Federal Employment Law Training Group
Training By Professionals For Professionals

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How's Your Year Going so Far?

The workload at the Merit Systems Protection Board is relatively steady (except in years that Congress causes a few thousand Stupid Sequestration© furloughs). Each Board member has to physically handle and mentally consider about five to six cases per work day in order to stay even with the in-flow of appeals. Take a day off for R&R and there will be around 12 cases waiting for you the next day. No one can do your work for you because you're anointed by the President and the Senate as the decision maker in each appeal. As our astute readers know, effective January 6, due to the premature resignation of one of its two remaining members, MSPB had to turn off the lights. With only one member left, the Board has lacked since then the necessary quorum of two members to issue decisions. Eventually, President Trump will nominate a replacement or two to fill the vacancies at the Board. Think what will be awaiting those new members once the Senate confirms them: a backlog that has been building every day since January 6. As of today, that's about 400-450 cases just sitting there. Waiting. Growing in size by an additional six cases every day. Denying closure to appellants. Building up back pay liability for agencies. Think of everything you've done in your delightful government job since December. Picture all that being undone, that you would have to relearn your job to do it again (similar to what will happen if the President nominates a neophyte to be a Board member), and that you were told to re-do everything that you've already done. That's the challenge that will be facing the new Board members. Are you looking to move up in government? If you accept an appointment at the Board, you can kiss that summer vacation goodbye, my friend. And maybe even Thanksgiving, depending on when the Senate gets around to blessing your little heart to be a Board member.

Bill

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May 4

Dealing with behavioral Health Issues in the Federal Workplace
May 11

Costly Bad Advice
By Barbara Haga

I was going to write about performance plans this month, but a situation about some advice given by an HR practitioner has been gnawing at me for a while and I need to vent.

Background

Commonly a situation comes up in a class somewhere where a supervisor wants a second opinion on the advice that he or she was given regarding a particular scenario. I usually start with the caveat that there are local issues, local past practices, union contract provisions, etc. that I am not privy to that might change the answer. Sometimes the answer I give is significantly different than what their legal office or HR office advised. I try to make them feel better by telling them that this is art and not science, and two practitioners looking at the same facts may very well come up with different approaches to a particular situation. Sometimes, I tell them I learned this business in an agency that was known for being tough on disciplinary and performance problems, so my answers may suggest stronger approaches than what is typical in their agencies. But, sometimes when I hear the answers that were given, my jaw drops and I am speechless. This is one of those cases.

John, the Firefighter

A Firefighter, who we will call John, sustained a severe hand injury outside of work. The projected recovery period was going to be several months. As a result of this injury, John was unable to meet the lifting, carrying, pulling, and climbing functions of his job. A Firefighter must be able to lift and carry someone, climb ladders, operate equipment, handle hoses, put on firefighter gear, etc. John could not perform these requirements per the medical certification that he provided from his health care provider.

In addition to the Firefighter qualifications, there is also a requirement to be a certified Emergency Medical Technician (EMT). In order to fulfill those duties, there could be a need to lift and turn a patient, put a patient on a stretcher, insert an IV, etc. All of these duties were things that John's injury prevented him from doing.

Apparently, John was a good employee and the Fire Department was willing to wait for him to be able to return. Unfortunately, John's injury kept him out of work long enough that he ran out of leave. So, he asked to come back to work. In a Fire Department, there must be X number of qualified Firefighters on duty for each piece of equipment at each station at all times. For example, when there are not enough Firefighters arriving in the morning for the new shift, someone from the prior shift is held over on overtime to fill the gap. The bottom line is that there is no such thing as a "light duty" Firefighter. An injured Firefighter might be sent to work in Dispatch or could be assigned to the Inspection Unit to work while he or she is physically disqualified, but those slots are limited. Often those slots are held for Firefighters on light duty as a result of an on-the-job injury, since keeping those individuals at work reduces the chargeback costs under Workers' Comp. So, John was advised that there was no light duty work available.

