Federal Employment Law Training Group
Training By Professionals For Professionals

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"The future ain't what it used to be." As we move deeper into the Presidential campaign cycle, we have to admit that Yogi Berra was onto something there. This past year saw a significant frontal attack on some of the foundational aspects of our civil service, at least in words. And 2016 and 2017 stand to be the Big Opportunity for those words to be put into law, depending in large part on who is elected as our new Supreme Leader come November. Current political players will start positioning themselves for a new (private sector?) job, political player wannabes will be betting on winners and losers in the elections, brushing up their connections with the incoming administration folks, hoping to be picked as one of the two new members at MSPB, perhaps (or perhaps not) as the new Special Counsel, and maybe a reshuffling of the three-card deck over at FLRA. Yes, the gloss on the civil service is scheduled for a do-over this year and next. But here at FELTG, we'll continue to stay the course, providing advice and training for you wonderful ladies and gentlemen who actually do the work of government, regardless of who becomes your next benevolent overlord. You will soon have to hang new agency-head pictures in your lobby, but your go-to group for employment law training will remain the same. We might not be as eloquent as Yogi, but we're working on it. "You can observe a lot by just watching." Priceless.

Take care,

COMING UP IN WASHINGTON, DC

Workplace Investigations Week
April 18-22

FLRA Law Week
May 2-6

Supervisory HR Skills Week
May 16-20

Employee Relations Week
June 6-10

OR, JOIN US IN SAN FRANCISCO

MSPB Law Week
June 13-17

AND, HOW ABOUT HONOLULU?

Managing Federal Employee Accountability
August 1-5

WEBINARS ON THE DOCKET

April 14 (tomorrow!):
Significant Federal Sector Developments: The Latest and Greatest

May 5:
An In-Depth Look at Selection and Promotion Cases

Proposing a Demotion
By William Wiley

Questions, we get questions. Not many questions about demotions, however, because agencies rarely use them. But recently we got an interesting query as to exactly what to include in the proposal letter of a demotion:

> Today, someone who should know MSPB case law told me that when an agency proposes a demotion, it is required for the proposal letter to state the position and grade to which the agency is proposing the employee will be demoted. This someone added that if this requirement is not met, MSPB will conclude that a due process violation has occurred. I asked this someone to point me to case law, but s/he could only identify the due process cases with which we are all familiar. Am I missing something? How does an employee's ignorance of the specific job and grade to which he may be demoted impact his due process rights?

And our FELTG response:

Very nice to hear from you. As for your question, amazingly this issue has not come up squarely before the Board, at least not in any final opinions and orders. I think that's because demotions are rare and because agencies more-or-less routinely say in the proposal letter the step and grade of the demotion. Doing so helps to set the expand bracket for negotiating a lesser demotion with the employee after he responds to the proposal.

From a due process standpoint, I can see a potential problem if I really strain my brain. For example, if we were to propose a "suspension" without stating the length, that might give the employee/appellant the argument that if he had known of the length of the suspension, he would have exercised his response rights differently. If you think about it, an employee might not put a lot of effort into defending against a one-day suspension, but might hire a lawyer for his response if the suspension was going to be 90 days. I can see an analogy to a demotion in that if we don't tell the employee how much salary he has the potential to lose, he doesn't know how to exercise his due process right to respond. He might not respond at all if the demotion were one-grade, but might hire a big law firm if it was going to be from a GS-12 to a GS-5.

On the practical side, I don't know why we would NOT tell the employee to what level the demotion would be. Doing so gives us one less thing to worry about as a possible reversal point (and we know that arbitrators and recently the Board are looking very hard at due process). The employee has a right to respond to the penalty analysis in *Douglas*. Without knowing the severity of the penalty (the degree of the demotion), it arguably would be difficult for him to respond to the penalty assessment (because he doesn't know the degree of the penalty).

In my practice, I never propose a demotion. If the employee has done something that warrants a demotion, it also warrants a removal. Therefore, I propose a removal, allow the employee to respond, then offer a voluntarily demotion as an alternative. If the employee accepts, I've avoided the appeal/complaint/grievance process. If he does not, the Deciding Official can still implement a demotion instead of the proposed removal as it is a lesser penalty.

