Federal Employment Law Training Group
Training By Professionals For Professionals

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All Your Civil Servant are Belong to Us

I have no idea what that means. My son, the Computer Guy, tells me that it is a take-off on a meme derived from a poorly translated video game from about ten years ago. He further defines a meme as a "unit of cultural transmission," something of no inherent value that nonetheless is shared and appreciated by individuals within a community as an ethereal embodiment of a part of that community. And thus, it hit me; the FELTG Newsletter is a meme. Started on a whim, broadcast around the solar system for free with no inherent value, read monthly by tens of thousands of individuals within the federal employment law community. Yes, you can spend your agency's bucks by subscribing to "official" publications of serious value and without typos. But you won't get that same sense of camaraderie, that "we're all in this boat together" feeling anywhere else but right here in the FELTG Newsletter. We write to help you feel good about yourself, to perhaps make you smile, and on occasion, pass along some bit of information that hopefully will help you run the government better. In some ways, we're like one of the original huge memes, the Numa Numa guy. You've seen him singing to himself and to the world like nobody's watching. One website describes that video clip as **"**a movie of someone who is having the time of his life, wants to share his joy with everyone, and doesn't care what anyone else thinks." That's not far from the FELTG Newsletter, "a publication written by people having the time of their lives, who want to share that joy with everyone, and who don't really care what anyone else thinks." We hope that when you read us, we help you to feel good. Now, if you want to have a moment of feeling good outside of our newsletter, go waste some government time and revisit this guy; if he doesn't make you smile and do arm pumps, you don't belong to us: https://www.youtube.com/watch?v=KmtzQCSh6xk

Bill

COMING UP IN WASHINGTON, DC

Absence & Medical Issues Week
September 19-23

Making Performance Plans Work
October 5
Special one-day event!

Workplace Investigations Week
October 24-28

Settlement Week: Resolving Disputes Without Litigation
October 31 - November 4

FLRA Law Week
November 14-18

OR, JOIN US IN ATLANTA

Developing and Defending Discipline: Holding Federal Employees Accountable
November 29 - December 1

WEBINARS ON THE DOCKET

September 22:
Addressing Medical Issues in Misconduct Cases

October 13:
Common Mistakes in Handling Performance Problems

EEOC Issues New Guidance on Retaliation Claims
By Deryn Sumner

Last month, the EEOC issued revised Enforcement Guidance on Retaliation and Related Issues. The Commission last issued such guidance in 1998. Since then, Congress passed the Americans with Disabilities Act Amendments Act, which came into effect on January 1, 2009, as well as the Genetic Information Nondiscrimination Act, the Lilly Ledbetter Fair Pay Act, and other laws which cross paths with claims of retaliation. Additionally, the Supreme Court issued its decision in *Burlington Northern v. White*, 548 U.S. 53 (2006), which addressed claims of retaliation in the workplace and held that "context matters" in determining whether an employee's rights have been chilled because of engagement in protected EEO activity. So, it's good to see that the Commission has updated Enforcement Guidance to address these changes. Just as it did with the Enforcement Guidance issued regarding reasonable accommodation claims, the Commission concurrently issued a question and answer publication to accompany the Enforcement Guidance.

The press release issued by the Commission to announce the publication of this Enforcement Guidance includes a quote from the EEOC's Chair, Jenny R. Yang, noting that retaliation is asserted in almost 45 percent of charges received by the EEOC, which makes it the most frequently alleged basis of retaliation. Regarding the federal sector complaints process, the press release noted that retaliation has been the most frequent basis alleged since 2008, and that findings of discrimination on the basis of retaliation comprise between 42 and 53 percent of all findings from 2009 to 2015. Speaking as someone who reviews the decisions issued by the Office of Federal Operations each year, this statistic does not surprise me.

