Federal Employment Law Training Group
Training By Professionals For Professionals

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Every now and then I'm reminded of some of the craziness that gets filed by appellants on appeal to MSPB. This one made me laugh out loud. Buried down deep in the routine detritus of a decision where the Board says it considered everything in making its decision in *Jones v. HHS*, DE-3330-14-0427-I-1 (2015)(NP), I noted the following line:

> *We have considered the remaining arguments raised by the appellant on review including, but not limited to, his analysis of "The Odyssey" by Homer.*

Bet you never thought about attaching one of your college term papers your petition for review, did you?

And speaking of fun at the Board, a belated congratulations to all those Board employees who got an extra four hours of administrative leave earlier this year. If I understand correctly, that was award to you (in the face of all those nasty Congressional concerns about the use of admin leave) not based on any increase in productivity, but because you reported how happy you are working at MSPB. Just a thought, but perhaps next survey time, report that you are thrilled! Maybe get eight hours off with pay.

Love you guys-

Bill

COMING UP IN WASHINGTON, DC

Absence & Medical Issues Week
September 19-23

EEOC Law Week
September 26-30

Making Performance Plans Work
October 5

MSPB & EEOC Hearing Practices Week
October 17-21
Limited enrollment program

Workplace Investigations Week
October 24-28

OR, JOIN US IN NORFOLK

Advanced Employee Relations
September 13-15

WEBINARS ON THE DOCKET

August 25:
Making Mediation Work for Your Agency: A Practical Approach

September 8:
Writing Effective Summary Judgment Motions for the EEOC

A FELTG Offer You Should Consider Seriously

By William Wiley

Our FELTG team of instructors presents seminars throughout government, interfacing with many agencies each year. One of the things we've come to notice is that agencies often tell us that they add layers of extra steps to labor/employee relations processes beyond what is required by law. Although the statutory minimum process required to fire a bad civil servant for misconduct involves a single supervisor and 30 days of pay, a large number of agencies greatly exceed these minimums; e.g.:

- According to MSPB reports, 80% of agencies take more than 45 days to remove a bad employee.
- Most agencies use at least two levels of supervision to terminate a misconduct-ing employee.
- Some agencies use a multi-member board to propose or decide a tentative removal, plus all the layers of unofficial review that go on before the matter ever gets to the Board.
- Lawyers are brought into the procedures at various levels and given the authority to block the tentative removal (denial authority is rarely official, but exercised anyway).
- According to MSPB surveys, 97% (ninety-seven frigging percent!) of front-line supervisors mistakenly believe that it takes more proof to fire someone than the law has required for nearly 40 years.

Our civil service is routinely (and justifiably) criticized for our inability to promptly deal with misbehaving employees, both by Congress, and also by the hard-working employees who see that bad employees do not get fired and receive the same salary and benefits as they do. Yet rather than deal with these nasty realities, agencies continue to come up with convoluted, unnecessary, and inefficient ways to hold bad employees accountable for bad conduct.

Fortunately, we here at FELTG have come up with a challenge for you readers that just might fix this dismal situation. To see if you're eligible to accept our challenge, consider the FELTG philosophy regarding civil service accountability:

1. **Managers - not lawyers nor human resources specialists - should make decisions regarding employee discipline.** Most all formal agency policies, instituted by agency heads, say that line managers make discipline decisions based on the advice and counsel of HR and legal. However, the reality is far from this, in our experience. Routinely in our supervisor training classes, participants say things like, "That's great, but HR won't let us do that." Or, "My draft proposal has been sitting in legal for six months waiting on them to approve the removal." Well, that's just terrible. It is a rare HR specialist or reviewing attorney who has been trained in how to manage an organization. We may know the law, but we have little actual real experience being held accountable for the functioning of an organization. Although we can advise, it is the front-line manager who most fully appreciates the harm caused by the non-performing employee and who has to suffer the loss of productivity and unnecessary salary expenditures that result from delayed removal actions. Therefore, the line manager should be making those decisions, not us.

2. **Supervisors should be trained, then held accountable for how well they discipline.** Instead, what we've found is that upper management and staff advisors often think that because of their respective exalted positions, they are in the better position to make discipline decisions, that the front line supervisor should not be allowed to act because, darn it, they just aren't as smart as we are.

