



Federal Employment Law Training Group

Training By Professionals For Professionals

FELTG Newsletter

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Maybe Our System Really Is Broken



If you want the details, you'll need to read the decisions. However, to a lay person trying to understand our civil service oversight system (and I include our leaders in Congress in this grouping), these are the only facts that matter and that make

our civil service protection system appear to be bollocks:

1. In 1996 (Billboard Number One Song of the Year: [Macarena](#)), MSPB held that the appellant had probably been constructively suspended relative to absences from work that commenced in 1990 (Billboard Number One Song of the Year: [Hold On](#)).
2. In December 2016, in its "Final" Order in this case, 26 years after things started, MSPB ordered the Postal Service to pay the appellant's attorney \$100,734 in legal fees and costs. As part of its adjudication of attorney fees in this case, MSPB had to decide whether 0.3 hours sending a fax was professional legal work or simply clerical work, among other high level decisions, *Schultz v. USPS*, PH-0752-94-0233-M-1 (2016)(NP).

Whether you fiercely love the civil service as we do here at FELTG or loathe the civil service as some of our elected officials seem to do, you have to admit that there's something wrong with this process.

In *Hold On*, Wilson Phillips sings, "I know there's pain. Why do you lock yourself up in these chains?" For those planning our new civil service,

these lyrics might be a good mood setter. Also, *Holding On* might be a good approach to take for all civil servants for the next couple of years.

However, here at FELTG, we're sticking with the *Macarena* view of life: "Dale a tu cuerpo alegria ...

Hey, Macarena!" *Bill*

COMING UP IN WASHINGTON, DC

Absence & Medical Issues Week
March 27-31

Workplace Investigations Week
April 24-28

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June 5-9

JOIN FELTG IN DENVER

Managing Federal Employee Accountability
May 8-12

WEBINARS ON THE DOCKET

Suspected Bad Behavior: Performing a Legally-Sufficient Misconduct Investigation
March 23

Significant Federal Sector Developments
April 6

**Case Law Update: When Is an Employee
“Regarded As” Disabled Post-ADAAA?
By Deryn Sumner**



The Americans With Disabilities Act Amendments Act (ADAAA) became effective on January 1, 2009 and did not apply to cases arising prior to that date. The internet tells me that in 2009, we were aghast at Balloon Boy’s parents for tricking us

into thinking a boy was floating away in a giant balloon, wondering how Tareq and Michael Salah Salahi managed to sneak into a White House State Dinner, and applauding Captain “Sully” Sullenberger for safely landing a plane on the Hudson River.

So, yeah, it’s been a long time since the ADAAA was enacted, but we are now finally seeing substantive decisions applying it from of the EEOC’s Office of Federal Operations. A notable recent decision is *Elden R. v. Department of Interior*, EEOC Appeal No. 0120122672 (February 24, 2017). The Commission addressed an appeal the complainant filed on June 11, 2012 (while the rest of us were readying for the 2012 Summer Olympics in London, remember those?) and found that his termination in January 2011 was discriminatory because the agency “regarded him” as having a disability.

The agency selected the complainant for a GS-05 Wildlife Refuge Specialist position, which required him to work collateral law enforcement duties. While serving in the military, the complainant suffered neck and back injuries which prevented him from being able to sit on the floor with his legs straight in front of him and reach his fingers beyond his toes. He passed his initial physical examination and the physician concluded he could perform the duties of the job. However, he wasn’t able to successfully complete one part of the Physical

Efficiency Battery examination (PEB) that was required in order to attend the Federal Law Enforcement Training Center in Glynco, Georgia. That one part? The sit-and-reach portion.

It was recommended that he be allowed to work out three times a week under the agency’s policy allowing certain employees to use work hours for exercise and try the test again in a few weeks. His requests were denied and after he informed his chain of command about his concerns about meeting the sit-and-reach requirements and requested a waiver, he received notification that the agency was going to terminate him from the job. Notably, during a meeting to discuss the issue prior to his termination, the complainant’s supervisor told him that he was “highly disappointed” that complainant did not reveal his “disability” during his interview for the job.

