Federal Employment Law Training Group
Training By Professionals For Professionals

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We are Different

I had a chance to work with a talented, solid, agency attorney a couple of weeks ago. Although relatively new to the field of federal employment law, she had spent many years in the world of criminal law. As I took her through some of the more basic points in practice before MSPB/EEOC/FLRA/OSC, she had some wonderfully delightful, emotional, New-York-style insights:

> "That's just freaking crazy!"
> "We would do just the opposite in criminal law!"
> "That makes absolutely no sense! What are they thinking?!?"

The session was enlightening for us both. She learned a bit about federal employment law and I was reminded that ours is a specialized legal field, a field in which common sense, a good brain, and experience in other legal areas may do you little good. They don't teach this stuff in law school. You don't win cases on appeal just because you are right, smart, and good looking (although the good looking part doesn't hurt). You have to know what these oversight agencies say that the law is, whether you agree with them or not. And that's what we've been teaching here at FELTG since Hillary Clinton was elected to the Senate and Donald Trump built Trump World. Come to our classes, experience our audio-conferences. Learn this business or run the risk of losing cases you should not, and occasionally being embarrassed herein this here newsletter. *Res ipsa loquitur, infra, Kemosabe*.

Bill

COMING UP IN WASHINGTON, DC

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

HOW ABOUT SAN FRANCISCO?

Advanced Employee Relations
December 5-7

Managing Federal Employee Accountability
December 5-9

WEBINARS ON THE DOCKET

Legal Ethics for Government Attorneys
October 19

Significant Federal Sector Developments: What's Happening with MSPB, EEOC and FLRA
October 27

That's It! I've HAD It! I'm DONE!
By Deborah Hopkins

I am mad. Really mad. I am mad about the terrible advice a federal supervisor was given by her chief counsel's office, about not holding an employee accountable for her performance out of fear of an EEO reprisal complaint. The kind of situation you'll see below happens every day in agencies across the country, and to use a legal term, it sucks.

Here's an email I recently got from a FELTG customer, and below that you'll see my response.

> Dear FELTG Super-Powers,
>
> A colleague who was a Federal EEO person for many years suggested that I contact you.
>
> I just returned to Federal service after a ten-year hiatus. I am the supervisor of a small staff in a large agency. I started a couple of months ago and last week I learned I was part of an EEO complaint that was filed three days after I started work. Little did I understand when I took the job that this person had been a problem with the agency for at least five years.
>
> There do not appear to have been any reprimands or other disciplinary actions for either her conduct or her performance. She has been given outstanding reviews for poor work because of the hope to have her leave the agency. In the few weeks I have been here it is clear that she should have been gone years ago.
>
> I'm curious as to whether or not anyone has ever had an action against an agency for its consistent lack of taking action against a "rogue" employee such as the one I have. She was moved from one office to mine about three years ago because she was such a problem. I have now inherited this problem and am seen—after only a few weeks on the job—as simply a continuation of discriminatory supervision.
>
> Now that her EEO complaint has been submitted she has become increasingly rude to me and others. I have been counseled by our chief counsel's office to document her behavior and performance but not to take any disciplinary actions because that might be seen as retaliation.
>
> Should I be concerned and talk to my own counsel regarding this matter?
>
> Thanks.

Dear Supervisor,

Thanks for reaching out. I am frustrated for you, because I know this is a tough situation; you're not alone in this, and we get calls and emails every week from supervisors like you with eerily similar scenarios.

To answer your questions, as far as we know nobody has ever taken official action in the courts against an agency for refusing to hold "rogue" employees accountable for performance or conduct, probably because so many agencies engage in this culture. But we do sometimes see proposed bills on Capitol Hill (recent example: the DVA), or articles in the newspaper, about how agencies need to do better. That's as far as it's gotten.

In my personal opinion (this is not legal advice), while your chief counsel's office was wise to tell you to document what the employee is doing wrong, it has given you poor advice in telling you that you should not take action against this employee for fear it looks like reprisal. In fact, it's not just poor advice, it is dead wrong advice and actually violates 5 USC § 4302(b)(6) which **requires** agencies to remove from their positions employees who do not meet minimum performance standards. That's right,

you don't remove a non-performing employee and you're violating the law.

Not taking action against an employee like this just continues to allow what has been happening for years, and trust me, employees who are given "Outstanding" ratings for doing poor work will never leave on their own; why would they be motivated to?

The biggest thing, should you decide to take action, is certainly to document the business-based reasons why you are taking the action (for example, if you are initiating a PIP or disciplinary action for misconduct). Based on her history the employee will likely file a reprisal complaint, and there's nothing you can do to stop it - but the way you defend yourself is by having the documentation of your reasons.