Hope this helps. Let me know if you need anything else. Wiley@FELTG.com

Reasonable Accommodation: Alternative Effective Accommodations versus Undue Hardship
By Deryn Sumner

Last week I joined Ernie Hadley and Gary Gilbert for FELTG's twice-annual open enrollment session, *EEOC Law Week* in Washington, DC. On the third day of the program, we walked through disability discrimination law, the various theories that can be applied to these claims, and the obligations employers

have to accommodate employees with disabilities.

As Ernie and Gary like to say, there are no points awarded for creativity in analyzing disability discrimination claims. First, the employer must determine if the employee is an individual with a disability by establishing he or she has a medical condition which substantially limits a major life activity. Since the passage of the ADA Amendments Act more than six years ago, this is not an onerous standard for employees to meet. Next, the employer must determine if the employee is qualified to perform the essential functions of the position with or without an accommodation. If the employee meets these criteria, remember that an employer must provide an accommodation unless providing the accommodation would pose an undue hardship to the employer.

Based on some of the questions we received during the sessions and the breaks at *EEOC Law Week*, I wanted to talk a bit more about this requirement that the employer provide an accommodation. Sometimes in response to a request from an employee for accommodation, the initial reaction is to conclude that the accommodation requested is not reasonable. That then leads to the decision to argue that it would be an undue hardship to provide the requested accommodation. And that is going to land the agency in hot water for failing to accommodate the employee. Instead of focusing on arguing whether the accommodation requested by the employee might pose an undue hardship, agencies should instead focus on how an effective accommodation can be provided.

Recall, at this point, the agency has already determined that the employee is qualified to perform the position with or without accommodation. So, the employee can perform the job and the question turns to what accommodations the agency can provide. The law is clear that the employee does not need to be provided with the accommodation of his or her choice, but merely an effective accommodation. So instead of preparing to argue as to how the requested accommodation poses an undue hardship, the agency should engage in the interactive process and figure out what the agency can reasonably do to allow the employee to perform the essential functions of the job. Don't focus on how the employee's requested accommodation is unreasonable; look to what effective accommodations can be provided. This is the part of the process where creativity is encouraged. Different accommodations work for different people with different medical conditions working in different positions.

And a final reminder: undue hardship is a defense to a claim of disability discrimination and should not be asserted without being very confident that it really would be an undue hardship to accommodate the employee. The Commission's regulations at 29 CFR 1630.2 state the factors that should be considered in such an analysis:

I. The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;
II. The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
III. The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;
IV. The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and
V. The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

Proceed down this path at your own risk. Instead, if the accommodation requested by the employee is

not feasible, the agency should focus on what alternative effective accommodations can be offered to allow this employee to perform his or her job. Sumner@FELTG.com

Webinar Spotlight:

An In-Depth Look at Selection & Promotion Cases
May 5, 2016

Discrimination is often alleged when a federal employee, or an applicant for a federal job, is not selected for an open position – and she believes she was not selected because of one or more protected categories. This webinar covers what agency reps, supervisors, EEO specialists and union reps need to know about the selection and promotion process.

· **Basic Principles of Selection:** How much discretion hiring managers have in choosing who gets the job; what factors weigh the heaviest in making a selection.

· **Selection Criteria:** Objective v. subjective criteria; differing criteria for differing jobs; interviews; educational requirements.

· **Defending a Selection:** Documentation of the selection process; keeping records; burdens of proof.

This session shouldn't be missed. Register your site today for only $270.

Using a PIP in a 752 Performance Removal
By William Wiley

Another reader question. And this one is from an attorney at one of those few agencies that is not covered by the unacceptable performance removal provisions of 5 USC Chapter 43. Does a Performance Improvement Plan have any place in that non-432 world?

The issue:

> Dear FELTG Super-Brains,
>
> Because we are a government corporation, our agency cannot use Chapter 43 to remove employees for poor performance and rather, must use Chapter 75. Nevertheless, we still place poorly-performing employees on performance improvement plans.
>
> I know that under Chapter 43, if an employee passes a PIP but later fails to maintain their performance in same performance measures from the PIP during the year following the PIP, they can be removed without being put on another PIP. My question is, is there any similar advantage offered to agencies for removals under Chapter 75? Or does the test remain the same no matter what?