Up to this point, everything made sense.

The Advice from HR

Somehow the matter was referred to HR. I don't know how that happened. It may have come up as a reasonable accommodation request, or it may have been raised by the union, but eventually an HR practitioner responded.

The answer: the Fire Department was required to accommodate John by allowing him to return to duty in the Fire Station and to work there performing whatever duties he was able to complete. If they did not comply, Fire Department management could be facing an enforced leave action that they couldn't win.

That advice is so wrong I hardly know where to begin.

Not a Qualified Disabled Person

John did indeed have a physical impairment that limited several major life activities such as lifting, reaching, working, etc. But, there is no way he can be determined to be a *qualified* disabled person. The definition of qualified disabled person is that the individual can perform the essential functions of the position with or without accommodation. John could not perform firefighting and EMT functions without accommodation – and what accommodation could be given that would allow him to do so?

If John is not a qualified disabled person, then he is not entitled to accommodation. So, the advice that the Department was required to accommodate John is not correct. The EEOC ruled on a case just last year with similar facts. In *Marlin K. v. Department of the Navy,* EEOC Appeal No. 0220140005 (2016), a Wastewater Treatment Plant Operator was injured in an off-duty car accident which left him with multiple injuries that precluded him from climbing ladders and stairs, walking to collect samples, and lifting more than ten pounds. Although the employee asserted that the agency could have accommodated him by assigning a coworker to perform the physical duties of his position that violated his medical restrictions, the EEOC found that the agency was not required to remove any of the essential duties of the position as a reasonable accommodation.

The "Light Duty" Position is not a Real Job

If John could have been assigned as a Dispatcher or Inspector then he could have performed duties in a recognized position, but as mentioned earlier, there were none of those slots available when John tried to return to duty. To have John come in and "do whatever he could do" doesn't make sense. I suppose he could fill out paperwork and check tags on equipment, but there wouldn't be many Firefighter tasks that he could do. It is at best make work, and might comprise a few hours of the day, but certainly not a full shift.

Someone Else was Being Paid to do John's Job

Remember, there must be X number of qualified Firefighters on duty at any time. Even though the accommodation required that John be on duty and paid, someone else had to perform the demands of his Firefighter position since he is not physically qualified to do so. Thus, someone else was brought in, likely on overtime, to perform John's duties. I don't know of any EEOC decision anywhere that requires an employer to pay **two** people to do one job.

How Could this be *Enforced Leave*?

We started with some basic facts about John. Because of his injury, he is not qualified to perform the duties of his assigned position. John knows this. His doctor knows this. Management knows this. John wants to return to work because he has run out of leave. An enforced leave action is putting someone on their leave without their consent. If it is done by following due process for cause, the agency should be sustained. It is when it is done without due process that agencies get in trouble. In this case, there would be cause for a suspension – it's an inability to perform case. This principle is not new. See *Pittman v. MSPB,* 832 F.2d 598 (Fed. Cir. 1987).

The Cost of the Bad Advice

This organization covers a region of the United States. When they got the response from their servicing HR office, it was transmitted in writing to all of their Fire Departments as the requirement for handling this type of situation. From now on, every time there is an outside of work injury that disqualifies someone from their Firefighter job, they will repeat what they did here. It is a costly mistake that could be repeated at multiple locations in the future.

I think sometimes in the HR world we forget what the real-world impacts are of the answers we provide.

What Should have been Done?

John should have been instructed to apply to the leave donor program. Perhaps enough other employees would have recognized the dire situation John was facing and would have given him enough leave to get him through the months he needed to recover. He could have been instructed to apply for FMLA, although in this case, it seems John was a good employee and no one in management was debating whether they would wait for him to come back to full duty and they were willing to give as much LWOP as he needed.

If John insisted that he should be accommodated, he should have been advised in writing explaining why he did not meet the conditions for accommodation. If he tried to return to work, the agency could have suspended him for inability to perform, either a regular suspension if there was a set return to duty date or an indefinite one if the date was not known.