As we teach during *EEOC Law Week*, managers often falter after receiving notice that an employee has filed an EEO complaint. Remember that protected activity includes serving as a witness for a co-worker's complaint, filing your own complaint (including starting the informal counseling process), and requesting reasonable accommodation. Even if the underlying activity is not found to have merit, an employee can still succeed on a subsequent complaint if he or she can show that agency management took actions to treat the employee differently after learning of the protected activity, or made comments that had the result or intent of chilling the employee's engagement in protected activity. When considering claims of retaliation, it's important to remember two key points. First, as I've discussed in this space in January of this year, what states a claim of retaliation under the Commission's case law is broader than what states a claim of discrimination. That is to say, a claim that could be dismissed for failure to state a claim under any other basis could feasibly state a claim of retaliation.

The updated Enforcement Guidance covers what protected activity is, the applicable legal analysis to use to analyze claims of retaliation, the remedies available to successful complainants who file claims of retaliation, and guidance regarding how interference with the exercising of rights under the ADA constitute retaliation. The Enforcement Guidance also includes specific examples of what constitutes an adverse employment action. The complete Enforcement Guidance is available on the Commission's website here: https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm . Sumner@FELTG.com

Is it Just Me, or is Reasonable Accommodation Becoming Trickier?
By Deborah Hopkins

At FELTG we love our webinars. As part of each webinar agenda, we take Q & A breaks to answer your questions. Sometime we get questions that come via email after the webinars end, and occasionally we'll answer

those in our newsletter so that all our readers can hopefully learn something. Today is just such a time.

After teaching a recent webinar on disability accommodation, I received the below scenario from a customer. I've changed a few of the details and some identifying information to make this a true "hypothetical," but the essence of the scenario remains intact.

> Dear FELTG,
>
> I have a case and I was wondering if you could help.
>
> An employee assigned to a job at Office B (about an hour from our main site, Office A) requested reasonable accommodation (RA) two years ago. At that time, there was space for her to sit in Office A, which she thought would help, and I told her that she could as long as there was space, and that if she was getting her work done she could work from Office A. I received a call from our RA rep who reviewed the information with me over the phone and said, "That sounds good." I asked if there was something else needed, for example paperwork/forms, and he said no.
>
> Fast forward one year, we were starting to run out of space at Office A, and I followed up with HR regarding what to do now. The employee's position belongs in Office B, is stationed there and should be there. The original RA rep is no longer working here and the employee's file is incomplete. There aren't even any medical records (so I understand).
>
> I told the employee she needs to reconnect with the new RA rep, and again, as long as there is space, she could stay at Office A. It took almost a full year to get things figured out. Finally, the employee was offered a different job at Office A, in a different department. She declined.
>
> Now I am a week from having new employees start work, and no desks for them to sit at in Office A, where they will be assigned.
>
> I prepared a memo for the union explaining that the employee needs to return to her duty station [at Office B], that she declined the RA offered [the reassignment to a different department in Office A], and that the interim accommodation [working at Office A] is no longer possible.
>
> I asked HR to review this plan, and they told me not to send it, because they employee is preparing another RA requesting telework. Her job is not approved for telework.
>
> I think I am going to proceed with memo to union and request that she move back to her assigned duty station at Office B.
>
> I believe this case has been mishandled, I believe she has a real medical need, but the job is not at Office A and the program really needs the position to be posted in Office B.
>
> Any recommendations?
>
> Thanks in advance.

Thanks for the question. This type of situation is fairly common: these types of "unofficial accommodations" work for a while until something needs to change, and there's no paperwork to look at to know what the problem is or what other accommodations might work. The good news – or bad news, depending on how you look at it – is that background paperwork and medical records are not really necessary in your situation because the employee has been working at Office A and only now is this possibly starting to cause an undue hardship. No paperwork, no problem; it's time for a reasonable accommodation reassessment anyway.

Just to be sure we're coming from the same place, though, let's review the law on reasonable accommodation.

When making an accommodation request, an employee must show that she is a qualified individual with a disability, and that she needs a reasonable accommodation in order to successfully perform the essential functions of her position without causing harm to herself or others. From there, the agency is required to accommodate the employee unless doing so would cause an undue hardship, or no accommodation is available.