   You aren't going to like this, but here's the deal. If you have front line supervisors who do not know how to administer discipline, then it is YOUR FREAKING FAULT. You either hired the wrong person, failed to train that person, or declined to hold that person

accountable when he did not properly discipline his workforce. We all learned this in the 80s when we were studying Japanese total quality management styles. Instead of checking production at each step of a process, you train individuals to do their job properly in the first place, then hold them accountable at the end of the process for quality and efficiency. By doing away with all those intermediate check points, things can get done much faster.

1. **The statutory legal minimums are fair to the employee.** Yet we see agencies provide much more than is required when it comes to holding employees accountable, for reasons we cannot fathom. For example,

    - Before initiating a Performance Improvement Plan to assist a poor performer to improve, some agency policies mandate that the supervisor should place the employee into a pre-PIP mini-PIP, and then formally PIP her only after she fails the pre-period. Why? If the employee has already demonstrated unacceptable performance, why add the additional time to the improvement process? You sure don't see the private sector doing something like this. Agencies were created to provide government services, not government employment.
    - If an employee presents a medical certificate from his physician that concludes he cannot do his job, if the employee cannot be accommodated, then the direct approach is to remove the employee based on a charge of Medical Inability to Perform. The employee's medical certificate is preponderant proof that the removal is warranted. Yet, at least one large agency we know will instead delay the process and incur additional costs by sending the employee for a Fitness for Duty medical examination. Again, why? The employee's doctor says he can't do the job. You're not helping the employee when he applies for disability retirement by sending him to a FFD (the fact of the medical inability removal does that by itself). Using the employee's own self-generated medical documentation is just about the best medical evidence you can have on appeal.
    - Once a removal is proposed, the employee cannot be removed for 30 days. During this time, she has the right to defend herself by responding to the proposal. The minimum response period is seven days, but there's no real problem if the agency extends the response period to 10 or 20 days, to accommodate the needs of the employee. Yet, way too many agencies cavalierly extend the response period beyond 30 days, many times to 60 days or more, at the request of the employee or his representative. "I'm a very busy and important employee-representing lawyer. I don't have time in my tight schedule to prepare a response in less than 90 days." Or, "As the employee's union representative, we exercise our right to file for information related to the removal, and demand that you extend the proposal period to allow us to receive that information and analyze it."

      Well, isn't that just absolutely unfortunate. In other words, these representatives are asking me, the agency representative, to donate good government money to pay the employee's salary because the employee's lawyer is too busy or the employee's union wants to exercise a right to information. In my world, as agency counsel, I'm busy, as well. And by law we've already given the employee access to all the material relied upon in making the decision to propose removal. You're requesting an extension beyond 30 days? Denied. If you don't like that,

take it up with MSPB (I say this knowing that MSPB has NEVER reversed a removal based on an agency's refusal to extend the notice period).

On the rare occasion that I am feeling magnanimous or I'm working with a deciding official who took his nice-guy pills that day, I'd be willing to extend the notice period beyond 30 days, but only if the employee is willing to request LWOP for that extra time. You need more time than Congress said is necessary? You pay for it.

The Cure

Now that we're clear regarding the problem, here's our FELTG challenge to you.

Try something different.

And here's the *Different Something* to try:

- Establish a group of employees. Select a part of your organization that is relatively representative of the type of work you do. Best to start out with a non-union group to simplify implementation. The bigger, the better.
- Divide the group in half so that you have a test group and a control group. Make the division as random as possible while maintaining the goal of having two similar groups.

For the control group, retain your current procedures. For the test group, establish new discipline policies as follows:

1. Recognize only three types of discipline: reprimands, suspensions, and removals.
2. Delegate discipline authority to first level supervisors. The first line supervisor would issue reprimands, and propose and decide suspensions and removals independently.
3. HR specialists and legal counsel could be requested to advise at the request of the supervisor, but would have no authority to prevent or delay the supervisor from taking disciplinary action.
4. The notice period for suspensions of up to 14 days would be 24 hours. For proposed removals, the notice period would be 30 days with no paid extensions granted. Suspensions beyond 14 days would not be allowed. Demotions would not be proposed, but could be implemented as settlement of a removal if the employee and supervisor agreed.