Unreasonable Accommodation

The requirement in disability cases is "reasonable" accommodation. I hear too often of cases where the accommodations are unreasonable – like this one. I don't know if practitioners don't know that not everything can be accommodated or that they are so afraid of a finding of discrimination that they advise steps beyond what management's burden should be, but we owe it to those to whom we provide advice and guidance to do better than this. Haga@FELTG.com

Why "Gentlemen's Agreements" Aren't Enforceable Before The EEOC
By Deryn Sumner

In the January edition of this newsletter, I discussed the importance of ensuring that the terms of settlement are properly contained within the "four corners" of a settlement agreement and clearly understood by everyone involved. Just a few weeks ago, the EEOC's Office of Federal Operations issued a decision illustrating why this is so important. In *Retha W. v. Department of Agriculture*, EEOC Appeal No. 0120151000 (March 24, 2017), the complainant filed an appeal from a Final Agency Decision finding no breach of a settlement agreement. The Commission affirmed the agency's position that no breach occurred. The Commission's decision tells us that the settlement agreement contained two terms: that the agency would agree to pay the complainant $8,000 and in exchange, the complainant would agree to withdraw her EEO complaint. Seems like unless the agency just plum forgot to issue the payment or refused to do so, there would be no means for a breach, right?

Well, actually the complainant had a different understanding of what the agency was agreeing to do in resolution of the case. Citing a "Gentlemen's Agreement" that the complainant claims was "communicated with the involved parties, including Complainant, her representative, the Agency's

resolving official, and the state conservationist at the time the Settlement Agreement was signed," the complainant asserted that the agency agreed to announce a GS-12 position for which the complainant would be considered for and listed on the referral list. When the agency never advertised such a position, the complainant alleged a breach of the agreement.

The agency reviewed the terms of the settlement agreement itself and found no reference to a term wherein the agency agreed to advertise a position or give the complainant consideration for any such position. She got the payment of $8,000 she was due under the agreement, and that was it. Although the agency admitted there being some discussion during settlement negotiations of a position potentially becoming available at some point in the future, there were no promises made and no such agreement was included in the settlement agreement.

In its decision, the Commission included its oft-cited precedent that settlement agreements are simply contracts between the parties, that the intent of the parties must be expressed within this contract, and that the meaning will be determined from the four corners of the agreement without looking to extrinsic evidence. Noting that the "Gentleman's Agreement" was never reduced to writing (but not that the complainant was female), and that the complainant should have sought to have the term included if she wanted it as part of the settlement, the Commission found no breach of the agreement. Sumner@FELTG.com.

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Focusing on employee leave, performance, and conduct, this seminar is a must-attend for federal ER professionals. Registration is open now.

A Trip to the Federal Court of Appeals
By Deborah Hopkins

A few weeks ago I made a trip from my Petworth condo down to the Prettyman Courthouse on Constitution Avenue, just blocks from the U.S. Capitol. The reason? FELTG's own stellar instructor Katie Atkinson was scheduled to present oral argument in an EEO discrimination case. Those of you who have been in the business even for just a little while know that this level of litigation is a Big Deal – it's one step away from the Supreme Court. Yowza. Statistically, most people who read this newsletter will never get to that forum, so let me just paint a picture for you with my words.

Building security is tight and only attorneys with active bar cards are allowed to carry in cell phones; all other electronics are seized and held by security at the lobby level. (Finally, a reason to use my bar card! One is not required to be an attorney to represent a client before the MSPB or EEOC, thus there is no requirement to show a bar card or inform the administrative judge of a bar number during litigation.)

The courtroom is pretty imposing. If you've been to an MSPB or EEOC hearing, you were probably underwhelmed (as I was) with your first "hearing room" experience. If you haven't had that experience, let me set the stage: in most cases hearing rooms are bathed in fluorescent lighting, there might be coffee stains on the carpet, not a remote occurrence of mahogany furniture or classical pillars anywhere. In fact, a lot of EEOC hearings take place in simple conference rooms. So when I walked in to Courtroom 31, I took in the imposing painted portraits of the many men whose presence had graced that very bench (sadly, just a handful of female faces adorned

the walls), the dark wood, the formal jury box, and the multiple security officers. Everyone was dressed in conservative business suits – even people who were only there to observe.