If the agency cannot provide a reasonable accommodation without causing an undue hardship, or no accommodation is available for that job, the agency must next consider reassignment as an accommodation by looking for a vacant, funded position for which the employee is qualified, all the way up to the department level (if the agency is part of a larger Department). If no vacant, funded position is available at the employee's grade level the agency should look for lower-graded positions for which the employee is qualified. If the employee refuses to accept the reassignment, the employee in essence waives the reasonable accommodation right.

At first glance it seems like you have your bases covered, as you've already offered the employee another position near the physical location in Office A where she currently sits, and she has refused the reassignment. You mentioned that the position the employee currently holds is not telework eligible, and that HR informed you the employee is in the process of requesting telework as accommodation. There's an aggressive option and a conservative option. The aggressive option is to tell the employee (and the union) that she needs to go back to Office B next week, and not to consider the telework option until you receive it – after all, you have no paperwork that even confirms the employee *has* a disability. Here's where you need to be careful, though. The conservative option is to keep things as they are and allow the employee to work in Office A until you receive the telework request that you know is coming any day now.

Whether you go aggressive or conservative, though, remember this: **when telework is requested as a reasonable accommodation, the general rules and policies for telework do not apply, and the reasonable accommodation rules take over.**

For example, if a new employee requests telework and the agency telework policy states that all employees must work full-time for a year before being telework-eligible, the agency would be correct to refuse the new employee's request. However, if that new employee requests telework as accommodation for a disability, the agency cannot unilaterally use the telework policy as a reason to deny the request. See *Dahlman v. Consumer Product Safety Commission*, EEOC No. 0120073190 (2010). If the new employee has a disability and makes that telework request, the agency is obligated to engage in the interactive reasonable accommodation process and must consider whether telework would be a reasonable accommodation for this employee. If it is, the agency must grant telework if no other accommodation is available. *See Kubik v. Department of Transportation*, EEOC No. 01973801 (2001). If there is another effective accommodation besides telework, though, the agency has a right to choose that accommodation instead.

You mentioned there are no medical records. Now is a good time to ask your employee for new medical documentation, because but even though it sounds as if you have no questions about the employee's medical situation, you at the very least need to know what the employee's limitations are so you can consider which accommodation(s) might work.

Once you know the employee's medical limitations, you'll need to look at the essential functions of her position to consider whether telework is a reasonable accommodation. In addition, while you say the program needs someone to be present at Office B, the fact that the employee has been working from Office A for several years might work against you. It is not insurmountable; perhaps having the employee work from another location is now causing an undue hardship at Office B; we just want to make sure you have all your bases covered.

So, assuming the employee has a qualified medical condition, you must now consider whether the employee could do her job from home. As we said above, the analysis for telework as a reasonable accommodation varies from case to case, and the fact that the job is not telework-eligible under the agency policy is not good enough. Because this is a request for RA, you need to consider whether any of the employee's work can be performed from home. *See Ellis v. Department of Education*, EEOC No. 01A42966 (2006). Perhaps it is not possible for this job to be performed at home; for example, jobs that require patient contact, or access to secure information available only on the agency network, may not be able to be performed from home. *See Humphries v. Navy,* EEOC No. 0120113552 (2013); *Petzer v. Department of Defense*, EEOC No. 01A50812 (2006).

Each of these situations is unique and requires participation in the interactive process. Talk with the employee and the RA coordinator to determine whether telework – whether on a permanent or intermittent basis – might be the best option.

I know it's not an easy answer, but I hope this helps. Good luck! Hopkins@FELTG.com

FELTG is Coming to San Francisco

Advanced Employee Relations
December 5-7, 2016

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

- Leave abuse
- Performance accountability
- Discipline

Plus, hands-on workshops will allow you to leave with the tools you'll need to succeed.