And our insightful (or not) FELTG answer:

> Very nice to hear from you. As for your question, we don't have any MSPB cases on point, but the same old Chapter 75 logic applies:
>
> - First, you have to tell the employee what you expect (i.e., have a rule and tell him the rule). A PIP Initiation letter will do that for you. If at the end of the PIP the employee has failed to meet the expectations you set (MSPB likes to call those expectations "firm benchmarks"), you have a violation of the rule and a basis for a 752 removal.
> - If the employee successfully completes the PIP by getting her performance up to an acceptable level, give the employee a PIP Warning Letter, There's a sample on p. 230 of the world-famous textbook, *UnCivil Servant*, www.deweypub.com.
> - If the employee fails during the PIP or post-PIP and you propose a removal, you'll have to do a *Douglas* Analysis to justify the termination. The fact that you've previously PIPed him for the

element he has failed will go to the factors: isolated or repeated, work record performance, and clarity of notice; perhaps rehabilitation potential. Unfortunately, a PIP failure works against removal when evaluating the *Douglas* Factor related to "intentional." One of the beauties of a classic Chapter 43 removal is that intent is irrelevant; not so in a 752 performance removal.

Unfortunately, under Chapter 75, you'll run into judges who want to evaluate your standard of performance to determine whether in their mind, you have set a level of performance that deserves a removal for failure. In a classic Chapter 43 case, on the other hand, a judge cannot evaluate the wisdom of the critical element. *Winlock v. DHS*, 2009 MSPB 23, is a good Chapter 75 case to look at regarding this little hurdle, although there DHS did not use a PIP.

Another unfortunately: we've seen a new collection of Board members since *Whitlock.* This Board even in a Chapter 43 performance has stuck its nose into the strength of the agency's determination as to whether a standard was too tough. In *Muff v. Commerce*, 2012 MSPB 5, the Board came up with some stupid "genuinely unacceptable performance" approach, although there I think they were put off more by the length of the post-PIP period for determining subsequent unacceptable performance, and not the standard itself. The good news is that only one of the Board members who voted in *Muff* is still serving, so maybe we can avoid any further inroads into management's right to set a performance standard.

Too bad you can't use Chapter 43. It is a dynamite tool for holding people accountable. Tomorrow, I'm drafting a proposed removal for a client who initiated a PIP at the end of February. 30 days and out is a pretty decent way to get people to do their jobs.

Hope this helps. Best of luck. Wiley@FELTG.com.

If the Agency Settles, Does that Mean the Employee Wins?
By Deborah Hopkins

Settlement makes up a major part of federal employment law practice. In fact, most disputes in our field settle – whether they initiate as grievances, EEO complaints or as appeals of agency disciplinary action – before they ever get to hearing.

Settlement happens. A lot. Yet somehow, this is a topic that doesn't get a lot of love in the training world. Many of us think we know how to settle, but few of us are actually ever trained in the skills required to negotiate settlement agreements. Settlement Skills is certainly not a mandatory class in law school, and no agency or union that we know of requires its reps to complete training in settlement negotiations or ADR.

There are several considerations to make when determining whether your case is one that's prime for a settlement offer.

First, both sides have to be willing to settle. If you approach the employee (or, for employee reps, if you approach the agency) and they are not willing to discuss settlement, you're probably done right there. You can always ask again, and as most of you know, the AJs at MSPB and EEOC are going to ask about the possibility of settlement at just about every phase of the process, but if one side says no, you can't force settlement on them.

Second, you should consider the conditions that will be included in the settlement agreement. Will there be an admission of fault or liability? Is an apology required? Will there be a reference clause or a confidentiality clause? No two settlements are exactly alike, and some fairly creative arrangements might be upheld. One of my favorite settlement stories occurred in David Hasselhoff's 2008 divorce settlement: he got to keep total

possession of the nickname "Hoff" and the catchphrase "Don't Hassle the Hoff." Yep, really.

Third, there must be valid consideration. For those of you who didn't go to law school (or for those of you who remain scarred from Contracts), consideration is a bargained-for exchange and in the context of settlement it means that each party has to do something to its detriment as part of the agreement – something that it isn't already obligated to do. Valid consideration might be something like the reassignment of a supervisor, or allowing an employee to swap work shifts. An agency offering to treat a complainant with "dignity and respect," and "not to retaliate," however, is not valid consideration; the EEOC said the agency was already supposed to be doing that for all employees. *Dubois v. Social Security Administration*, EEOC Request No. 05950808 (1997).