A clerk for each of the three judges came out about five minutes before court was in session, and arranged the bench per what appeared to be unique specifications – materials on the table set just so, and even the angle of the chair's swivel toward the door to chambers. Talk about formal.

With one minute to go, the marshal explained to the crowd (a group of approximately 30 people; three arguments were scheduled for that morning) exactly what would happen next.

Then, as the judges walked out, in something astoundingly formal and supremely cool because it's just like what happens at the Supreme Court, the Court Crier announced in a commanding voice, "The Honorable Justices of the District of Columbia Court of Appeals. Oyez! Oyez! Oyez! All persons having business before the Honorable, the District of Columbia Court of Appeals, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court."

So cool.

So let me give you a quick lesson in procedure. The party filing the appeal goes first. There's a little light at the podium – kind of like a horizontal traffic light – that turns green when the clock begins. With two minutes left (in general, oral arguments are scheduled for 10 or 15 minutes each side, though in more complex cases more time may be designated) the light turns yellow, and when time is up it turns red.

As much as attorneys practice the oral argument, when the light turns green anything can happen. Judges can interrupt, ask questions, pontificate, or change the entire direction of the discussion. That's why it's important to intimately know the case law from the briefs; chances are you'll be asked about cases by name.

And ask questions the judges did. I won't go in to the details of the oral arguments here but suffice it to say, Katie Atkinson did an amazing job. The most impressive thing to me was that she didn't even take up the entire time reserved for argument. She stood and addressed the Court, made her argument, answered the judge's questions, and when she was finished making her point she sat down. What a stellar example of a veteran move that reflects the mindset of a pro: whether in argument or in writing, after you've made your strong argument, STOP talking (or writing). No need to dilute your argument with meaningless words.

We're looking forward to the decision which should come out any day now. In the meantime, if you need hearing practices training, let us know and we can send our resident pro to teach you all she knows!

Hopkins@FELTG.com

Legal Analysis 101
By William Wiley

All right all you brilliant legal-like minds out there. Work through this law with me. What do you think this means, and why did Congress say it?

5 U.S.C. 1214: (f) During any investigation initiated under this subchapter, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation … without the approval of the Special Counsel.

If it's of any help, the "subchapter" referenced in this language is Title 5 - Government Organization and Employees, Part II - Civil Service Functions and Responsibilities, Chapter 12 - Merit Systems Protection Board, Office of Special Counsel, and Employee Right of Action, **Subchapter II** – **Office of Special Counsel.** So, what we are talking about is that period of time that OSC has decided to come in to your agency and investigate the suspected reprisal against an alleged whistleblower by one or more of your management officials. OSC usually notifies you officially of its investigation when it has heard enough from the employee/complaint to conclude that maybe there is fire beneath the smoke of the claim. It contacts the agency, usually through the office of general counsel, when it is ready to demand documents and needs access to agency employees to depose. That's when you know, often for the first time, that there is an OSC investigation afoot under this subchapter.

The statute prohibits an agency from disciplining "any employee" for "prohibited activity." Well, the activity prohibited that OSC investigates is reprisal against a federal employee for whistleblowing. The "activities" that are prohibited are specifically enumerated at 5 USC 2302(a)(2)(A) and include most significant personnel actions such as disciplinary actions or performance ratings. The "prohibited" part refers to taking the action based on an improper motive, namely whistleblower reprisal. As for the "any employee" language, those who can be investigated for whistleblower reprisal are federal employees who have the "authority to take … personnel actions." 5 USC 2302(b).