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

Yes, But Who?
By William Wiley

Here's another article in our series of advisories to the new incoming President. Hey, you may know a lot about building golf courses or flying around the globe acting all "Stately," but here at FELTG, we bet you don't know diddly about federal employment law. Fortunately, we do, so here's another recommendation for you.

Dear New President:

Ask "who."

Now that you're in charge of the Executive Branch, about once a month or so you're going to read some article about gross malfeasance in the way that one of your federal agencies is being run. The media loves to make us civil servants look bad, and goodness knows those fellows on the other side of the aisle on Capitol Hill absolutely revel in the thought of dragging one of your secretaries before an oversight committee where she can be asked brilliant questions such as [implementing Southern drawl], "Madam Sek-e-tary, are you saying – for the record – that you fully support government waste, fraud, and abuse at the highest levels of your administration? My goodness, how do you stand to look at your sweet self in the mirror? Bless your little heart."

Case in point: September 1, 2016, *Washington Post*, A-2: *Patent examiners - Nearly 300,000 hours found to be fraudulently billed amid case backlog*. The article discusses a recent Inspector General (IG) report which found that for part of 2014 and all of 2015, U.S. Patent and Trademark Office (PTO) employees cheated the government out of $18.3 million in salary (and possibly up to $36 million) by claiming time worked which was not. The report points to an abuse of flexiplace/flextime policies as a source of the lost time, plus employees who "gamed" the system while supposedly reporting to the PTO main office in Alexandria.

Assuming that this report is in general close-to-correct, as President you will be interested in fixing thigs, won't you. Therefore, you will want to know the cause of this problem so you can address the cause. What follows are a couple of possible causes alluded to in the article (followed by our usual snarky FELTG comments):

- **"There may be other [legitimate] reasons for the lack of a digital footprint."** Yeah, and when I was in kollege, I subscribed to *Playboy* to read the in-depth articles. If there were other legitimate reasons for the discrepancies, don't you think those brilliant, well-trained IG investigators would have noticed them?
- **The union contract has limitations on a supervisor's ability to hold flexiplace employees accountable.** Hey, guess what? Collective bargaining agreements can be changed! Management can make proposals and bargain. If a compromise cannot be reached, four Presidential appointees decide what the CBA will say. When confronted with a management proposal that would increase accountability, supported by a very public IG report that finds there is limited accountability, my money is on those Presidential appointees coming down on the side of efficient government.
- **"Eight years ago, the agency stopped requiring employees to swipe their badges when they leave the headquarters building. This is only required when they go into work."** Then change the darned policy. Sounds like an internal security matter for PTO, and internal security policies do not have to be bargained with the union (although the impact of the policy change does). For employees who are not in the bargaining unit, the policy change can be effective tomorrow. Same answer for allegedly outdated low performance standards. Changes to performance standards also do not have to be bargained.

Somehow poor employee accountability procedures managed to be put in place at PTO. Mister/Madam President, the "who" question is, "Who is responsible for this happening?" There are two potential groups of culprits:

Line Management

A. It is possible that the leadership at PTO is generous on purpose; that the folks in charge intentionally put into place policies that allow employees to game the system and avoid accountability. Maybe they think that federal employees are underpaid and that by allowing abuse of the pay system, good people will remain employed at PTO rather than go work for some high paying patent law firm. If this is the case, that the slack policies were intentional, then you as El Presidente need to consider who you appoint to these positions and whether this is how you want your appointees to manage.
B. Alternatively, it is possible that the PTO leadership came to believe that it had no choice but to reduce the oversight of the agency's employees, that it had to sign a CBA that reduced accountability, that it could not fire employees who abuse leave, that it had to have loose accountability procedures. If this is the case, then somebody on your behalf should be looking into how PTO leadership came to believe these things.
C. Or, it is possible that the individuals who have been appointed to leadership positions in PTO are just stupid. For a solution if this is the case, see "A." above.