Regarding personal risk, we'd need to know more about the situation to answer that question. If you've been given a direct order to not take action against this person and you decide to then your job could be on the line, because insubordination (or perhaps failure to follow a direct order) is a serious offense.

If you'd like to discuss in more detail to see if perhaps you need an attorney, please feel free to let me know and we can set up a phone consultation, as FELTG does provide legal advice to consult with supervisors in situations like this.

I hope this helps. Good luck.

***

But wait, we're not done yet. I got a response from this supervisor and she said that she was moving forward with action (yay!) in the form of a warning (NOOOOOOOOO!). Please, please, please – don't do it. Here's why:

If you give this problem employee a warning, she can file an EEO reprisal complaint. If you put her on a Performance Improvement Plan (which you can do with no proof, as long as you can merely articulate what critical element she isn't performing well) she can file an EEO reprisal complaint.

If she fails to improve after the warning, you have no recourse except to warn her again or to put her on a PIP. If she fails the PIP, you can remove her from federal service.

So either way you go this employee can file an EEO reprisal complaint, but here's the big difference:

> If your agency wins the EEO hearing (and remember, the EEO process takes 2-3 years) and successfully defends against the reprisal complaint regarding the warning, your problem employee **still works for you**. If your agency wins the EEO hearing (in 2-3 years) and defends against reprisal over the PIP, **the lady has been gone from your workplace for 3 years minus the length of the PIP** (we suggest 30 days unless a union contract dictates otherwise).

To me, counselors, the choice is obvious.
Hopkins@FELTG.com

What Do We Mean When We Talk About "Qualified Individuals with Disabilities"?
By Deryn Sumner

A few weeks ago, I had the pleasure of teaching FELTG's biannual *EEOC Law Week* alongside Ernie Hadley and Gary Gilbert. On Wednesday, we covered disability discrimination law and focused much of our time on talking about when one is considered disabled for purposes of making a claim of disability discrimination and the law surrounding requests for reasonable accommodations. As Ernie likes to say, when analyzing disability discrimination claims, there are no points for creativity. You should walk through each part of the analysis in order, starting with whether the employee in question is an

individual with a disability. After passage and implementation of the ADAAA more than seven years ago, that analysis has become rather perfunctory as the definition of what constitutes a major life activity was widely expanded and Congress took great pains to highlight that the purpose of the Act was for broad coverage of those who need its protections.

The next step in the analysis is whether the employee in question is a qualified individual with a disability. Because we received some questions about this part of the analysis during our training, I wanted to dedicate some space here to explain what we mean when we talk about "qualified."

The Commission's regulations at 29 CFR 1630.2(m) define qualified as "the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position."

Most of this definition is straightforward. An employee, or applicant for a position, must be qualified by way of having the right skillset, prior experience, and whatever educational requirements are needed. The government has no obligation to place unqualified individuals into positions, even if they are protected by virtue of having a disability.

The parts that trip up agencies tend to be that an individual can be qualified if he or she can perform the position with accommodation. "But wait!" you exclaim. "We were told not to skip any steps in our analysis and now we're focused on reasonable accommodation before we've determined if the employee is actually entitled to one!" Yes, that's true and I don't have a good response for you as to why "reasonable accommodation," which isn't actually defined until later in the sub-section, is used to define "qualified." But it is part of the definition and must be considered in looking at whether the employee is a qualified individual with a disability.

The second part that can create trouble is the last phrase: "essential functions" of the position at issue. What is an essential function? Again, let's look at the definition in the regulation at 29 CFR 1630.2(n):

> **(1)** ***In general.*** The term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.
>
> **(2)** A job function may be considered essential for any of several reasons, including but not limited to the following:
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> **(i)** The function may be essential because the reason the position exists is to perform that function;
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> **(ii)** The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
>
> **(iii)** The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.
>
> **(3)** Evidence of whether a particular function is essential includes, but is not limited to:
>
> **(i)** The employer's judgment as to which functions are essential;
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> **(ii)** Written job descriptions prepared before advertising or interviewing applicants for the job;
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> **(iii)** The amount of time spent on the job performing the function;
>
> **(iv)** The consequences of not requiring the incumbent to perform the function;
>
> **(v)** The terms of a collective bargaining agreement;
>
> **(vi)** The work experience of past incumbents in the job; and/or
>
> **(vii)** The current work experience of incumbents in similar jobs.

Note that the definition contains a variety of factors, none of which are, "I dunno, whatever the employee's position description says." The employer must actually think about what the individual does from day-to-day in his or her position. Also note that the definition envisions employees holding the same position in different duty locations to have different essential functions. As we discuss, it's a heck of a lot easier to determine a job duty is not essential if there are thousands of other employees in a facility who could perform the job duty than someone in a geographically-remote and sparsely-populated workspace.