Wrap all this up and in lay terms, what the law says is that an agency must get OSC's approval during an OSC investigation if it intends to discipline a management official for the misconduct of reprising against a whistleblower. This makes sense if you think about it. If an OSC investigation results in a conclusion that I have reprised against a whistleblower, OSC can file charges against me before MSPB and have the Board discipline me. However, during an investigation into whether I reprised against the whistleblower, if the *agency* were to discipline me for reprisal with – say – a one-day suspension, OSC would be precluded from subsequently disciplining me more seriously because I would have already been disciplined for the misconduct. No sir; no double jeopardy in our system of workplace justice, thank you very much Fifth Amendment (in analogy only, of course).

Did you notice the "…" above? For clarity, when quoting the law, I left out the phrase "or for any related activity." That's an awkward seemingly-unnecessary term, but it appears to me to refer again to the "any employee" with the authority to take a personnel action. Once more, we're talking about needing OSC approval to discipline a management official.

Why all this detail? Because some agency officials have concluded that this language requires that it get approval from OSC prior to disciplining the *employee* who filed the reprisal complaint (for misconduct, not related to whistleblowing). In fact, even EEOC appears to believe that OSC approval is required prior to an agency disciplining an employee who has filed a whistleblower reprisal complaint. *See Latricia P. v. USDA (Natural Resources Conservation Service),* EEOC Appeal No. 0120152533 (February 16, 2017).

Where in the world might an agency as experienced as the Department of Agriculture get the idea that it needed OSC approval to discipline an employee who has filed a whistleblower reprisal complaint resulting in an investigation? Well, I certainly do not have any specific inside information into this case, but in my experience, I have heard that incorrect interpretation of the law put forward by – are you ready? – OSC itself. Hey, if I'm OSC, my job is to protect whistleblowers from bad

treatment. If you fire or otherwise discipline the whistleblower while I'm conducting an investigation, you're going to mess up my investigation and interfere with my defense of that employee. If I can get you to believe that you need my approval to discipline a complainant, why would I not want you to believe that?

A number of you readers have had dealings with OSC in situations in which you have an intent during an investigation to discipline the complaint for misconduct or perhaps fire the complaint for poor performance. Even if you have not heard an OSC representative tell you affirmatively that you need OSC's permission to go forward, have you ever heard an OSC representative say to you, "Hey, if you need to fire this complaint for reasons unrelated to whistleblowing, do what you need to do to hold him accountable. Our approval is required only if you're going to discipline one of your managers for reprisal."?

I am not worried about my email inbox becoming crammed with responses to this question.

OSC does not have the authority to require you to get its approval prior to disciplining a complainant during an investigation. If it believes your discipline amounts to reprisal of some kind, it can file a motion for a stay of the discipline with MSPB. The *Board* can order you to hold off on disciplining the employee, but OSC cannot.

Know the law. Do not rely on OSC's interpretation of it. They are many good people at OSC, some of which I have considered my friends for 35 years. Yet their job is different from your job. You need to run the government and hold misbehaving employees accountable; the Special Counsel does not. Wiley@FELTG.com

COMING UP IN DC

Legal Writing Week
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FELTG's limited-enrollment writing-based program *Legal Writing Week* focuses on effective legal writing in federal sector employment law cases, including:

- Drafting proposed discipline
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- Petitions for Review
- Final Agency Decisions
- Motions for Summary Judgment
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Registration is open now. We'll see you there!

Seventh Circuit Court of Appeals Agrees with EEOC's Position Regarding Sexual Orientation Claims
By Deryn Sumner

As we've apprised the FELTG audience before, there has been a steady progression over the years regarding how claims of sexual orientation discrimination have been processed by the Commission. Initially, such claims were outright dismissed for failure to state a claim. Then, the Commission took the view that claims of sexual orientation discrimination really stated claims of sexual stereotyping, and thus ordered agencies to start processing these claims under that theory. Then, in *Baldwin v. Department of Transportation*,

EEOC Appeal No. 0120133080 (July 15, 2015), the Commission dispensed with such analyses and definitively held that claims of sexual orientation discrimination are inherently related to sex and therefore should simply be considered claims of sex discrimination.