Staff Advisors

A. Perhaps the PTO accountability staff advisors (the Office of General Law and Office of Human Resources primarily) have advised line management on good procedures for holding employees accountable, and line management has rejected that sage advice (see A. and C. above). For example, when the PTO union

proposed that employees who work at home part-time not be required to log onto their computers and have 24 hours to respond to a phone call or email from their supervisor, maybe the staff advisor to the management bargaining committee gave solid accountability advice: "That's just plain crazy. We'll have no way of documenting whether people do their work when they say they did. There's no way we should agree to that." If senior management chooses to ignore this recommendation, there's not much the LR advisor can do, but agree to the proposal and sign the CBA.

B. Alternatively, maybe it wasn't line management who made these sorts of decisions. Perhaps the staff advisors were the "who" that made these calls, that implemented low production standards based on how work was being done in the pre-computer days of *1976* (don't get upset with us; we're just reading from the *Post* article) and did not recommend charging people AWOL and reprimanding or firing employees who cheat. If this is the case, did the staff advisors act this way because they are evil intentional wasters of tax payer dollars, or are they just ignorant?

Here at FELTG, many times all we know is what we read in the newspapers. And that is all we know about this situation. The bottom line given the facts as reported by the IG are these. When it comes to who is responsible, it is either:

1. Ignorance, or
2. Evilness.

Madam/Mister President, we have to leave the evilness up to your ability to select good appointees. As for the ignorance, we aren't a training company for nothing. You want your people to learn how to bargain a contract with your union? We teach that. Discipline employees who lie about their use of government time? We can show you how to fire them quickly and fairly until the cows come home. Manage absence and leave? We present an entire week of training on that singular topic twice a year, at a cost to the government of much less than $18,300,000.

And finally, here at FELTG, we are absolutely bewildered by the following little tidbit from the article:

> "Investigators did not recommend that patent officials pursue administrative or criminal action against any individual examiner because the inspector general is prohibited under federal privacy laws from disclosing their names."

You're telling us that we have created an entity in government to investigate criminal activity and employee misconduct, but that agency cannot release the names of employees for the purpose of criminal prosecution or discipline for misconduct? Oh, Mx President, the problem is even worse than we thought. Wiley@FELTG.com

NEW! Settlement Week: Resolving Disputes Without Litigation
October 31 - November 4

Most disputes in federal employment law settle before hearing – whether they initiate as grievances, EEO complaints or as appeals of agency disciplinary actions.

Join FELTG for this brand-new seminar and learn the skills you need to save your agency time and money, and successfully resolve federal employment law disputes without litigation.

Monday - Why Settle in Federal Sector Employment Disputes?

Tuesday - Knowing the Players

Wednesday - Determining Objectives and Methods

Thursday - Alternative Dispute Resolution

Friday - Drafting Enforceable Settlement Agreements

Registration is open now!

Fox News Could Have Used This Report a Few Months Ago
By Deryn Sumner

My colleagues and I are never going to see settlements in the range of $20 million dollars, as Fox News agreed to pay out last week after being hit with a sexual harassment lawsuit filed by Gretchen Carlson and others. But harassment in the federal workplace does exist, even if we're not dealing with such high numbers in settlements. As I mentioned in one of my other newsletter articles this month, the EEOC issued revised Enforcement Guidance on Retaliation in August 2016. The Commission has had a busy summer, as it also issued a report of the "Select Task Force on the Study of Harassment in the Workplace" in June 2016. The report was issued by two of the EEOC's Commissioners, Chai R. Feldblum and Victoria A. Lipnic. (Hat tip to one of my Firm's law clerks, Chauna Pervis, who clerked for Commissioner Feldblum this summer and alerted me to the report).

The report is extensive, totaling more than 150 pages, and walks through two main topics: "What We Know About Harassment in the Workplace" and "Preventing Harassment in The Workplace." The Commissioners end the report by providing a summary of recommendations and checklists for employers. Although this space is too limited to delve into all of this report, I did want to highlight some points that I think are most useful for our FELTG audience.