Employers most often run into problems by failing to actually think about and define the essential job duties when reviewing accommodation requests. Keep these definitions in mind to make sure your analysis is appropriate. Sumner@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!

PLUS…

For supervisors and advisers, that same week, join us for:

Managing Federal Employee Accountability
December 5-9

Details also found at www.feltg.com.

Starting to Lose "The Faith"
By William Wiley

Here at FELTG, we are civil service systems people. We take the position that there's little wrong with the system that cannot be fixed by the system. In other words, we may occasionally disagree with a decision issued by an oversight agency, but for the most part, we see the system as working.

And then I run into two decisions in the same week that give me pause and make me wonder if the system really is working.

First, a decision from the Federal Circuit Court of Appeals, the reviewing court that oversees the final orders issued by MSPB. It is rare that a decision issued by this court causes concern as most of its decisions affirm the Board, some years at a rate of 95% or so. That rate is to be expected as it is built into the law that the court is to be deferential to the Board on matters of fact and most matters of law.

Unfortunately, that deference did not happen in a recent decision. The facts of the case are not in dispute. The appellant, a housekeeper, had a substance abuse problem. He was absent from work for six months. Most of that time, he was participating in a rehab program in a correctional facility. However, toward the end of that period, because he got in a fight with another program participant, he was excused from the rehab program and remained in jail for the last 38 days of the six-month period.

His employer, DVA, removed him in large part because of the six-month absence. Unfortunately, the judge concluded that the period of absence while the appellant was participating in the rehab program was an approved absence. That left only the last 38 days of unapproved absence. Although the judge felt this reduction warranted mitigation of the removal to a 40-day suspension, the Board set aside the judge's decision and upheld the removal. *Purifoy v. DVA*, 2015-3196 (Fed. Cir. 2016).

Then things got screwy on appeal to the Federal Circuit.

First, the court agreed with the judge that the agency could not charge the appellant with AWOL for the time the appellant was in the rehab program. It reasoned that when the employee notified "one of his supervisors" (point of interest: federal employees have a single immediate supervisor when it comes to requesting leave) that he would be absent due to rehab, the supervisor's response that the appellant should "take care of [himself]" was an approval of leave for the period of rehab. It reached this conclusion even though the official he spoke with told him, "You also need to see your supervisor and fill out the proper paperwork."

Apparently, the Federal Circuit doesn't know that a) employees have a single supervisor for leave purposes, not several; b) employees *request* leave, they don't just *notify* of an absence; and c) "paperwork" is often required to determine the type of leave being requested, the justification for the absence, and the expected duration of absence. It is not some bureaucratic follow-up of no importance to the determination about whether the employee's leave request will be approved.

Secondly, the court noted that the MSPB judge had found that the entire six-month absence was not supported by "substantial" evidence. Every practitioner in this business knows that the proper evidentiary standard is a "preponderance" of the evidence. Apparently, the court does not.

Third, the court agreed with the judge that a significant mitigating factor was the fact that the sustained period of 38 days of AWOL was for less time than the originally charged six-month period. Apparently, it is engaged in the fallacy that if a big charge is reduced to a smaller charge, the big penalty of removal should be reduced to a smaller penalty. That makes no sense. Charge a criminal with killing ten people, and prove that he actually killed only one still warrants a murder conviction. The reasonableness of the penalty should be based on the sustained charges without reference to the charges that were brought, but not sustained.

Fourth, the court is concerned that the appellant was not put "on clear notice that his absence would result in severe discipline." Well, what difference does that make? We are concerned generally about clarity of notice so that an employee knows exactly what misconduct to avoid. Here, the dude was in jail. He could not have avoided the AWOL even if he was given exceedingly clear repeated notice of possible severe discipline BECAUSE HE WAS INCARCERATED! If given clear notice, would he have not become incarcerated? Perhaps staged a prison break so he would not be AWOL? Ridiculous.

Fifth, the court faulted the Board for its failure to discuss the adequacy of a penalty less than removal for the sustained 38 days of AWOL. In other words, why not suspend the employee instead of firing him? Well, if we suspend him we lose his services for some period of time without any guarantee that he will not be AWOL again. And the harm he is causing the agency by his AWOL is that it loses the benefit of his services. Therefore, if it were to suspend the employee, it would be doubling up on the harm caused by his misconduct. It's either remove or take no adverse action at all. Given the harm to the coworkers caused by their having to do this guy's work while he was AWOL 38 days, removal is reasonable. And keep in mind, the agency's penalty selection has to only be reasonable, not perfect.