The complainant filed an EEO complaint (after a brief sojourn to the MSPB where his appeal was dismissed for lack of standing as he was a probationary employee) and alleged that the agency unlawfully perceived him as an individual with a disability when it terminated him. Citing legislative history, the Commission agreed and took this opportunity to provide a nice summary of the Congressional intent behind the expansion of coverage in the ADAAA: “[T]he ADA Amendments Act broadened the application of the ‘regarded as’ prong of the definition of disability. In doing so, Congress rejected court decisions that had required an individual to establish that a covered entity perceived him or her to have an impairment that substantially limited a major life activity. This provision is designed to restore Congress’s intent to allow individuals to establish coverage under the ‘regarded as’ prong by showing that they were treated adversely because of an impairment, without having to establish the covered entity’s beliefs concerning the severity of the impairment” (internal citations omitted).

As for Elden, the Commission found that he met all of the qualifications for the position except the requirement to “sit and reach,” and as such, he was qualified to hold the position. The Commission then turned to whether or not there was a job-related and consistent with business necessity reason for Elden to be able to sit and reach, and found nothing in the record about how being able to reach over one’s toes with legs outstretched related to any job function of a Wildlife Refuge Specialist. Noting that the agency had provided waivers to the “sit and reach” requirement for other individuals in substantially similar positions, the Commission found the termination was discriminatory and awarded relief, including reinstatement and back pay from his termination more than six years prior. Sumner@FELTG.com

[Editor’s Note: It’s decisions like this that on occasion make me think I am just not smart enough to understand how EEOC approaches legal analysis. The Americans with Disabilities Act defines “disability” as “a physical or mental impairment that substantially limits one or more major life activities.” Therefore, in my limited brain capacity, to be found to “regard” someone with a disability, it would seem that we need to find an agency action based on a “limitation on a major life activity.” The agency here acted based on this individual’s inability to sit on the floor with legs outstretched, and then reach with his fingers beyond the tips of his toes. If that action is a “major life activity” for any of you readers out there, you are living a much more exciting life than am I. The fact that an uninformed layperson calls a medical limitation a “disability” does not make it a “disability” under law. I’m just saying ...
– Wiley]

Performance Recognition – Worth the Costs?

By Barbara Haga



This month I am continuing the discussion regarding whether performance recognition is a productive part of the performance management process.

Grievances and Reconsideration Requests

For some agencies, it seems that the design of appraisal systems, including in some cases the tying of awards to appraisals, is all about avoiding grievances. It’s not whether it’s a good program, or accomplishes the goals of performance management, or meets the need for feedback, it’s whether all of the guesswork has been eliminated so that the appraisals can be defended if there are challenges. Grievances and requests for reconsideration can be a huge drain on agency resources, so trying to avoid them is a reasonable response.

Grievances can run the gamut, from a challenge to one employee’s summary rating to an institutional grievance filed by the union about the entire rating system. Depending on what your appraisal program and/or grievance system allows, there could be a grievance about an individual element rating in an employee’s appraisal, even though it wouldn’t change the overall rating. Unless the matter is excluded, comments written in an appraisal may also be grievable. Add in pay-for-performance and the ante goes way up and is likely to increase the number of grievances, because now paychecks and ultimately annuities are at issue. If you tie awards directly to the level of appraisal (i.e., everyone rated Level 4 or 5 gets an award but not those rated Level 3), then you are likely to generate grievances because employees want a share of the pie. The number of places where something could go wrong is mind-boggling.