As for unacceptable performance procedures, the test group would implement the following:

1. Although no proof is required to initiate a PIP, the immediate supervisor will make a list of all mistakes the unacceptable performer has made prior to being PIPed, related to each failed critical element.
2. PIPs will be for 30 days.
3. The supervisor will meet weekly with the PIPee to provide feedback on the week's work.
4. HR or legal will provide weekly feedback to the supervisor as to the quality of the PIP counseling sessions.
5. Should the PIPee fail irretrievably prior to the end of the 30 days, the PIP will be terminated and the supervisor will propose the PIPee's removal immediately. The decision regarding the proposed removal will be made by the second-level supervisor.

For both misconduct and unacceptable performance:

1. The supervisor will place each employee for whom removal is proposed on administrative leave and deny the PIPee access to the workplace and to the agency's intranet.
2. Decisions regarding proposed removals normally will be made no later than the 31st day after the proposal.
3. HR and/or legal would receive copies of all proposals and have the responsibility to notify the supervisor and higher-level management of any problems that are identified. Notice periods normally would not

be extended to provide time for HR or legal notification.
4. Higher-level management would provide monthly feedback to every supervisor as to that supervisor's effectiveness regarding employee accountability through discipline and performance improvement.

"Oh, my goodness. Those folks at FELTG must have been smoking some funny tobacco if they think this makes any sense." Well, don't give us a hard time. What you see here is EXACTLY what was envisioned by the authors of the Civil Service Reform Act of 1978. The only tweak we've added is the mistake list for unacceptable performance. We had to do that because of the way the discrimination and whistleblower laws have developed over the years. Otherwise, you're looking at a plan and approach envisioned by Jimmy Carter way back when the Bee Gees's "Stayin' Alive" was the number one song for the year.

Not a bad anthem for the project, now that I think about it.

Before you implement the project, engage an outside group to develop program indicators and to evaluate the success or failure of the Different Something as time progresses; maybe MSPB or OPM would be willing to provide an evaluation as they have an interest in an efficient government. Oversight by a neutral party would add legitimacy and reduce bias compared to internal evaluation.

FELTG's No-Catch All-In Offer

For the first agency who is willing to give this approach a try, FELTG will donate at no cost to the agency initial training and on-going support for all of your supervisors who will be participating in the test group. Yes, we'll have our expert trainers on-site and on-line to get your supervisors up to speed so that they can handle the responsibility of disciplining fairly and effectively. We believe that education is key to using effective government accountability procedures, and we're willing to put our money where our mouth is. If your supervisors succeed, we succeed. If they screw up, we've wasted our time and tarnished our otherwise-sterling reputation.

So put on your big girl or big boy pants, realize that there just might be a better way to do things, and give the old school way a try. FELTG will be right there with you, for better or for worse. If you're self-important and stubborn, set in your ways, and think that your supervisors are too stupid to handle discipline, then we don't want to work with you. However, if you believe that employee accountability was always intended to be a front-line responsibility and that people can be educated to do something as straightforward as administering employee discipline, then give us a call: 844-at-FELTG. Together, we can make the civil service great again. Wiley@FELTG.com

OFO Applies Supreme Court's Analysis in Young v. UPS to Federal Sector EEO Cases
By Deryn Sumner

Last year, the Supreme Court issued its decision in *Young v. UPS*, 575 U.S. __ (2015), to provide guidance as to how claims under the Pregnancy Discrimination Act should be analyzed. In a 6-3 decision authored by Justice Breyer, the Supreme Court held that the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) should apply to claims raised under the Pregnancy Discrimination Act. Thus, just as in other claims involving allegations of disparate treatment motivated by discrimination, the employee bringing the complaint must first establish a *prima facie* claim by showing membership in a protected class, an adverse employment action, and some inference to support that the adverse employment action is related to the employee's membership in the protected class. If the employee makes such a showing, the burden shifts to the employer to provide a legitimate, non-discriminatory reason for the action identified, and then the burden shifts once again back to the employee to show that the

reasons given are pretext for discrimination. Given the similarities in claims of employment discrimination raised under the Pregnancy Discrimination Act to cases raised under Title VII and accompanying statutes, the decision in *Young* instructing courts to apply this framework to claims of pregnancy discrimination made a lot of sense. At its core, all of these claims concern an employee alleging he or she is being treated differently because of membership in a class determined to be protected by Congress.