Finally, the court goes out of its way to note that the appellant represented himself in his appeal and conducted an "extensive pro se cross-examination of the government's witnesses." It reasons that due to his "credibility and demeanor as both a witness and an advocate at hearing," the Board should give "special deference" to its judge's conclusion that the appellant has rehabilitation potential.

Look. We teach trial advocacy here at FELTG (next offered in DC October 23-27, 2017) and we know how challenging it can be to conduct a cross-examination. At the same time, we know that conducting a cross-examination is in no way related to the ability of someone to avoid going AWOL in the future or to otherwise perform housekeeping duties.

It is the deciding official's responsibility to assess the *Douglas* Factor for rehabilitation potential. At the time the decision was made to fire this individual, he had not yet acted his own advocate, even if that were to be relevant. **This point is huge:** Should the agency's penalty assessment when made at the time to remove receive deference when all of the charges are sustained as was the case here (*Payne v. USPS*, 72 MSPR 646 (1996))? Or, should the Board reconsider the penalty selection factors at the time of appeal based not only on the *Douglas* Factors before the deciding official, but also based on factors that occurred post-removal through the hearing?

I feel sorry for this appellant. Addiction is a terrible burden to bear and a tough diagnosis to beat. At the same time, I feel sorry for his coworkers who had to pick up the slack when this guy did not report to work for an extended period of time. I feel sorry for the vet patients who might not have received the degree of housekeeping services that were warranted because whoever was doing this appellant's job was too busy to do all that really should have been done. And I feel sorry for the agency that is trying to hold this individual accountable for his unapproved absence, and who correctly considered the penalty factors when it made the decision to remove the employee.

Our civil service system is being attacked by those running for political office and by those already on Capitol Hill for making it too difficult to remove federal employees. Interventionist second-guessing decisions like this one from the Federal Circuit feed into that attack, and perhaps actually do indicate that it is the system that is the problem.

I have another case that makes this same point, but it will need to wait for a separate article. In fact, here at FELTG, if indeed the system is the problem, we even have an earth-shaking alternative approach to removing individuals form government for our new President to consider. That recommendation will have to wait for an even later article. Wiley@FELTG.com

Arbitration – "It's Just Not Fair"
By Barbara Haga

About a year ago I wrote about a credit card misuse case where the disciplinary action was taken to arbitration. The arbitrator did not find that a GS-13 (with prior discipline about card use) taking ATM advances on the card when not on travel was personal use of the card and did not sustain the removal.

I thought that was a blatant example of an arbitrator applying a different standard than the MSPB on a particular kind of charge, but that was nothing compared to the performance case that I am writing about today. This case is *American Federation of*

Government Employees, Local 1923 and U.S. Department of Veterans Affairs (2016). The decision came out June 10. I hope the DVA filed an exception.

Background

The grievant was a Vocational Rehabilitation Counselor, GS-12. She had been in her position for over ten years and had previously passed the Skills Certification Test for her position. She worked in an "out-based" location away from where her supervisor was located.

There is a current announcement out for a job like this on USAJOBS. It's an opening at GS-101-9 target GS-12. The duties described include the following: 1) Provides and coordinates a wide range of rehabilitation counseling and case management services to veterans with disabilities and other eligible individuals, 2) Performs initial evaluations, makes eligibility determinations, does rehabilitation planning and problem solving, and conducts counseling, 3) Coordinates and implements rehabilitation services, completes case documentation, employment services, and administration and interpretation of vocational testing, 4) Makes recommendations and referrals to other sources, which may assist the veteran. Clearly these are functions that veterans are in desperate need of at this time (the Bureau of Labor Statistics shows an unemployment rate for veterans this summer of 4.9%).

The qualifications requirement for the GS-9 is a master's in rehabilitation counseling. It appears from the current announcement that specialized experience can be gained in other Federal, state, and local rehabilitation work, but that is only substitutable for an internship requirement and doesn't meet basic qualifications. The grievant arrived as a GS-9 employee in 2001 and was promoted to GS-12 in 2002 according to testimony of the deciding official. The grievant admitted in her testimony that there were issues with her meeting the required standards in FY 13 and FY 12.

The PIP

The supervisor testified in the hearing that in September 2014 she found that the employee was failing three critical elements: Quality of Work, Timeliness, and Successful Closure or Production. These elements are measured by national, number-driven standards. The standards included numbers like 88% on Fiscal Accuracy, 96% on Entitlement Determination, 83% on Accuracy of Evaluation, Planning, and Rehabilitation, etc. I don't know about my readers, but 83% and 88% seem generous to me – 12-17% improper payments would be okay????