Fourth (and last for today), the agreement must be enforceable. The agreement must be signed by someone with the authority to make the decisions held therein, and the agency and employee must have the ability to comply with the terms. Included in the enforceability requirement is a "meeting of the minds" where all parties involved know what they're agreeing to. Without that, the settlement agreement is not valid.

Just last week I was talking with an agency representative who is a former prosecutor, and she said, "Settlement just doesn't feel right. It's like saying the employee did nothing wrong and the agency is at fault." That's a common misconception, but it's not actually grounded in truth; settlement has no direct tie to liability or admissions of wrongdoing. Even if it goes against your gut to consider settlement, keep in mind it's not just about "guilt and innocence." Plus, even when an agency wins an appeal, it's going to cost the agency. A successful defense averages about $100,000 at MSPB. We're not sure how much is costs for an agency to win at EEOC, but a number of those complaints are unresolved for years, so we know it's not cheap.

As a result of interest in this topic, we at FELTG are creating a brand new open enrollment program on Settlement, Mediation, ADR and other ways to resolve disputes without litigation. The program will be held in Washington, DC October 31 – November 4, and we'll have details for you, including an official program name, very soon.
Hopkins@FELTG.com

Featured Program

Supervisory HR Skills Week
May 16-20, 2016
Washington, DC

Attention, all federal supervisors (and people who advise supervisors): FELTG has an open enrollment training program just for you.

It covers a range of topics:

Monday: Holding Employees Accountable for Performance and Conduct

Tuesday: Managing Employee Leave Issues

Wednesday: The Manager's Role in EEO

Thursday: Communication and Leadership Skills

Friday: Supervising Unionized Employees

As a bonus, supervisors who complete this training will meet OPM's mandatory training requirements for new supervisors found at 5 CFR 412.202(b).

Registration is open now. You won't want to miss it!

Register by April 18 and you'll receive a free copy of the *UnCivil Servant* textbook!

Career Lessons Learned from My Father
By Deryn Sumner

Note: When I first started contributing to this newsletter, Bill told me I had liberty to write about pretty much whatever I wanted. I'm going to take him up on that this month and depart a bit from my usual arena of EEO law to talk about my father's career and the lessons I've learned from him. **[Editor's Note: I am so smart.]**

On April 18, 2016, my father, Dave Sumner, retires from his position as the Chief Executive Officer of the American Radio Relay League (ARRL). Those of you who know what ham radio is likely know about ARRL. Those of you who are ham radio operators may even know of my dad, even if you know him only by his call sign, K1ZZ. In his role leading this non-profit, he traveled all over the United States and the world attending conferences, meetings, and conventions spreading the mission of ARRL: to advance the art, science, and enjoyment of Amateur Radio.

My dad has been a ham radio operator since the age of 13. He held his first job at ARRL during the summer of 1968 and joined the staff full-time in 1972. Some people work to live and some people live to work. My father was fortunate enough to make a career of his passion for ham radio. That's not to say that he enjoyed every aspect of the job. However, last week my husband and I flew up to Connecticut to attend my father's retirement party. I had the pleasure of hearing some very touching tributes to my dad's work over the many decades he has been with ARRL. Some common themes emerged during these speeches that caused me to reflect on what makes a good supervisor that will cause people to travel (some from other countries) on a rainy Thursday evening to wish you well at the end of your career. I thought these themes I came away with would be helpful for some of the supervisors in the FELTG audience.

Don't take credit for the work of others, and go out of your way to make sure those who do good work get proper credit for it. Be a mentor to other employees. Hearing so many people say what a mentor my dad had been to them in their careers was a delight. If someone comes to you with a problem, don't make that person feel silly or demeaned for asking you for help. Assist with working to come up with a solution and make sure they have the tools to get there. Keep calm, even when things get contentious. Know your stuff or know where to look it up. Everyone may not have the encyclopedic memory of my dad (I know I don't) but you should speak with authority and credibility.