An Illegal Appraisal System

Let's take a look at a grievance about appraisals that had far reaching and also costly impact. You can read about it at <http://www.govexec.com/oversight/2007/09/arbitrator-rules-against-sec-pay-for-performance-system/25249/#.WKhpAb8NM3k.email> and [http://www.govexec.com/pay-benefits/2008/10/sec-union-settle-pay-for-performance-](http://www.govexec.com/pay-benefits/2008/10/sec-union-settle-pay-for-performance-case/27829/#.WKho5xF4C2Y.email)

[case/27829/#.WKho5xF4C2Y.email](http://www.govexec.com/pay-benefits/2008/10/sec-union-settle-pay-for-performance-case/27829/#.WKho5xF4C2Y.email) The Securities and Exchange Commission (SEC) implemented a pay-for-performance system in 2003. The system had 15 pay levels, with up to 31 steps in each level. An employee with an Outstanding rating could move up three steps in a year, resulting in a 4.5% salary hike. In impasse negotiations, the Federal Service Impasses Panel allowed SEC to implement because the Panel found that the system "reflects a pay structure that was well-researched, based on best practices from other agencies, meets the agency's needs, and is comparable to those of other financial regulatory agencies." So, how did this well-designed system fall apart? Apparently, the performance requirements were not specific to the jobs that employees performed. According to NTEU, who represented the effected employees, the measures of performance were not specific to the jobs performed by the employees and thus employees had little way to know what the supervisors or the review board that gave the increases was looking for.

That was just part of the problem. The union pointed out that these not-so-clear performance requirements had an adverse impact on African-American employees and employees 40 or older, who were statistically rated lower than their counterparts. The matter was taken to arbitration. Apparently, the agency was not able to substantiate that the ratings were legitimate, and the arbitrator ruled in 2007 that the system was illegal because it was discriminatory. The end result was an award of \$2.7 million that was to be divided among the African-American employees and

older workers who were affected by the discrimination.

In addition to the settlement to correct the past discrimination, the SEC and NTEU came to an agreement about new performance criteria that they designed together. The new system was based on private sector benchmarks, a review of each job to determine the measures that fit each one, and training for managers. [Note: I thought the content of performance appraisals was not subject to negotiation, but then I get confused some times. It happens when you are old enough to remember what the *huge* issues were when the Civil Service Reform Act of 1978 was initially implemented. See *National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt*, 3 FLRA No. 119 (1980) for starters.]

Anyway, negotiable or not, the agency and the union agreed on specific performance measures. I am reading that to mean that the measures took out some of the subjectivity and replaced it with more objective measures. It's common that unions want that. They generally like to see a system that limits the amount of discretion that the manager has – and objective measures do that.

Creating Measures that Remove Subjectivity

My union friends are probably not going to like this part of the column. (And, yes, I do have some union friends). While I understand what their interests are, I am concerned about what I consider a watering down of performance measures. In organizations where unions tried to limit the judgment being applied and the discretion that the supervisor had to assess the work and replaced that with more "objective" measures (like SMART measures), the agency gave up assessing the higher level skills.

What does that look like? Instead of measuring by things like "applies appropriate

techniques within accepted guidelines in dealing with complex situations, employs technical knowledge and strong skills in persuasion to convince recipients of reviews/audits of the need for changes to obtain their commitment to make changes, or applies judgment in interpreting guidelines and

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advances reasonable alternatives to meet goals of the program” the measures become more like “completes 90% of audits on time and without the need for significant technical changes. Three or fewer minor errors in an audit report are considered acceptable. Any delays in meeting assigned deadlines must be approved in advance by the supervisor.”

Why would an organization want to measure by objective standards? It makes it easier to defend the ratings, as apparently the SEC was unable to do. And, when the awards are linked to the rating level without any independent recommendation whether an award is warranted, then more grief of explaining why one received an award and another didn't is eliminated. But, do awards in such systems really motivate people to do more and do better? I don't think so. What I have seen is that it just becomes some extra dollars tied to the appraisal. In the days when I started my career, performance awards were handed out in ceremonies in front of coworkers. Now, in some organizations you just get your copy of the SF-50 with no fanfare – and sometimes you are given that SF-50 in the closet and sworn to secrecy in case anyone asks what you got. We have come a long way, Baby, but I think we went the wrong way.