The grievant provided testimony about whether the numbers were applied equitably – that sometimes there were delays in receiving course certification from a school a veteran was attending, and there were issues about computer down time. The account of the management testimony on these points recounted in the decision is not what I would have hoped to see – that these are national averages that take into account certain problems in system availability, leave time, and problems in obtaining records, but that hundreds of counselors are able to meet these standards across the country every year. Testimony about how they were developed, how long they had been used, etc., would have been helpful.

The PIP notice was prepared with union participation. There was an oral meeting where failings were discussed and after the meeting the employee and the union were asked for input. There were two extensions to the PIP to provide time for training where the employee (a GS-12 full performance level employee) was taking training in the Vocational Rehabilitation Counselor Fundamentals. Another extension was granted at the employee's request. During the PIP there were bi-weekly meetings by telephone and in person. The arbitrator wrote that "… copies of the meetings were documented and provided to her." I am also assuming that there were notes from each of the meetings that were given to the employee.

During the PIP the employee reached Fully Successful on two elements but remained at unacceptable on Quality of Work. If I am following the decision correctly it seems that the PIP was

issued in September 2014 and ended in March 2015, so the grievant had a six-month opportunity period. Because she was at Unacceptable in one of her elements at the end of the PIP, she was removed from her position.

The Arbitrator's Conclusion

The arbitrator overturned the removal. When I read this decision this summer I nearly fainted. Here is the highlight from Findings and Discussion: "The testimony is clear that the grievant seriously endeavored to achieve acceptable work performance and was unsuccessful in Critical Element 3 of her Performance Appraisal. The determination of successful performance of Critical Element 3 is undisputed. It is unclear whether the performance level was of her own making or due to a combination of attributing [sic?] factors."

The arbitrator credited the employee's account about delays in processing actions because of computer issues. Management did not refute that to the arbitrator's satisfaction. But that was just one aspect of the unacceptable performance. The decision goes on:

> The failure of the grievant to meet standard in relation to the Quality of Work Critical Element presents similar concerns of fairness. Particularly noteworthy is the grievant's outcry for supervisory assistance in constructing an acceptable report. Here again, the evidence is clear that supervision did exactly what was called for by Article 27, Section 10 in relation to identifying specific performance-related problems and deficiencies … TMS training, extending the period of the PIP and others. Missing however is the response to her persistent request of the grievant for guidance and discussion on how to present an acceptable write-up to her supervisor.

The employee wanted samples. Apparently, the employee asked the supervisor and other employees for samples of a properly completed report. The supervisor told her she should be able to create that herself. In other words, it appears she couldn't create an acceptable report on her own and needed a go-by.

The arbitration decision addressed *Douglas* Factors in discussing that the employee was not responsible for delays caused by system problems. "The same kind of delay has contributed here to the grievant's separation as though she was at fault. An employee without fault has been penalized. Thus, the extent or degree of any impact on *Douglas* Factor consideration is improper and cannot be found that the agency acted within the meaning of fairness an objectivity of Article 27.… (It does appear that a manager testified about *Douglas* factors, but the arbitrator *should* know better.) **[Editor's Note: *Douglas Factors* have NO PLACE in a 432 unacceptable performance removal because the penalty cannot be mitigated. This is the second DVA case in a matter of weeks that we've run across in which *Douglas* Factors were improperly considered in an Unacceptable Performance removal under 5 CFR 432, *see Walls v. DVA*, DE-0752-13-0278-I-1 (September 7, 2016)(NP)(*infra*). Somebody needs to come to our classes, learn our business, and get the word out.]**

The arbitrator ended with this:

> Despite the lack of any procedural errors in relation to the grievance [sic] performance appraisal and PIP, the grievance [sic] removal remains contractually deficient. The Master Agreement recognizes and affords employees the right to a fair and equitable performance appraisal to the maximum extent possible.

> Refusing reasonable requests of an employee assiduously endeavoring to maintain employment is hardly fair or equitable.… In the effort to be procedurally or mechanically correct in separating the grievant, management apparently lost sight of the underlying substantive purpose of a performance appraisal and the role of supervision in relation to PIP's.

American Federation of Government Employees, Local 1923 and U.S. Department of Veterans Affairs, 116 LRP 25915 (June 10, 2016). If I were keeping a list of names to strike.... Haga@FELTG.com

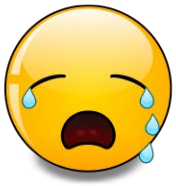
Seventh Circuit Grants Petition for En Banc Review in Sexual Orientation Case
By Deryn Sumner

As we've discussed a few times in this space, in July 2015, the EEOC's Office of Federal Operations made headlines when it declared in *Baldwin v. Department of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015) that claims of sexual orientation were simply claims of sex discrimination, stated claims under Title VII, and should be processed by federal agencies under existing procedures. The EEOC made further headlines earlier this year when it filed two lawsuits against private sector employers alleging sex discrimination against gay employees and relying upon *Baldwin* to argue the cases had standing. The plaintiff-side employment law community seized upon this, to varying degrees of success.