At its core, employment discrimination law is about the relationships between people. It is one of the best (and of course, one of the worst) aspects of the job representing employers and employees in EEO complaints. Employees feel disrespected, even harassed, by how their supervisor treats them. A supervisor tries to hold accountable an employee who feels defensive, or that the criticism is unwarranted, or that they haven't been given the proper tools to succeed. Sometimes these interactions are motivated by unlawful animus because of someone's membership in a protected class. And sometimes it's because two people have a poor working relationship or there is disrespect on either side. Being in a room with a group of people who respected my dad and will miss working with him was certainly a highlight for me. Supervising people is hard work, but remembering that they are people and part of your job as a supervisor is to nurture their careers, can go a long way to fostering healthy working relationships. Sumner@FELTG.com

More Use and Misuse - Vehicles
By Barbara Haga

I am sure that most readers are generally familiar with the statutory penalties associated with misuse of government vehicles. I thought that a look at some cases that involve that charge and related forms of misuse might be a good topic to explore. There are lessons here about careful crafting of charges.

The Basics

The statutory penalty appears in 31 USC 1349. Enacted in 1982, the relevant sections include the following:

§ 1349. Adverse personnel actions

> (b) An officer or employee who willfully uses or authorizes the use of a passenger motor vehicle or aircraft owned or leased by the United States Government (except for an official purpose authorized by section 1344 of this title) or otherwise violates section 1344 shall be suspended without pay by the head of the agency. The officer or employee shall be suspended for at least one month, and when circumstances warrant, for a longer period or summarily removed from office.

(§ 1344 discusses when passenger vehicles may be used for transportation for a government employee from the residence to the place of employment and other related usage such as travel to a transportation terminal).

We will look at two Federal Circuit cases which outline what is required to establish willful use and reckless disregard, or actually in these two cases what didn't establish those things. These cases look at two different scenarios – one when an employee was authorized by a supervisor to use the vehicle and then the supervisor was disciplined and one when the employee used the vehicle assigned to him for a purpose judged to be unofficial.

Supervisor Authorizing Employee to use Vehicle

The case is *Felton v. Equal Employment Opportunity Commission*, 820 F.2d 391 (Fed. Cir. 1987)*.* Felton was the acting Area Office Director of an EEOC Regional Office. A clerical staff member's car broke down on the expressway on the way to work. She got a ride to work and subsequently asked Felton to use the office's government vehicle to return to the car to secure it before it was towed for service. Felton approved use of the vehicle and was suspended for 30 days thereafter. She testified in her appeal that she authorized the use of the vehicle because the employee was the only typist, there was a large backlog at the time, and that use of the vehicle allowed resolution of the problem with the vehicle in the most expeditious means possible. The AJ found that the Felton knowingly, consciously, and willfully authorized the use of the vehicle for other than an official purpose and sustained the suspension. The full Board denied the petition for review and Felton challenged the action at the Federal Circuit.

The Court reversed the suspension, finding that there was no evidence to support a finding that Felton knew or should have known that the use of the vehicle in the circumstance of this case would be held to constitute use for a nonofficial purpose or that she acted in reckless disregard of whether the use was or was not for an official purpose. The analysis included examination of both points.

The decision explains how "willful" should be reviewed. The Court wrote:

> Had the word "willful" been omitted from the statute, the statute would apply to any authorization for any nonofficial purpose. It would have made all unwitting, inadvertent and unintended authorizations for nonofficial use a violation of the statute. *See Morissette v. United States,* 342 U.S. 246, 270 (1952). Such is not the case here. That Felton's authorization was a conscious and intentional act was admitted, but a knowing authorization of an unofficial use requires more than mere intent to do the act which lays the foundation for the charge. The requirement of knowledge applies to the unofficial nature of the use as well to the authorization. She knew and intended to authorize the use, but there is no evidence that she actually knew that the use would be characterized as "nonofficial."

The Court also found that Felton's authorization was not in reckless disregard of whether the use

was for other than official purposes. In this they reviewed the content of the EEOC order on use of motor vehicles. The policy stated: "What constitutes official purposes is a matter of administrative discretion to be exercised within applicable laws. The general rule may be stated that where transportation is essential to the successful operation of an authorized agency purpose, such transportation will be considered as official use." The Court found it reasonable that Felton could conclude that that the use authorized in this case would promote the successful operation of the agency.