However, it's always nice to have case law applying Supreme Court framework to federal sector cases and last month, the Office of Federal Operations gave us just that in two cases issued on the same day.

In *Roxane C. v. USPS*, EEOC No. 0120131635 (July 19, 2016), the complainant alleged that the agency told her, an employee with medical restrictions related to pregnancy, that there was no work available within her restrictions and sent her home without pay. The EEOC found that an administrative judge improperly granted summary judgment in the agency's favor because genuine issues of material fact remained as to how the agency treated those other employees who requested light duty, but who were not pregnant. According to the decision, the evidence seemed to show that the agency may have provided work to those who had suffered on-the-job injuries, and thus also had restrictions requiring light duty. The facts are remarkably similar to those in the *Young* case. If true, it appears the complainant may have experienced disparate treatment as compared to others outside of her protected class, just the type of evidence the *McDonnell Douglas* framework envisioned.

And in the other decision issued that day concerning pregnancy discrimination, *Andera P. v. USPS*, EEOC No. 0120152639 (July 19, 2016), the complainant alleged she was terminated due to pregnancy for excessive absences for her use of 45 hours of leave during her probationary period. The EEOC remanded the case for further investigation as to what specific accommodations were requested and not provided to the complainant, specific information regarding her medical restrictions, and whether similarly-situated, non-pregnant employees were allowed to use similar amounts of leave without being terminated.

Both decisions reference and apply the *Young* framework in remanding the cases for further proceedings. Sumner@FELTG.com.

Webinar Spotlight:
Making Mediation Work for Your Agency: A Practical Approach
August 25, 2016

Most cases settle before ever going to hearing, and one of the most effective tools to resolving federal employment law disputes without litigation is through mediation.

This 90-minute webinar will cover:

- What mediation looks like in the federal government
- The necessary steps to effectively prepare for mediation
- Why there are so many myths about mediation – and the truth about them
- And more!

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

Transgender Discrimination on Agency Premises is a No-no
By Deborah Hopkins

I taught a webinar a few weeks ago and covered a case that created quite a bit of conversation, and even some debate. Deryn Sumner wrote about this particular case in the FELTG newsletter a few months ago, but since not everyone had a chance to read that article – or perhaps they read it and still have questions or concerns – I want to revisit it from a slightly different perspective.

Here's the situation:

A transgender female employee was denied a chance to make a presentation during a Bible study meeting held by an employee-run religious organization that met within a federal agency. The organization was created and recognized under the agency's Employee Organization Policy, which meant that it was sponsored by a senior executive, met on agency premises, used agency resources (such as email and newsletters), and even received compensation from the agency to travel to events.

The employee was denied the chance to make her presentation, even after she offered to present as a man during the meeting. When asked why the request was denied the organization's president, also an agency employee, said she did not want to promote a "transgender lifestyle" among the Bible study members because that went against the beliefs of the group.

Many folks on the webinar saw logic in this thought; others did not. Hang with me here.

The transgender female employee filed a discrimination complaint and the agency initially dismissed it for failure to state a claim, asserting that it was the organization's president acting in that role, and not the agency, that refused to allow the employee to make her presentation.

On appeal, EEOC reversed the dismissal and remanded the case back to the agency after finding that the employee stated a viable claim for hostile work environment harassment.

Why the remand, you might ask? EEOC said that the president's use of the term "transgender lifestyle" could "reasonably be perceived as offensive, as it is indicating that transgender people somehow are different from others and have a different lifestyle than others, and as a result, they should be treated differently." EEOC also said that not allowing someone to dress conducive to the gender with which they identify, is "humiliating and dehumanizing" and that refusing to allow a transgender employee to make a presentation "causes further alienation" among coworkers, and interferes with her work environment. Finally, EEOC said that if the agency failed to take immediate and appropriate action to stop the harassment, the agency could be found liable for the harassment.

So here's where the discussion came in: a number of participants asked how the EEOC could (or whether it should) get so involved in a voluntary, employee-run organization's free exercise of religion. How could the EEOC supersede the group members' decisions to determine who was allowed to make a presentation during a meeting – especially when the person who requested to make the presentation had a lifestyle that did not match the core beliefs of the group?

Some asked whether this perhaps stated a claim of religious discrimination and whether the organization might have standing to file a complaint. EEOC addressed this potential claim, and said that it is a violation of the law to subject one employee to a discriminatory hostile work environment in order to accommodate another employee's religious beliefs.