However, there was a recent victory in the form of the Court of Appeals for the Seventh Circuit's grant of a request for a rehearing *en banc* in the case of *Hively v. Ivy Tech Community College*. There, a part-time adjunct professor argued she was denied full-time employment and subsequent promotions because of her sexual orientation, and she filed a lawsuit under Title VII. The District Court granted the College's Motion to Dismiss, which the Court of Appeals affirmed in its July 28, 2016 decision. *See Hively*, 830 F.3d 698 (7th Cir. 2016). That decision included extensive discussion of the surrounding law relating to sexual orientation claims, which up until recently had been focused on the idea of sexual stereotyping. The Court noted that Congress had not included sexual orientation as a basis under Title VII and recent attempts at amendment had been unsuccessful.

The decision concluded, "Perhaps the writing is on the wall. It seems unlikely that our society can continue to condone a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry. The agency tasked with enforcing Title VII does not condone it, (*see Baldwin,* 2015 WL 4397641 at **5, 10); many of the federal courts to consider the matter have stated that they do not condone it (*see*, *e.g., Vickers*, 453 F.3d at 764–65; *Bibby*, 260 F.3d at 265; *Simonton,* 232 F.3d at 35; *Higgins*, 194 F.3d at 259; *Rene*, 243 F.3d at 1209, (Hug, J., *dissenting*); *Kay*, 142 Fed.Appx. at 51; *Silva*, 2000 WL 525573, at *1); and this court undoubtedly does not condone it (*see Ulane*, 742 F.2d at 1084). But writing on the wall is not enough. Until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent, and therefore, the decision of the district court is AFFIRMED." *Id .at 718.*

Seems pretty final, huh. However, the Court of Appeals just last week granted the appellant's petition for an *en banc* rehearing. Such requests are very rarely granted and this seems to signal that there's more to come from the Seventh Circuit on this issue. Oral argument has been scheduled for November 30, 2016 and we'll keep you updated on this and other developments in Title VII case law. Sumner@FELTG.com



Changing the Law Won't Help
By William Wiley

Dear Mr./Ms New President,

Sometimes I don't know whether to scream or cry.

Last week was the 38th anniversary of the passage of the Civil Service Reform Act of 1978. In 1984, MPSB held that under the "new" Civil Service Reform Act, although it could mitigate unreasonable removals for misconduct taken under 5 USC Chapter 75, it had no similar authority to mitigate removals for unacceptable performance taken under 5 USC Chapter 43. Thus, one of the great gifts of the Reform Act came into existence: the ability to fire an unacceptable performer who failed a PIP (performance improvement plan) without having to defend not taking some lesser action such as a demotion or reassignment. From the earliest days, we learned that we had to include a *Douglas* Factor analysis if we fired someone for misconduct, but not if we fired him for failing a PIP. *Lisiecki v. Federal Home Loan Bank Board*, 23 MSPR 633 (1984).

Some 30 years later, DVA fired a guy for failing a PIP, entitled the removal "Unsuccessful Performance," and referenced 5 USC Chapter 43. However, it included in its appeal submissions a *Douglas* Factor analysis, which the Deciding Official referred to in justifying not taking a lesser action. MSPB reasoned that since the agency included a *Douglas* Factor analysis, it must REALLY have been taking a misconduct removal under 5 USC Chapter 75 regardless of its claims otherwise, required it to justify its penalty and applied the higher preponderance of evidence standard required in misconduct removals (rather than the lower "substantial evidence" burden of proof called for in performance actions).

In 1217, King John signed the second Magna Carta, thereby establishing for the first time in countries that base their laws on those of England (as we do here in the Colonies), that the government will treat its citizens fairly before taking away their property. In a subsequent Magna Carta in 1354, English law even came up with a name for this new requirement for fairness: due process. We brought due process into our country when our fore-parents drafted the Constitution. The Federal Circuit applied it in the world of federal employment law 30 years ago when it said that Deciding Officials violate due process if they rely on information unknown to the employee when deciding to fire the guy. *Sullivan v. Navy*, 720 F.2d 1266 (Fed. Cir. 1983).