The wing of the EEOC that conducts litigation to obtain relief for victims of employment discrimination followed by filing civil actions in U.S. District Court, as we discussed last year in this newsletter, applying the argument in *Baldwin*. These and other cases are making their way through the federal district courts and courts of appeals. Just recently, on April 4, 2017, the Court of Appeals for the Seventh Circuit issued a decision affirming the holding that claims of sexual orientation state claims of sex discrimination. The case is *Hively v. Ivy Tech Community College of Indiana* and in it, the Court of Appeals vacated the district court's dismissal of the complaint on the basis that a claim of sexual orientation didn't state a claim under Title VII, and remanded it.

The Court of Appeals decision referred to much of the same precedent as the EEOC's decision in *Baldwin*, tracing the evolution from the Supreme Court's holdings in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). Noting that it could not act to amend Title VII to include sexual orientation, the Court turned to whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex. There was substantial discussion of statutory interpretation, which I will leave for those of you fascinated by such discussion to read on your own. And the EEOC got credit for the decision in *Baldwin*, when the Seventh Circuit Court of Appeals noted, "the agency most closely associated with this law, the Equal Employment Opportunity Commission, in 2015 announced that it now takes the position that Title VII's prohibition against sex discrimination encompasses discrimination on the basis of sexual orientation. Our point here is not that we have a duty to defer to the EEOC's position. We assume for present purposes that no such duty exists. But the Commission's position may have caused some in Congress to think that legislation is needed to carve sexual orientation *out* of the statute, not to put it *in*."

Raising another aspect to the analysis, the Court of Appeals also discussed an argument raised by *Hively* referencing the Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967). This is the case that held that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the *Equal Protection Clause*." Ms Hively argued that her association with another woman was the cause of the discriminatory actions she experienced, which the Court credited in its decision. As we see more of these decisions come out of Courts of Appeals, it becomes more and more likely that the Supreme Court will address whether Title VII includes sexual orientation claims as sex discrimination claims in the near future. Sumner@FELTG.com

On a Related Note …
By William Wiley

Over drinks and dinner the other night, our favorite time to pontificate on the fate of the civil service, Deb, Ernie Hadley, and I came up with the following fascinating facts:

1. There are five EEOC Commissioners. Each is appointed by the President, confirmed by the Senate, and serves a fixed term from which they essentially cannot be removed. All five cannot be from the same political party.
2. Currently, one of the five positions is vacant. The term of another expires in ten weeks. The term of yet another expires on July 1, next year. That means that within the next 15 months, President Trump will have the

opportunity to name three new EEOC Commissioners, a voting majority.

3. The President is free to select whomever he thinks would be a good Commissioner. If I were the President I would certainly want to appoint individuals as Commissioners who shared my view of civil rights law. For example, if I strongly felt that sexual orientation was a form of sex discrimination, as does the Seventh Circuit, then I would appoint individuals who hold the same view. On the other hand, if I felt that was not the case, as at least two other circuit courts have concluded, then I would appoint individuals with that view.
4. For years EEOC has taken the position that its only real controlling court is the US Supreme Court. In other words, it does not feel itself bound by the rulings of the individual circuit courts.
5. As EEOC interprets the civil rights laws for the purpose of federal employee discrimination complaints, whatever it says about sexual orientation as a protected category applies to all federal agencies regardless of contrary rulings by the individual circuit courts.
6. The Commission has held, as explained by Deryn above, that sexual orientation discrimination is a form of prohibited sex discrimination. However, nothing stops a bunch of new Commissioners from moving in the other direction.
7. In fact, as far as I can tell, nothing requires the President to appoint a full complement of five Commissioners. He could appoint a Republican of his choosing, and if confirmed by the Senate, there would be a voting quorum even though the other two seats – seats that would have to be filled by members of another party – remain vacant.