Still with me here? Because the organization was created and recognized by the agency's Employee Organization Policy and used agency resources, the laws that apply to the agency at large (here, we're talking about civil rights laws) apply to this employee-run organization as well. The agency had the duty to investigate and promptly correct any discrimination or harassment that came from the organization's members, who were the complainant's coworkers, because their conduct was reasonably related to the complainant's work within the agency.

Were it not for this connection with the agency, there would probably not be potential agency liability here. For example, if the group was made up of agency employees but was entirely independent, unaffiliated with the agency, did not use any agency resources, and met after work hours off agency premises, the complainant might not be able to show that her exclusion was reasonably related to her day job.

A word of caution moving forward: the same analysis would apply to similar organizations that attempted to discriminate against others because of other protected classes: race, color, national origin, religion, sex, age, disability, genetic information. Whether you agree or disagree with this reasoning, this remains true: you just can't do it; *Hillier v. IRS*, EEOC Appeal No. 0120150248 (April 21, 2016). Hopkins@FELTG.com

A Refinement in the Due Process Dilemma
By William Wiley

By now, we all know the problem. To satisfy the Constitutional mandate for due process, the Deciding Official in a proposed removal should not rely on anything not in the proposal notice or the employee's response to the proposal. Violate due process, and the agency automatically loses the appeal. There's no concept of "Was there any harm?" when it comes to evaluating a due process violation, as there would be in other situations in which the agency makes an error.

As issues before MSPB go, this one has evolved to be particularly onerous. It's very easy for a Deciding Official (DO) to unintentionally rely on something not before the employee in making a decision. DOs are smart people and they know lots of stuff. It's up to us practitioners to coach them seriously about relying only on the limited information provided in the proposal and the response.

In my practice representing agencies, I've become exceedingly gun shy about the DO relying on ANYTHING not known to the employee. In most of the actions in which I work with agencies these days, the DO goes back to the employee at least once during the notice period either asking for more information or providing the employee new information that the DO has acquired, out of fear that there might be some tiny bit of fact that the Board on review finds to be a due process violation. I've half-joked (but only half) that I'm thinking about having the DO send a draft decision letter to the employee for comment prior to issuing the darned thing. That way, the chances would be greatly reduced that she would be relying on some fact that accidentally had not been made known to the employee prior to the final decision being issued. I know, sounds silly, but I'd rather be silly than reversed. Here's the rule:

> When an agency intends to rely on aggravating factors as the basis for imposing a penalty, such factors should be included in the advance notice of the adverse action so that the employee will have a fair opportunity to respond to those factors before the deciding official. *Lopes v. Navy,* 116 MSPR 470 (2011). If an employee has not been given notice of an aggravating factor supporting an enhanced penalty, an *ex parte* communication with the deciding official regarding such a factor may constitute a constitutional due process violation because it potentially deprives the employee of notice of all the evidence being used against him and the opportunity to respond to it. *Ward,* 634 F.3d at 1280; *Lopes,* 116 MSPR 470, ¶ 6.

Sometimes an employee will raise an issue or make a statement in his oral response that the DO wants to rely upon as an aggravating factor. I've wondered, given this era of special sensitivity to due process, whether the DO is safest to tell the employee that she plans to rely on that information, or how she is characterizing that information, and allowing the employee to respond to that prior to making a decision. After all, it's entirely possible that a DO might misunderstand an employee's response somehow and thereby rely on an incorrect understanding of what the employee actually was saying.

Well, the good news for agencies is that the DO does NOT have to tell the employee how she is considering the employee's response. In a recent case, when the DO considered the employee's response, she drew the conclusion that the employee was demonstrating a lack of remorse. On appeal, the employee claimed that because he was not informed and allowed to respond to the DO's

conclusion that he lacked rehabilitation potential, his due process rights had been violated.

The Board was clear in rejecting this argument. It reasoned that the agency could not have notified the employee that it would consider the lack of remorse in her response because the response postdated the proposal notice. Regulations requires that the DO consider BOTH the proposal and the RESPONSE to the proposal: "In arriving at its decision, the agency will consider only the reasons specified in the notice of proposed action and any answer…" 5 CFR 752.404(g)(1).