Some 800 years later, in 2013, a DVA Deciding Official (DO) listened to recordings of inappropriate customer phone calls involving the proposed-removal-employee. The DO then relied on those calls when deciding to fire the employee for taking too long on those calls. This little due process violation is what we in the business call a "two-fer". Not only did the DO violate *Sullivan* by relying on secret information, she also upheld a charge other than the one that was brought; e.g., Inappropriate Calls vs. Too-Long Calls. *Walls v. DVA*, DE-0752-13-0278-I-1 (September 7, 2016)(NP)

Our friends at DVA have been in the media a lot the past year or two, for several reasons:

- A whistleblower revealed what has been described as a wide-spread practice of juggling the appointment books so that it appeared that DVA was providing prompt medical care to our vets when in fact a number of them were waiting months and years for an appointment.
- Congress brought pressure on DVA top leadership to punish those managers responsible for gaming the appointment system and thereby harming our vets.
- In response, political appointees at DVA stated that it was hard to discipline bad federal employees because of the onerous civil service protections. In support of this claim, it pointed to two or three instances in which DVA had indeed disciplined senior managers, only to have those actions set aside on appeal by the mean old Merit Systems Protection Board.
- In response to that response, Congress changed the law to reduce the period of time an SES employee at DVA has to defend himself before he can be fired (from 30 days to 7), and foreclosed review of the judge's decision by the three politically-appointed members of the Board at MSPB. As of this writing, similar legislation has been proposed (or maybe even enacted; I lose track with end-of-year continuing resolutions) to extend these reduced protections to most all DVA employees.

Oh, the misplaced effort. If *Walls* is an example of why agencies are losing cases before MSPB (and it

is), the fault lies not in the law, the fault lies in the lack of knowledge of the laws that control the procedures we use in the federal workplace. Congress can reduce the darned notice period down to 15 minutes, and DVA is still going to lose cases if it hasn't learned to apply legal principles that have been around since the Middle Ages (when we burned witches at the stake, all educated people communicated in Latin, and the top leadership positions for women in society were as either an abbess or a queen regnant).

There simply is no excuse for the procedural errors that were made in this case. FELTG phones are open every workday of the year. Our online registration is available 24/7. We work our trainers so hard that they beg for mercy (and an increased per diem allowance to cover their sizeable bar bills). If you are in a leadership position within your agency, and you're tired of losing cases on appeal, go look in the mirror. The odds are awfully good that the problem is not in the civil service protections in law. If your lawyers and human resources professionals do not know how to handle these cases, the problem is in you.

With all due respect. Wiley@FELTG.com

Webinar Spotlight:

Preparing for a New Administration: Potential Impacts on the No FEAR Act and Prohibited Personnel Practices
November 17, 2016

* Are federal civil service protections soon to be obsolete?

* Will anything change one President Clinton or President Trump takes office?

It all depends on what happens November 8, so join FELTG a few days later to discuss the current status of PPPs and get a preview of what might be coming in 2017.

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

OFO Awards $8,000 in Compensatory Damages Where Complainant Submitted Evidence of Substantial Harm but Failed to Link It to Agency's Actions
By Deryn Sumner

Successful claims for non-pecuniary compensatory damages need two things: evidence of harm and evidence of a connection between the harm and the agency's actions. Last month, the Office of Federal Operations issued a decision that clearly articulates the need for complainants to link the harm alleged to the agency's actions found to be discriminatory. In *Kit R. v. Department of Army*, Appeal No. 0120140952 (September 23, 2016), the complainant had great evidence of harm but failed to meet that second requirement.

After establishing that her performance appraisal had been downgraded in retaliation for her prior EEO activity, the complainant submitted statements from herself, her physician, and two of her children. And on its face, it's great evidence in support of a large award of compensatory damages. The complainant stated that her supervisor's actions caused her to feel angry, insecure, have lowered self-esteem, negatively impacted her sex life, and caused her not to be able to sleep at night but to sleep all day. Her children, whose ages were not identified in the decision, stated that she did not speak to them for months at a time, that she would use profanity for no reason, her eating habits were impacted, and she would "sleep all day in a very dark house." Her physician submitted a statement that the complainant slept for approximately four hours every night, experienced fatigue, and even had suicidal thoughts.

Based on this evidence, you may be thinking that the agency would be on the hook for somewhere between $45,000 to $100,000 in compensatory damages. But the Commission awarded $8,000. Although there was a lot of evidence of harm, the Commission concluded, "after reviewing these documents, we find that Complainant generally failed to link the retaliatory appraisal to the symptoms and conditions she reported." Thus, the Commission found an award of $8,000 to be

appropriate for the "generalized assertion that she was distressed because of the appraisal."