Haga@FELTG.com

How Should You Document Misconduct?

By Deborah Hopkins



In response to last month's article about letters of counseling doing more harm than good ([Another Reason to do Away with letters of Counseling](#)), I received the below letter. Since this covers questions a number of you have, I figured this Newsletter was a good place to post and reply.

Hello,

I read with interest the article you wrote that warns that supervisors may be better off not putting letters of counseling in an employee's file. I am an Administrative Officer and assist our managers with labor/employee relations issues. I frequently advise managers to start with counseling memos to try and address unacceptable performance and misconduct. However, we have noticed a trend where our union is filing grievances and taking these cases to arbitration alleging they are discipline when they are not. Fortunately, we've settled at mediation before an arbitration hearing. Your article cautions that EEO cases are now being built on the issuance of counseling memos. This is very frustrating for managers trying to get their employees to do the right thing.

What would you suggest a manager should do to build documentation to support an actual disciplinary action if they are not to issue counseling memos to an employee? Would you suggest that they simply have a verbal counseling and the manager write a

Memo to the file to record this discussion? Would it be okay for a manager to send an email message to the employee summarizing the conversation?

Just wondering what a manager can do. If they don't have a way to prove the employee was put on notice of their unacceptable conduct before taking disciplinary action, it will be more difficult to prevail when actual discipline was issued.

Any guidance would be greatly appreciated. Thank you!

Dear FELTG Reader,

Thanks for the note.

Let me start by clarifying that there are different procedures for performance and misconduct.

In performance situations, the employee has to be given a performance plan. There's no requirement to document unacceptable performance prior to placing the employee on a PIP. Therefore, you issue the plan, wait until you conclude that the employee is performing unacceptably, then initiate the PIP. No prior warnings or counseling are required here. If the employee fails the PIP, you can propose removal. Easy peasy.

Let's move over to conduct now. In misconduct situations, the employee has to be on notice of the rule; he does not have to be warned that he has broken the rule. As long as the employee knows the rule, prior written warnings are not necessary to discipline. *Lehnerd v. OPM*, 55 MSPR 170 (1992). To tell an employee the rule, email works best. There doesn't need to be a warning that they've engaged in misconduct in the past because that triggers optimism bias and a possible EEO complaint in which the employee tries to defend herself.

Let's hash this out a little more.

In some cases, "counseling" an employee might help. For employees who just need a little coaching or guidance, a talking-to is often all they need to get better. If so, great - these are not the employees who are going to file a grievance or an EEO complaint. But a problem arises when the counseling gets memorialized into an official letter or document that goes into the OPF; as you've mentioned, employees grieve these (or file EEO complaints) and it's terribly inefficient because these documents serve no necessary purpose in progressive discipline.

We don't have exact statistics, but from our FELTG experience we see that employees are far less likely to grieve a verbal counseling session than they are a written memorandum. Personally, I think there's something about the tangible letter going into an actual file that gets them riled up or scared or upset. Could an employee grieve a verbal meeting; sure, probably, but it's not as tangible as a letter that says, "You were bad." It's inefficient, because these letters lead to things like mediation and arbitration but they can't be used as the basis for progressive discipline. Can they be used to go to notice? Sure. But hang with me; we have a more efficient method we recommend to managers who are dealing with misconduct.

Here it is:

Step 1 - If there is a question about notice, the supervisor should talk to the employee to put him on notice of the rule. Send the employee an email after the talk, recapping the conversation. This helps provide documentation of notice without it being a formal memo put in an OPF. Remember, memos or counseling letters don't count toward progressive discipline. In addition, the supervisor should take hand-written notes about the discussion she had with the employee, and should also make notes about the employee's conduct following the

discussion. (We suggest keeping a separate notebook for each employee, so if a case goes to discovery only notes relevant to this particular employee get submitted to the record.)