The report notes that it focused on a broad view of harassment, that is, claims of being treated poorly in the workplace because of membership in a protected class. The report is careful to note that under the legal framework, not all of these allegations examined would constitute actionable harassment. That is, that some of the allegations would not be sufficiently severe or pervasive to state successful claims.

The report notes that during fiscal year 2015, federal employees filed 6,741 complaints alleging harassment, which constituted 43% of all complaints filed by federal employees. (Careful readers may wonder how the Commission can represent that formal complaints alleging retaliation constitute the most frequent basis alleged. To that I have two words: retaliatory harassment. Okay, a few more words for those in the back: retaliation is a basis and harassment is a legal theory under which you have to establish treatment motivated by membership in a protected class, i.e. basis.

Some more fun statistics, straight from the report. Of the total number of complaints filed in FY2015 by federal employees alleging harassment approximately:

- 36% alleged harassment on the basis of race,
- 34% alleged harassment on the basis of disability,
- 26% alleged harassment on the basis of age,
- 12% alleged harassment on the basis of national origin,
- 7% alleged harassment on the basis of sex, and
- 5% alleged harassment on the basis of religion

The report focuses on the business case for addressing claims of harassment, including the cost of resolving the viable claims (and, let's be honest, the nuisance ones as well), as well as the costs to productivity and morale caused by harassment, the desire to promote retention of good employees, and the harm to a company's reputation when claims of harassment go public.

The report even cites to a 1994 MSPB report on Sexual Harassment in the Federal Workplace to illustrate the point of lost productivity:

> *Imagine an employee who's being bothered by a coworker who leers at her or makes comments full of innuendo or double entendres, or who tells jokes that are simply inappropriate in a work setting. The time this employee spends worrying about the coworker, the time she spends confiding in*

her office mate about the latest off-color remark, the time she spends walking the long way to the photocopier to avoid passing his desk, is all time that sexual harassment steals from all of us who pay taxes.

Adding up those minutes and multiplying by weeks and months begins to paint a picture of how costly sexual harassment is. Increase this one individual's lost time by the thousands of cases like this in a year, and the waste begins to look enormous. And this may well be a case that doesn't even come close to being considered illegal discrimination by the courts. Whether or not they're illegal, these situations are expensive.

No report of a taskforce would be complete without recommendations and this one has many, including suggestions for revising training (noting that many training programs are focused on allowing employers to assert affirmative defenses to claims and not to prevent harassment), changing a culture of a workplace from the top down to be clear that harassment is not tolerated (although it includes an admonition against "zero tolerance" policies, noting that they are often ineffective), and tips to address conduct carried out through social media.

The complete report is available here: https://www.eeoc.gov/eeoc/task_force/harassment/index.cfm. Sumner@FELTG.com

Making EAP Referrals
By Barbara Haga

This month we are exploring what a referral to an Employee Assistance Program (EAP) looks like.

Referral in Daily Practice

Years ago OPM had a film that I often used in supervisory training on EAP. In fact, I used it so many times I can practically quote the script. Unfortunately, it was quite dated. The manager in the video was wearing a plaid sports coat right out of the '70s and, at one point during the employee's downward spiral, you saw a scene where the manager was in his office bemoaning his fate while emptying his pipe into an ash tray. Obviously an update was needed and OPM released one, but I never thought that the updated one did as good a job of showing the actual referral.

I will never forget the employee in the original version; her name was June, and she seemed to be having some family problems that were coming with her to work. It appeared that she was a Management or Program Analyst or something similar. Her performance had deteriorated. She was missing deadlines and messing up on details, and when she was asked about a work issue by a senior manager she chewed him out! The immediate supervisor was Charlie. In his initial meetings with her, June was very good at deflecting his focus on her performance issues. For example, when he talked to her about errors in a report where the sums didn't tally properly, she came back at him with "I found those errors and I have corrected them and I will have the report on your desk by the end of the day." She even patted him on the shoulder and said, "Everything's going to be okay, Charlie." After a few exchanges like that, the supervisor was at his wits' end and June's mistakes and omissions and poor behavior were beginning to reflect on him.