It can be very hard to challenge allegations of harm raised by complainants and their friends, family members, and medical care providers. However, agencies can often effectively argue for reduced awards where, as here, the complainant failed to establish a sufficient link between the harm and the agency's actions found to be discriminatory and/or retaliatory. Sumner@FELTG.com

Making Yourself FELTG-Smart
By William Wiley

Sometimes in one of our seminars after we present an especially scintillating nugget of employment law advice, a participant will break down in tears saying something like this:

> *"How do you guys do it? You always seem to know what to do in most any employment law situation. Do you commune nightly with God? Do the Board, Commission, and Authority members vet their decisions through you for correction? Do your instructors have permanent cyberFEDS© connections blue-toothed into their cerebral cortexes?"*

Yes, yes, yes … we do at times appear to be magical and unusually wired. And although our secret connections have to remain secret, we can share with you a trick that will help move you along the road toward FELTG Nirvana, gathering employment law wisdom as you progress, making you nearly as smart as our FELTG instructors (although, of course, never quite reaching that level of expertise).

Prepare to be enlightened, because the trick is:

1. Read the case decisions.
2. Draw practice conclusions.

Here's how it works. Consider, if you will, the following analysis from a relatively routine MSPB opinion:

The evidence considered by the administrative judge consisted entirely of out-of-court witness statements, and she evaluated the probative value of that hearsay evidence, including but not limited to the deciding official's sworn affidavit refuting the appellant's claims, based on the factors set forth in *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 87 (1981). Under *Borninkhof*, the following factors affect the weight to be accorded hearsay evidence: (1) the availability of persons with firsthand knowledge to testify at the hearing; (2) whether the statements of the out-of-court declarants were signed or in affidavit form, and whether anyone witnessed the signing; (3) the agency's explanation for failing to obtain signed or sworn statements; (4) whether declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) consistency of declarants' accounts with other information in the case, internal consistency, and their consistency with each other; (6) whether corroboration for statements otherwise can be found in the agency record; (7) the absence of contradictory evidence; and (8) the credibility of declarant when she made the statement attributed to her.

The administrative judge found that the appellant withdrew her hearing request; accordingly, the witnesses could not provide hearing testimony. The administrative judge also found that all except one of the witnesses' statements were signed and made under the penalty of perjury. The administrative judge found that the appellant and the deciding official were not disinterested witnesses and that their statements were contradictory. The administrative judge found that the appellant failed to prove her claim of race discrimination because it was based entirely on double hearsay, which lacked sufficient reliability to have real probative value, and that she submitted only "sparse " evidence

showing that her removal was motivated by her race or by her association with a race. The administrative judge also found it significant that the appellant failed to submit corroborating evidence consisting of statements from disinterested witnesses substantiating the alleged race discrimination or contemporaneous evidence in diary or journal entries reflecting the alleged discriminatory comments.

When reading this decision, you could scan through this language, appreciating that it's foundational, then skip ahead to find out what happened to the appellant in the case. Or, if you were trying to become FELTG-smart, you could stop a second and consider whether there might be hints in here that you should use to tweak the way you do this business in practice, e.g.:

When relying on hearsay evidence in an appeal (as we all have to do on occasion), be sure to argue any of the following that are true statements:

1. There was no one available who had first-hand knowledge of this evidence.

2. The out-of-court written statements were made in affidavit form and co-signed by a witness.

3. You could not get sworn statements for a very good reason (being stupid or not reading the FELTG newsletter are not very good reasons).

4. The people making the statements are disinterested parties to the appeal.

5. The statements are consistent with other evidence in the record.

6. The statements can be corroborated by other evidence in the record; e.g., the individual who made the hearsay statement was keeping a contemporaneous log of events (tell your clients to keep contemporaneous notes as a case develops).

7. There is no unbiased contradictory evidence in the record.

8. The *Hillen* credibility factors support a conclusion that the person giving the statement is more likely than not telling the truth.

9. Double hearsay (e.g., Bill's out-of-court statement says that he heard Deb say that Ernie punched Peter, if offered to prove that Ernie indeed punched Peter) isn't worth a bucket of warm spit.

10. The other side's evidence is "sparse," a lovely subjective word that can be stretched to cover what might otherwise be characterized by the other side as "significant," and done so with a litigator's straight face.

There you have it. A trick to help you learn how to build a case for your side of the hearing room by applying practical lessons to implement a foundational principle in federal employment law. Now all you have to do is read all the other opinions issued by an oversight agency and draw similar practice conclusions. Or, alternatively, you can sign up for one of our fantastic FELTG seminars and learn from those of us who have gone before and have already done the leg work for you. Wiley@FELTG.com

FELTG is here for all your training needs!
Call us at 844.at.FELTG (283.3584), email us at info@feltg.com, or check out our website www.feltg.com.