Note: this step is not necessary if the

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May 8-12

It was a hit last year in New Orleans, Honolulu, and San Francisco. So now we're bringing this exciting program to the Mile-High City!

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supervisor can show the employee was already on notice of the rule before they broke the rule. For example, if the employee attended a training session about a work process and there is proof the employee attended (a sign-in sheet, for example), and the employee's misconduct is tied to something about the work process he learned in that training session, then the sign-in sheet provides documentation that the employee was on notice. In other words, employees don't get free warnings about every act of misconduct if they already knew what the rule was.

If there was sufficient notice, we recommend skipping the counseling memo and going directly to a reprimand. Reprimands hold

weight in progressive discipline. If you have an employee who has potential to get better, a reprimand will work just as well as (if not better than) a counseling memo. And as a bonus, if the employee doesn't get better, we've already taken care of a step in progressive discipline by issuing a reprimand, and can move on to a short suspension next. Can they grieve it? Sure. But they can grieve a counseling memo too, and that doesn't count as discipline. So, it saves time and effort to go directly to a reprimand. It's as efficient as we can be, given the nature of our business.

So, depending on notice, here's the Discipline Three-Step:

Step 2 - Reprimand

Step 3 - Short suspension

Step 4 - Removal

I know this can be frustrating; you have colleagues across the government who write letters to us about this very thing, every week.

I hope this helps. Keep the faith, and good luck!

Hopkins@FELTG.com

Filing with the EEOC's Office of Federal Operations: An Appealing Proposition?

By Deryn Sumner

Over the many months I've contributed to this fine publication, I've discussed a lot of decisions issued by the EEOC's Office of Federal Operations, but not a lot about the process of filing an appeal with the Office of Federal Operations. So let's dive in, shall we?

Complainants can file appeals of agency decisions to dismiss their formal complaints, so long as all of the claims in the formal complaint are dismissed. If not, then the agency

investigates the remaining claims and the complainant can challenge the dismissal of the dismissed claims by filing a comment on partial dismissal before the administrative judge once the investigation is completed. Complainants can also file appeals:

- From final agency decisions issued on the merits of their cases,
- From final actions issued by agencies affirming unfavorable decisions from administrative judges,
- On decisions for relief including petitions for attorneys' fees and awards of compensatory damages and other remedies, and
- On allegations of breaches of settlement agreements.

Agencies are required to file appeals to EEOC's Office of Federal Operations whenever they issue final actions which fail to fully adopt the administrative judge's decision, under 29 C.F.R. 1614.110(a). Agencies can also challenge findings from administrative judges regarding liability and/or remedies.

Each party gets 30 days to notice the appeal and 30 days from that date to file a brief in support of the appeal. Agencies are required to provide a complete copy of the complaint. Failure to do so can lead to sanctions, up to and including default judgment.

If the Office of Federal Operations does not rule in your side's favor, you can file a request for reconsideration of the decision. The standard, set out in 29 C.F.R. 1614.405(c), requires a showing that the Commission's decision had a clearly erroneous interpretation of material fact, a clearly erroneous interpretation of material law, or will have "a substantial impact on the policies, practices, or operations of the agency." The Commission ruled on more than 600 of these requests in 2016 alone and very rarely will grant a request for reconsideration. In some instances, the Commission will realize that it erroneously relied upon wrong law or fact but will deny the

request for reconsideration and re-open the decision on its own to correct the mistake (it has happened to me and is an amusing, but ultimately favorable, result).

