 3. PIP closeout letter invalid *June 27, 2013*: Proposed removal issued *October 31*, 2013: Employee removed	*December 6, 2012*: 30-day PIP initiated *January 7, 2013*: Proposed removal *February 7, 2014*: Employee removed
Salary cost estimate: $50,000	*Salary cost estimate: $8,000*

Same result, different costs, and without all those nasty intervening grievances to deal with. We don't need a long legalistic article to make this point.

Pretend that the money is coming out of your own checking account. Really, stop for a moment. Before you next automatically recommend a 90-day PIP, visualize the employee's weekly pay checks as personal checks drawn on your personal bank account. Now, which approach would you take?
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