Like most training films the manager tries it on his own without "guidance" and doesn't fare very well and then he gets help in planning out the referral and delivers the message the way he should have. The EAP counselor helps him prepare for the meeting with June. She tells him to focus on the deadlines and mistakes and to stop focusing on what he thought was going on outside of work. That's excellent advice even by today's standards.

Written Referral

The portion of the film when the manager advised June that she was being referred to EAP was done very, very well, and it became the model I followed

when I advised managers how to do this. In the film, the manager put together a letter describing June's failing performance giving specific examples of the errors and omissions. The film did not depict it as a PIP notice but was instead a warning that her performance was below standard.

I still recommend today that managers do written referrals documenting what the issues are. This accomplishes several things. First, it makes it real for the manager; he or she has to write down the details of what was wrong and why it was wrong. Secondly, it makes it real for the employee. Being chastised by someone about mistakes verbally isn't pleasant, but seeing a formal letter that recounts these things is quite a different experience for most people. Finally, it can help the EAP counselor. Sometimes employees agree to go but then do the "I have no idea why I am here" routine with the counselor. The letter helps the counselor ask about specifics. In June's case it might have been, "You had a conversation with Mr. Smith last Friday about a problem with a budget report. How did that conversation start? What did Mr. Smith ask you?" By asking these kinds of questions the EAP counselor may get the employee to open up about what led up to the outburst that was reported to her supervisor. **[Editor's Note: As we teach in our *UnCivil Servant* seminar for managers, contemporaneous notes like these are an excellent defense should the employee challenge the supervisor in a grievance or complaint.]**

The letter delivered in the film included a referral to the EAP counselor that Charlie had worked with. When June came in to his office for the meeting, attitude in tow of course, he handed her a copy of the letter. He reviewed the letter, focusing on the performance deficiencies. He told her that he was referring her to the EAP. June became agitated and said, "This is an adverse action letter. I'll file a grievance." The manager responded that it wasn't an adverse action; it was simply a referral to the program. He went on to say that things had to change and that her performance problems could no longer be tolerated. When she pushed back he said something like, "June, you have excuses for everything, but something has to be done about your performance."

June finally started to relent a bit and said, "Things at home have been tough for me lately, but it's not something I can't handle on my own." Charlie wraps up the meeting by repeating that her performance has to change. He goes on to say, "The choice is up to you whether you go to EAP or not. But, whether you go or not will be very important to me." At the end of the film we didn't know whether she went, but Charlie can show that he took reasonable steps to put her on notice about her performance and offered her a chance to take advantage of the EAP.

Preparing the Manager in Today's World

The world Charlie lived in is likely very different than what most agencies experience today. An actual on-site skilled EAP counselor is a luxury many agencies don't have. Instead they rely on Federal Occupational Health (FOH) or some other long distance service to take care of their counseling services. While that may be the most efficient answer, especially for agencies with widely dispersed populations, it doesn't take care of the problem of preparing the manager. Sometimes it falls on the HR practitioners to help the managers get ready for conversations with employees on tough topics like what was described above.

Putting referral information in the letter is a good start, but even the most brilliantly written referral letter, warning notice, or proposed performance or disciplinary action will not achieve its goals if it is delivered poorly and the meeting goes off track. That means not just e-mailing letters but going over the content with the manager and anticipating what kinds of things could come up and giving the manager an opportunity to think through the possibilities and how he or she will respond.