The Board members went out of their way to correct the judge's finding that there was no due process violation because the DO testified she afforded little weight to the lack of rehabilitation potential. "Little weight" is the wrong principle. The correct principle is that the DO can consider the response (without violating due process) without notifying the employee of the conclusions drawn by the DO subsequent to the response. *Nunnery v. Agriculture*, DA-0752-15-0378-I-1 (June 9, 2016)(NP)

Frankly, this could have gone the other way, with MSPB requiring that the employee be informed of and allowed to respond to any new conclusions drawn by the DO. Fortunately, the Board came down on the side of efficiency and fairness. DOs can now draw their own conclusions based on the facts before them. Because of this decision, we are tweaking the FELTG approach to decision letters a bit. Previously, we have taught that the best decision letter is the decision letter that simply affirms the proposal without any elaboration by the DO. There's still nothing wrong with that, and simple affirmance is still the easiest-to-defend approach. However, in a case in which the DO feels compelled to add something to the Proposing Official's analysis, as long as she adds opinion only based on existing facts and not new facts, we think it's safe to let it go. Wiley@FELTG.com

FELTG is Coming to Norfolk

Advanced Employee Relations
September 13-15, 2016

This three-day open enrollment seminar will cover the relevant things HR practitioners need to know about leave abuse, performance accountability, and discipline. Plus, hands-on workshops will allow you to leave with the tools you'll need to succeed.

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

Misinformation Runs Rampant When the Internet Attempts to Understand Federal Sector Processing
By Deryn Sumner

Earlier this week, I spent a few minutes poking around the EEOC's website to see if there was anything of interest to share with you, our FELTG newsletter audience. I came across a press release titled, "What You Should Know about EEOC and *Shelton D. v. U.S. Postal Service* (Gadsden Flag case)." The press release talked about a recent Office of Federal Operations decision. As I'm always interested when federal sector cases make it to the EEOC's newsroom, I read it with interest and ended up a bit bewildered. See, *Shelton D.* is not a notable decision worthy of a press release. It's a case holding that an agency improperly dismissed a formal complaint for failing to state a claim, and ordering the agency to reinstate and investigate it. The EEOC issues hundreds of these decisions every year. So why did the EEOC see fit to issue a press release about this decision?
https://www.eeoc.gov/eeoc/newsroom/wysk/gadsden-flag.cfm

Well, the case concerns a complainant's allegation that the U.S. Postal Service created a hostile work environment based on race (African American) and retaliation for prior EEO activity when a co-worker repeatedly wore a hat with the Gadsden Flag on it (commonly known as the "Don't Tread On Me"

insignia), even after management counseled the co-worker not to do so, and subsequently photographed the complainant at work without the complainant's permission.

The Postal Service dismissed the complaint for failure to state a claim, the complainant appealed, and the EEOC held that it did state a claim, and ordered the agency to investigate it. As everyone familiar with federal sector EEO complaints processing knows, this does not mean that the EEOC found that harassment occurred, that the complainant's claims currently or subsequently will have merit, or that the complainant is entitled to any relief. The decision was simply a procedural reversal instructing the agency to conduct an investigation so that a record upon which a factfinder could determine if harassment occurred would be created.

But alas, unsupported outrage accounts for most of the Internet these days and those who somehow found out and wrote about the decision, simply put, had no idea what they were talking about. When I searched for references to the decision, I got to see such inflammatory headlines as "Obama Bans Gadsden Flag" and "EEOC Holds Gadsden Flag Is Racist." Putting aside whether the flag is racist or not, the EEOC made no such determination in its remand of the complaint. The EEOC simply held that under the regulations at 29 CFR 1614.107, the complaint stated a claim that should be investigated. And no, President Obama did not weigh in on the EEOC's decision.

And now the kicker. The OFO decision remanding the case for investigation was issued in June of 2014. The decision that appears to have caused so much recent angst was the decision denying the agency's request for reconsideration, again a simple procedural decision that the EEOC issues by the hundreds every year, which was issued on June 3, 2016. Again, the EEOC's June 2016 decision only instructed the agency to investigate the claims, and did not conclude that the actions alleged constituted actionable harassment.

How about we focus our outrage on more important things, like how the EEOC is so understaffed and overwhelmed that it takes almost three years to get a case remanded for investigation.