Timeframes for how long it takes to get a decision from the Office of Federal Operations vary. Looking at 2016 decisions, some decisions on procedural dismissals were issued only about 4-5 months after being filed. However, more substantive cases can take longer. In the *Elden R. v. Department of Interior* case I discuss elsewhere in this month's newsletter, it took 4.5 years to get a decision on the merits. Sumner@FELTG.com

When to Give a Probationer Due Process Prior to Termination **By William Wiley**



Questions, we get questions. And sometimes it takes us a couple of responses to flesh things out. From an inquisitive (and patient) FELTG-ite:

Dear FELTG Brilliant Minds-

I have a hypothetical question. If you have a probationary employee with full appeal rights that is not performing at a satisfactory level; the manager does not want to put the employee on performance assistance because s/he is a probationary employee; but the manager wants to remove the employee, what is the charge? Failure to successfully complete a probationary period? If so, would the specifications be examples of his/her poor performance? How would you proceed?

And here's our "brilliant" (though incomplete) first response:

Thanks for your email. With probationers, there is no charge. We

just tell them that today is their last day of employment and hand them an SF-50 documenting their removal.

Although this is the minimum legal approach, here are options I've used over the years. They are all equally safe from a legal standpoint. The choice really is a personal one depending in large part on your philosophy of life:

1. Notify him today that he's being separated at the end of the pay period. Send him home and he gets paid until the end.
2. Along with the SF-50, give him a memo from the supervisor that says something benign such as "Effective today, I am separating you from employment during your probationary period. You have failed to demonstrate the qualifications and characteristics necessary for an employee of the Environmental Protection Agency."
3. Have the supervisor talk with him, perhaps along with an HR specialist and tell him that he has not successfully performed as a probationer and that you intend to separate him at the end of the week. Then, tell him that if he would prefer to resign now, the separation will be reflected as a voluntary resignation rather than as a termination during probation. Some employees see this as a "clean record" resolution although as a practical matter, it might not be as clean as he would like.

Personally, I like No. 3 if the employee is otherwise a good person. I try to use the tone, It's not you; it's me: "Hey, this didn't work out in this particular job. But we sometimes have other jobs open up here at EPA that might be a better fit. I hope you apply for them and are successful in some other type of work, especially if you get a little more education or experience in the field."

However you do it, here is what I ABSOLUTELY ALWAYS have the supervisor do: draft a memo for the record that describes whatever it is the employee has done that warrants removal: dates, specific failures, witnesses. Stick that in the file (don't give it to the employee) and use it defensively if/when the employee files an EEO complaint.

And then, our questioner's response:

That's just great. Thanks so much. That's a very good way to terminate a probationer in most situations and I'll make sure that we implement that approach office-wide. However, did you get the part of my question that says THE EMPLOYEE HAS FULL RIGHTS to the Board? She has completed more than a year of current continuous service without a break from another position within the agency.

Oops, we sort of missed that in our haste to respond promptly. Thank goodness that our reader did not give up on us.

Then, we're into a notice letter, a response, and a decision. In the notice letter, I would charge the incidents of poor performance that have occurred that cause the supervisor to decide to terminate the individual. Something like this:

By this memo, I am proposing that you be terminated during probation based on the following incidents:

Charge: Deficient Performance

Specification A: On February 21, 2017, you painted the walls in your office navy

blue. I had told you previously to paint the walls white.

Specification B: On February 17, 2017, you turned in your work for the week and it contained 18 widgets. On February 13, I had told you that you needed to produce 20 widgets that week.

Specification C: On February 10, you turned in a Survey Report that had ten misspelled words, three incorrect mathematical calculations, and used 10 point font even though our standard operating procedure for survey reports calls for 12 point font. See attached exhibit A.

And on and on. Then, you'll need to do a brief *Douglas* analysis justifying termination, and you're done at that step.

Seven days to respond, an impartial decision, and they are off the payroll in 31 days. Please note that the law changed in December and you can now place an employee who has received a proposed termination on Notice Leave, thereby getting the employee out of the workplace during the notice period without having to place him on admin leave.