What the Court did find was that Felton made a poor management choice. The AJ outlined other options Felton had, such as denying use of the vehicle and leave for the purpose of going back to the vehicle. The AJ relied on these management alternatives to support a finding that the decision was made in reckless disregard of whether the use was official. The Court's decision takes the opposite approach. The Court found that Felton's testimony made it clear that she acted in good faith in attempting to solve an office emergency. The decision states, "Poor management judgment in selecting an alternative to solve an office emergency does not rise to the level of 'reckless disregard.'" **[Editor's Note: And why any agency would ever charge willful misuse of a government vehicle under this statute is beyond my understanding. Charge "Misuse of Government Property" and save yourself all this heartburn.]** Haga@FELTG.com

Sanctions: Improper Conduct During Discovery
By Deryn Sumner

So far in this series, we've talked about when sanctions against agencies can be appropriate for untimely investigations or incomplete investigations. Now let's move, with a sigh of relief for most of you, to a discussion regarding when either party can be sanctioned for failing to comply with discovery. Many of the key elements are the same as what we discussed in February. When deciding whether sanctions are appropriate for conduct during discovery, the Commission will look at (1) the extent and nature of the non-compliance, including the justification presented by the non-complying party; (2) the prejudicial effect of the non-compliance on the opposing party; (3) the consequences resulting from the delay in justice, if any; and (4) the effect on the integrity of the EEO process.

Before moving for sanctions is appropriate, in almost every instance the moving party must first obtain a motion to compel the other side to fully respond to the discovery, whether it be written discovery requests or notices of deposition. If the non-moving party simply has not responded at all, a motion to compel will be very succinct (and should as always include evidence as to what efforts were made to resolve the matter before asking for the administrative judge's involvement). If the non-moving party still fails to comply with discovery, even after being compelled to do so, then moving for sanctions may be appropriate.

Your motion for sanctions should go through each of the four elements listed above. If the party has not responded to discovery at all, then the extent and nature of the non-compliance is significant. Be prepared to explain how the lack of cooperation has harmed you during discovery. Some judges take the view that anything important to the case is already included in the Report of Investigation and further discovery is not really necessary. You should explain why the information you are looking for is important for the case. For example, I have yet to see a Report of Investigation that has a comprehensive collection of information regarding damages. If you are representing the agency, you need to have discovery on this prior to the hearing.

As 29 CFR 1614.109(f)(3) states, sanctions can include an adverse inference against the non-moving party, excluding evidence that would be helpful to the non-moving party from the record, awarding attorneys' fees to a complainant, or dismissing a complainant's hearing request and remanding the complaint to the agency for issuance of a Final Agency Decision. This last one is what we see most often in cases where the complainant fails to comply with discovery. Should that be the case, then the administrative judge may find it

appropriate to dismiss the hearing request and order the agency to issue a FAD. Note, that does not mean the complaint itself is dismissed; the agency must still issue a decision on the merits. For agencies, sanctions for failing to cooperate in discovery can include excluding certain types of evidence that would support its argument or paying for the attorneys' fees and costs (including deposition transcripts in some cases) for the complainant's attorney to conduct the discovery. The best way to avoid such sanctions is to cooperate with discovery and communicate with the other side about what can be produced and what a reasonable timeframe for production is. Sumner@FELTG.com

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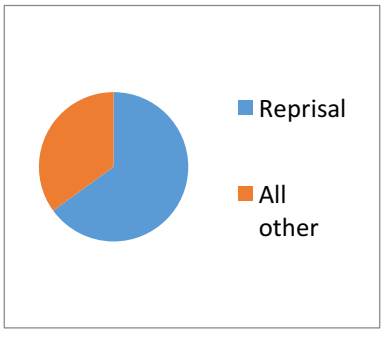
Honolulu, HI August 1-5



EEO Retaliation is a Different Animal
By William Wiley

Those who have been to FELTG's famous and fabulous EEOC law seminars have seen a graph similar to the one at the left. It represents the fascinating fact that for all the bases of civil rights discrimination (there are eight or so, depending on how you count things), a single basis accounts for about two-thirds of the findings of discrimination in the federal government. And that basis is "reprisal for previous EEO activity," usually previously filing a discrimination complaint claiming some other basis for discrimination: race, sex, age, whatever.