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Employee Participation in Employee Assistance Programs

By Barbara Haga

We recently had an inquiry from a reader about whether there is ever a time when a supervisor could legally direct an employee to seek Employee Assistance Program (EAP) services. This brought up a number of issues and considerations that seemed like a good topic to address in the next few columns.

Background

5 USC 7901 authorizes agencies to create a health services program to promote and maintain the physical and mental fitness of employees. The law, originally enacted in 1966, did not require such programs but authorized agencies to create them and operate them with appropriated funds.

OPM has identified a number of other laws, Executive Orders, and regulations that have addressed certain kinds of specific coverage on the EAP page of the OPM website: (https://www.opm.gov/policy-data-oversight/worklife/employee-assistance-programs/#url=Guidance-Legislation). Most of these additions are focused on drug and alcohol issues:

> Public Law 99-570 (5 USC 7361 and 7362), The Federal Employee Substance Abuse Education and Treatment Act of 1986, and 5 CFR 792 require Federal agencies to establish appropriate prevention, treatment, and rehabilitative programs and services for alcohol and drug abuse problems for Federal civilian employees.

> Public Laws 96-180 and 96-181 authorize agencies to extend counseling services, to the extent feasible, to family members of employees who have alcohol and drug problems, and to employees with family members who have substance abuse problems.
>
> Public Law 79-658 authorizes the head of agency to establish health services programs for employees, also forms the basis for expanding counseling programs from those dealing solely with substance abuse to broad range programs which provide counseling for other personal problems, e.g., family, financial, marital, etc.
>
> Executive Order 12564 requires agencies to establish a Drug-free Federal Workplace Program (DFWP), including an EAP as an essential element in achieving a drug-free workforce.

EAPs are voluntary, confidential programs that provide counseling and assessment to employees whose work performance and conduct are being affected by covered issues.

Mandatory Referral or Directed Participation?

There is a difference between mandatory referral to an EAP and requiring an employee to actually participate. Referral requirements are common as discussed below. There is nothing I have found in my experience that would allow management to make an employee participate. Even if you could, the information is still protected, so unless the employee consented to release, you still wouldn't have what you would wanted. Unfortunately, our laws and employment practices protect employees' rights not to take care of themselves and not to take prescribed medication and not to take advantage of services and/or medical care that are offered with the best of intentions.

Mandatory referral is quite another thing. We include the information in a notice or have a supervisor advise an employee that he or she is being referred. Sometimes that includes an appointment that has already been set up with directions of where to go. Mandatory referral may arise in these situations:

Federal Drug-Free Workplace Program (DFWP). Section 2(b) of EO 12564 signed by President Reagan on September 17, 1986 included provisions regarding use of employee assistance for counseling and supervisory referrals for rehabilitation. (http://www.samhsa.gov/sites/default/files/executive_order.pdf. The model Federal agency plan issued by Substance Abuse and Mental Health Services Administration (SAMHSA) is available at this link: http://www.samhsa.gov/sites/default/files/workplace/ModelPlan508.pdf. The plan states on p. 12 that "Any employee found to be using drugs shall be referred to the EAP."

Collective Bargaining Agreements. It is common that language has been negotiated in union contracts which requires management to make referrals in certain situations. I would surmise that the union's goal is to get the employee into an EAP program at the earliest possible time thus minimizing the possibility of some kind of performance or conduct action being initiated/effected. Of course, with such referrals being included in the agreement, if that step is missed there is an issue of failure to live up to the terms of the agreement which would likely arise in any ensuing grievance or appeal.

Agency Directives. Some agency policies include requirements for including EAP referrals in certain circumstances and/or in conjunction with disciplinary actions. An agency could require referral if an employee is found to be in possession of alcohol on duty or under the influence of alcohol on duty. There may be requirements for referral when there are altercations in the workplace or other similar issues. Some agency policies build in a requirement to include EAP referral information in proposed disciplinary notices.

Mandatory Referral or Creative use of Referrals?

While we may not be able to make a mandatory referral, we can be creative in trying to ensure that an employee actually participates. Once when working on a disciplinary case regarding an employee who was struggling with emotional illness issues, I arranged for the EAP counselor to be in a conference room down the hall while the disciplinary letter was being delivered. The letter gave the referral information and said we had someone available to speak with her right then. When the manager finished his part of the meeting, I asked the employee if she would be willing to talk to the counselor and she said she would, so I walked her down to the conference room. I can't recall what eventually happened with that case, but I distinctly remember that the employee seemed surprised that someone was immediately available and was grateful to have a chance to talk to someone.