FLRA has had no cases on this, but I'd bet money that they'd find the union has a right to be involved here even though the case law says that they don't have jurisdiction over a probationary removal. That's because this whole mess is based on a darned typo in the law that has created this odd-ball category of employees who are technically on probation, but who can appeal to MSPB their removals and are covered by 5 USC Chapter 75.

Best of luck out there. Wiley@FELTG.gov

Official Time: What's Considered Reasonable?

By Deryn Sumner

Under the EEOC's regulations at 29 C.F.R. 1614.605(b), complainants who are employees of the agency are allowed "a reasonable amount of official time" while on duty hours to do tasks relating to their EEO complaints. This includes time to prepare the formal complaint, respond to requests for affidavits from EEO investigators, and respond to Interrogatories, Document Requests, and Requests for Admissions during discovery once the case is in the hearing stage. Any time spent by the complainant as required by the administrative judge or the agency representative is typically considered inherently reasonable. This time includes attending fact-finding investigations and interviews with EEO investigators, mediations, settlement conferences, prehearing conferences and other prehearing proceedings, and the hearing itself.

NEW webinar series

Absence Due to Illness

- April 13
- April 27
- June 1

This three-part series answers your questions about employees who are absent from the workplace – short and long term – due to illness. From a cold that requires an employee to go home a few minutes early, to FMLA entitlement exhaustion for a family member's illness, we'll cover it all.

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But what about time spent not in the presence of the administrative judge or agency representative, such as drafting responses to an affidavit or working on an appeal? What is considered reasonable in those circumstances? Some agencies have internal guidance on how many hours of official time supervisors should grant employees for various aspects of processing their EEO complaints. In responding to requests for official time, or defending against claims that reasonable official time was not granted, you should check to see if your agency has such internal guidance. And of course, we can look to decisions from the EEOC's Office of Federal Operations to further guide us on the amount of official time considered reasonable to grant.

Let's look at a couple recent decisions.

In *Virginia K. v. Department of Treasury*, EEOC Appeal No. 0120142662 (December 28, 2016), the Commission looked at how many hours of official time were reasonable to grant to a complainant who needed to respond to 80 questions from the EEO investigator. The complainant requested 80 hours, I guess presuming that each question would take an hour to answer. The agency found six hours of official time to be more appropriate. On appeal, the Commission determined that 15 hours of official time was the right amount, stating, "Some questions were for duplicate information, *i.e.*, Complainant's name, position held, the identity of her supervisors, and her past EEO activity. Complainant was able to answer a number of questions with one word answers or short responses. Nevertheless, there were a large volume of questions. A number of them solicited information in detail, and some would likely require Complainant to gather and review documents." The Commission also factored into its determination as to the appropriate number of official hours the fact that the agency needed complainant to perform her normal job duties, she was behind on time sensitive work, and

she only worked 24 hours per week which, the Commission found, "affects the amount of official time that is reasonable." The Commission cured the agency's act in only granting six hours by ordering restoration of nine hours of administrative leave to the complainant's leave balances.

Okay, so depending on how many questions the EEO investigator asks a complainant to answer (and I've seen some that rival SF-86 forms), as many as 15 hours of official time can be considered reasonable. And what about drafting appeal briefs? The EEOC's regulations permit complainants to designate other federal employees as their representatives and allows them reasonable amounts of official time to work on the complaint. In *Sheryl S. v. Social Security Administration*, EEOC Appeal No. 0120150144 (November 1, 2016), the complainant's representative stated that it took him between 20 and 26 hours to prepare an appeal to the Office of Federal Operations (which I presume also included a brief in support of the appeal, not just the notice) but conceded that it was his first time preparing an appeal and may have taken longer than necessary. Noting that the appeal did not relate to complex factual or legal issues, the Commission affirmed the agency's grant of 11.5 hours of official time as reasonable. Sumner@FELTG.com



Employment Lawyers Having Drinks By William Wiley

They say that one does not want to watch either laws or sausage being made. I might add to that list that's it's better not to watch employment lawyers having drinks.