For years, I concluded that the reason that EEOC was more likely to find that a supervisor had acted in retaliation for a previous EEO complaint was my assessment of the human response to being accused of race/sex/age discrimination. If one of your employees formally charges you with being a racist or a sexual harasser, those are fightin' words in a lot of places. No normal person wants to be accused of violating another's civil rights. And terms like "racist" and "sexist" are heavily laden with strong emotion. Therefore, it seemed to me that a supervisor accused of civil rights mistreatment by someone she works with could be expected to change his feelings toward that employee, because that supervisor knows she's not a racist or sexist or whatever.

We teach in our classes that such feelings on the part of the supervisor are a normal human response and are not a problem AS LONG AS the supervisor doesn't act on those feelings. In other words, if one of your employees calls you a racist, you may feel hurt and even angry, but you are absolutely forbidden by law from acting on those feelings in any official way. For example, you don't have to invite the guy who called you a sexist to your birthday party, but you do have to make sure you continue to treat the employee in the workplace based on merit principles, and certainly not in retaliation for the filing of a complaint against you.

So when I saw statistics like those graphed above, that described how 2/3 of the findings of discrimination against federal supervisors are findings of reprisal for prior EEO activity, I wasn't totally surprised. Yes, the relative number of finds of reprisal as compared to the other categories seemed exceptionally large, but I didn't know what else it could be. My thought was that many supervisors just could not help themselves when accused of discrimination in EEO complaints, and no matter what we taught or what they knew the law required, retaliation slipped into actions that the supervisor took with the employee, often unconsciously.

And then, EEOC clarified things for me. I'm embarrassed to say that I didn't see this earlier, but embarrassment has never stopped me before. As I'm sure many of you experienced readers know, but that I did not realize until recently, EEOC applies TWO DIFFERENT STANDARDS when deciding whether a supervisor has violated an employee's civil rights by discriminating against him.

- If an employee is claiming race/sex/age/etc. discrimination, EEOC applies the general anti-discrimination provisions of statute which make it unlawful to discriminate with respect to an individual's "terms, conditions, or privileges of employment."
- However, if an employee is claiming reprisal/retaliation for prior EEO activity, EEOC applies the exceptionally broad statutory retaliation provisions that make it unlawful "to discriminate" against an individual because of that individual's previous EEO activity.

The retaliation provisions set no qualifiers on the term "to discriminate," and therefore prohibit *any* discrimination that is reasonably likely to deter protected activity. They do not restrict the actions that can be challenged to those that affect the terms and conditions of employment. Thus, a violation will be found if an employer retaliates against a worker for engaging in protected activity through threats, harassment in or out of the workplace, or any other adverse treatment that is reasonably likely to deter protected activity by that individual or other employees.

Consider the birthday party mentioned above. If you were to announce to your coworker guests that you did not invite Wiley because he is an Episcopalian, that would not be religious discrimination because your statements are not a "term, condition, or privilege of employment." However, if you were to announce to those same guests that you did not invite Wiley because he previously filed a religious discrimination complaint against you, then you would likely be found liable in a retaliation complaint because your statement "is reasonably likely to deter protected activity by that individual or other employees."

As EEOC so eloquently stated recently, "This broad view of coverage accords with the primary purpose of the anti-retaliation provisions, which is to maintain unfettered access to statutory remedial mechanisms. Regardless of the degree or quality of harm to the particular complainant, retaliation harms the public interest by deterring others from filing a complaint. An interpretation of Title VII that permits some forms of retaliation to go unpunished would undermine the effectiveness of the EEO statutes and conflict with the language and purpose of the anti-retaliation provisions." *Zenia M. v. HHS*, EEOC No. 0120121845 (2015).

The bar is not particularly high for an employee to prove race/sex/age/etc. discrimination. It is lower still when an employee claims that her supervisor has retaliated against her for previous EEO activity. It's not just human nature that causes a relatively high number of retaliation findings, it's the law. Wiley@FELTG.com

FELTG is Coming to The Big Easy

Managing Federal Employee Accountability
June 27-July 1, 2016
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Federal supervisors, HR practitioners and attorneys will all benefit from training on employee accountability, union concerns, the EEO complaint process, managing leave abuse and communicating effectively with employees.

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