EAP is one place where management's and union's goals are more closely aligned than many other areas. The goal is to help an employee solve a problem and remain a productive member of the workforce. If you have the kind of relationship with a union representative that would allow this, you could try to present a coordinated front in a meeting with both management and union there. The manager would say that he or she needs to deal with the situation but sees that the employee seems to be struggling with something that is coming to work with them from home. Management doesn't want to have to initiate discipline if the employee will take steps to deal with the underlying issue. Have the union official there to talk about the program and hopefully that it has helped other people and that the employee should try and see if it could be of assistance. Perhaps the union official could be the one to escort employees to where they need to go or to sit with them as they dial in to FOH or some other service.

One thing about getting the union to join in is that they can talk to an employee in a way that management can't. They can tell the employee in frank terms that the last person who had these kinds of issues ended up getting fired, or better yet, that the last person who had these kinds of issues got themselves straightened out and made a comeback and is still working there. If management said that the last person got fired it might come across as a threat – but when the union does it, they are helping! It's something to think about. Haga@FELTG.com

Attention, west coast Supervisors and Advisers:
Join FELTG in San Francisco for
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December 5-9
at the Marines' Memorial Club
609 Sutter Street, just off Union Square

U.S. District Court for Eastern District of Virginia Rejects EEOC's Holding in Baldwin
By Deryn Sumner

Practicing before the EEOC's federal sector administrative process is a funny thing full of contradictions. If there's a Federal Rule of Evidence or Civil Procedure that benefits your argument, then you bring it up to the administrative judge as persuasive and controlling. If the Federal Rules don't benefit your argument, you brush it off and tell the administrative judge that they only should be used as a guide and don't need to be strictly followed.

The EEOC does the same thing in its decisions issued by the Office of Federal Operations. If case law from the court of appeals and district courts contradicts the holdings the Commission wants to make, it will point out that anything less than Supreme Court case law is not controlling. You can see a clear example of that in last year's

decision regarding telework as an accommodation in *Lavern B. v. Dep't of Housing and Urban Develop.*, Appeal No. 0720130029 (February 12, 2015). There, the Commission noted that several circuits have held that an employer does not need to provide reasonable accommodations for commutes. However, the Commission went on to note that "federal district and circuit court decisions may be persuasive or instructive, but are not binding on the Commission" and held that an employee's request for an accommodation of teleworking or a shorter commuting time triggers the start of the interactive process. The decision also reminded federal agencies that they should be model employers "which may require [them] to consider innovation, fresh approaches, and technology as effective methods of providing reasonable accommodation."

On the flip side, if case law from the circuit or district courts bolsters the argument being made, then the Office of Federal Operations will heavily cite to these cases. An excellent example of this approach is in *Baldwin v. Dept. of Transp.*, EEOC Appeal No. 0120133080 (July 15, 2015), where the Commission held that claims of sexual orientation should be processed as claims of sex discrimination. The Commission extensively relied upon case law from the federal courts to support its holding.

Alas for the plaintiff in a recent decision out of the Eastern District of Virginia, the Judge did not find the Commission's arguments as compelling. In *Hinton v. Virginia Union University*, No. 3:15CV569, 2016 WL 3922053 (E.D. Va. July 20, 2016), the plaintiff's attorney tried to argue that the EEOC's decision in *Baldwin* created a matter of first impression in the circuit regarding Title VII's coverage of sexual orientation discrimination such that summary judgment was not appropriate. The Judge disagreed that issuance of the *Baldwin* decision changed anything, noting that the Fourth Circuit's holding that Title VII does not cover discrimination based on sexual orientation in *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th Cir. 1996) still applied and that "opinions of the…EEOC…are entitled to deference only to the extent that they have the power to dissuade." The Judge did not find that *Baldwin* served to persuade him.

As I discussed in the March newsletter, the EEOC's private sector litigation arm filed two lawsuits earlier this year challenging sexual orientation discrimination as sex discrimination based on the decision in *Baldwin*. One of those cases, against Pallet Companies, has already been settled for over $200,000. Sumner@FELTG.com