We generally don't see managers being hired because they have experience with this sort of thing. They have experience in other areas like budget, forestry, or rocket science. We expect them to learn these kinds of techniques on the job. I wish I could tell you that there is a good OPM film

or course available to help you help them. I looked through the HR University website but I didn't see a course that seemed to cover this type of topic. But, it is something worth investigating or developing materials for your own use. It will be worth the investment. Haga@FELTG.com

Agency Effectively Accommodated Employee with Sensitivity to Smells
By Deryn Sumner

Sometimes during *EEOC Law Week* and webinars, we'll get questions about if and how agencies can accommodate employees with chemical sensitivities. EEOC's Office of Federal Operations recently issued an interesting decision in *Martina S. v. Department of Defense*, Appeal No. 0120140227 (August 19, 2016) addressing allegations that the Agency failed to effectively accommodate an employee who was sensitive to scents. Martina, who as we know because of EEOC's naming convention is not actually named Martina **[Editor's Note: Or, is she? Hmmm.]**, worked as a Security Specialist in an office in Washington, D.C. that underwent construction. She complained that the fumes and dust made her sick and requested to be able to work in another office space, but the Agency conducted tests and determined the space was safe and denied her request because of the sensitive nature of her job. The Agency did ask the co-workers not to spray anything in the office. Also of note, Martina did not, at the time, respond to requests for medical documentation.

However, more than a year later, Martina did provide a medical note, stating she was "intolerant of stray perfumes or scents" and submitted her own list of items she was allergic to, which included cleaning supplies, markers, and Lysol. Her supervisor stated that if Martina provided medical documentation to support this list, she would send a message to staff members. But again, Martina did not provide medical documentation. Fast forward two years when a co-worker sprayed Lysol on her telephone, causing Martina to leave the building. After that incident, Martina submitted a medical note saying she was "intolerant to strong fumes and odors" and "should not be exposed to aerosols."

After another incident involving Lysol which caused Martina to go to the hospital, she submitted a request to be moved to another office location and included a letter from her doctor stating that she suffered from "reactive airway disease." The Agency, in coordination with the occupational health office, determined that Martina was not disabled as she only experienced symptoms in one location, and could work there if there were no strong perfumes or Lysol. Based on that, the Agency denied the request for relocation to another office space.

Martina filed an EEO complaint alleging harassment and failure to accommodate, and after an investigation, an administrative judge granted summary judgment in the Agency's favor. On appeal, the Office of Federal Operations agreed. The Commission found that the initial medical documentation Martina submitted did not show that she was an individual with a disability because it did not state that she had an impairment or how she was substantially limited in a major life activity. However, assuming for the sake of argument that Martina did provide sufficient medical documentation, the Commission found that the Agency did accommodate her by instructing employees not to use strong smelling products and Lysol, which included posting signs about the prohibition of their use. The Commission, noting that Martina was only entitled to an effective accommodation and not the one of her choice, assuming she was entitled to an accommodation at all, found that the Agency was not liable for the claims raised in Martina's formal complaint.

The lessons to be learned from this case include making sure that employees with similar allergies or sensitivities provide effective documentation and considering alternate accommodations that may be effective to accommodate such medical conditions. Sumner@FELTG.com

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Daily Agenda

Monday - Why Settle in Federal Sector Employment Disputes?: Why settlement is important; select options to discipline; rescinding the removal; statistics and writing; protective agreement provisions; unlawful agreements and duress.

Tuesday - Knowing the Players: The Office of Special Counsel, the Federal Labor Relations Authority, and Unfair Labor Practices; Interest-based negotiation in practice; positive framing; impasse; void agreements.

Wednesday - Determining Objectives and Methods: Why complainants and managers don't want to resolve disputes without litigation (and how to combat that); statements v. objectives; separating the people from the problem; creating and evaluating options for mutual gain; settlement options.

Thursday - Alternative Dispute Resolution: Calculating the costs of litigation; preparing for settlement; mediations; arbitrations; settlement conference; using settlement memoranda; offers of resolution; compensatory damages; tax consequences; red flags: union impact, OPM guidance and more.

Friday - Drafting Enforceable Settlement Agreements: Organizing for the agreement; establishing the chronology; settlement agreement writing style and conventions; sentence and paragraph structure; best practices for word selection; deconstruction of a sample report.

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