A couple of weeks ago, I was having dinner with two of the best federal employment

lawyers I have ever known. After the mandatory two-martini round of drinks (hey, we're lawyers; they don't call it a "bar association" for nothing), we found ourselves in an animated discussion that involved raised arms, exaggerated facial features, and loud voices. Clearly, those poor diners seated nearby must have thought us either to be engaged in something highly important or to be just flat out bat-poop crazy. No doubt they were distracted, if not completely put off, from their respective meals by our disruptive discussion.

And what was the topic that got us all fired up? Official Time for the Pursuit of EEO Complaints.

Here was the hypothetical scenario:

1. As Deryn well described in the previous article, EEOC regulations require that an agency grant employees "a reasonable amount" of duty time to work on their EEO complaints.
2. What if the employee has performed so poorly in the past that the supervisor has determined that the employee is working at the Unacceptable level, and has initiated a 30-day Performance Improvement Plan? As every experienced practitioner knows, 30-days is routinely accepted by MSPB as an adequate PIP length. At the end of the PIP if the employee has continued his unacceptable performance, the supervisor has no choice but to remove the employee from the position. 5 USC 4302(b)(6).
3. Then, during the PIP, the employee files several extensive EEO complaints, complaints that would require many hours of on-duty official time to prepare.
4. Question: Is the agency obligated to grant ANY official time given that the employee is on the cusp of being fired; e.g., can it declare that when applying

EEOC's regulations to the situation it is *per se* unreasonable to allow EEO-complaint official time for an employee who is on a PIP?

The good-government equities that would lead us to an answer to this hypothetical are balanced:

- On one hand, we want civil servants to be free of civil rights discrimination in the federal workplace. In pursuit of that honorable objective, it makes sense that the government would allow work time for the employee to seek redress from perceived discriminatory acts.
- On the other hand, we are taking strong hits from Congress and others charging that in the civil service we do a poor job of holding employees accountable for their performance, that we allow non-productive employees to linger on the roles for months and years beyond the time they should have been fired.

EEOC makes the rules relative to official time. As Deryn described in *Virginia K.*, the Commission will consider the work needs of the agency when deciding how much official time is reasonable; "she was behind on sensitive work." What we are missing is an EEOC decision as to whether there might be a situation in which zero official time is warranted due to the agency's need for productivity in a particular situation. One or two of us at dinner concluded that, yes, there are work situations in which no official time need be granted by an agency, and during the pendency of a PIP is one of them. One or two others at dinner that night concluded just the opposite, that there are *no* situations in which EEOC would conclude that denying any official time was reasonable.

So what do you think? Keep in mind that in the private sector, employers are not obligated to provide work time for individuals to pursue discrimination complaints. They must do it on their own time. Also, keep in mind that there's a movement afoot to try to run the government more like a private-sector business rather than like a bureaucracy. Perhaps that's why Congress enacted legislation effective in December that severely limits an agency's ability to place employees on an administrative leave status, without any exceptions for administrative leave for employees to pursue EEO complaints. And finally, when you look into the future trying to predict what will happen if this issue ever gets to EEOC, be sure to factor in that the decision will be made by individuals appointed by the new White House, not by the one that just left town.

So how did we resolve all of this at dinner? Well, we did what any good group of lawyers would have done: we ordered another round of drinks and moved onto other things to argue about. I wish you had been there with us.

By the way, here at FELTG, we've come up with two great alternatives as to what to do when you are confronted with an employee on a PIP who requests official time under EEOC's regulations. If you'd like to know what those are, you'll want to come to the next offering of our world-famous seminar [Absence and Medical Issues Week](#), starting March 27 in Washington, DC. Since you couldn't make it to our dinner, maybe you'll be able to hook up with us there. Wiley@FELTG.com

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