Here at FELTG, we have our own strong opinions as to how this law should be interpreted. But none of us has been appointed to anything in a very long time, so our opinions are worth exactly what you are paying for them. The reality of our business, though, is that protections from sexual orientation discrimination in the federal civil service as a form of sex discrimination are in a precarious position. Stay tuned to this space for any updates that come along. Wiley@FELTG.com

Bumping the Innocent Incumbent as a Remedy in Employment Discrimination Cases

By Deryn Sumner

Our mantra for fashioning remedies in employment discrimination cases is that the victim of discrimination should be placed, as closely as possible, in the position he or she held prior to the discrimination. In claims of discriminatory non-selection, this typically means giving the employee the position he or she applied for, or at least a substantially equivalent one, with the agency, along with the back pay and associated benefits, including any step increases or career ladder increases that would have been earned if the employee had received the position when she or he should have. So what happens when the position at issue is unique or one of a kind? Well, since the goal is to get the complainant to where he or she should have been, this can sometimes mean bumping or removing the person who got the job, likely through no fault of their own, so that the complainant can have it.

In 2016, the Commission considered such a case and ordered that the agency must bump the incumbent in order to remedy the discriminatory act. In *Toney E. v. Department of Agriculture*, EEOC Appeal No. 0420150019 (March 18, 2016), the petitioner worked as a GS-11 academic program manager at a Job Corps Center in Bristol, Tennessee and filed an EEO complaint alleging discrimination when the agency did not select him for any of four center director positions for Job Corps Centers

located in Coeburn, Virginia; Bristol, Tennessee; Franklin, North Carolina; and Pisgah, North Carolina, respectively. The agency issued a Final Agency Decision (FAD) finding it failed to articulate a legitimate, non-discriminatory reason for not selecting the petitioner and ordered he be promoted.

There is a substantial procedural history here, but relevant to this discussion, the Commission issued direction in Request No. 0520140443 (February 6, 2015) that the petitioner "be awarded the position of Center Director, GS-0340-13, or a substantially equivalent position. The Commission has consistently held that a substantially equivalent position is one that is similar in duties, responsibilities, and location (reasonable commuting distance) to the position for which the complainant originally applied."

The agency subsequently offered the complainant placement in center director positions in Swan, Washington; Ozark, Arkansas; Golconda, Illinois; or Laona, Wisconsin. The agency argued that this action placed it in compliance and noted that several Federal circuit courts have found that displacing an innocent employee with one who would otherwise have had the position but for illegal discrimination is generally not an appropriate remedy.

The petitioner filed a petition for enforcement seeking placement into the center director position in Bristol, Tennessee. After consideration of this petition, the Commission concluded that the center director positions offered by the agency were not substantially equivalent because they "were not in geographic/commuting locations remotely close to the positions that Petitioner was discriminatorily denied…The Agency maintains that it is unable to offer Petitioner the Bristol, Tennessee position because it is no longer vacant and is currently occupied by an incumbent employee who apparently was selected over Petitioner. Although there may be some disagreement among the Federal circuits, case law from federal courts and the Commission recognizes the bumping of an incumbent employee as a possible remedy for discrimination. The Commission also has previously held that the bumping of an incumbent is a permissible remedy when, in the absence of bumping, the petitioner's relief would be unjustly inadequate."

The Commission found that the agency's actions were not sufficient to remedy the discrimination and the only remedy would be to bump the incumbent and place the complainant there. I'm sure showing up to take over someone else's job, who is no longer there through anything he or she did, can make for an awkward first day of work. Sumner@FELTG.com

When to Use the New Notice Leave Law
By William Wiley

Questions, we get wonderful questions. This one came after a recent webinar we presented in which we encouraged participants to get the employee out of the workplace once removal is proposed. First, our participant's question:

> The presenter, Mr. Wiley, made a sweeping statement yesterday that employees should be put on "notice" leave when issued a proposed removal. The statement was very emphatic and left the impression that this should be a routine practice. However, in researching the issue, the following is required to place employee on "notice" leave, essentially describing a situation where the employee is believed to pose a threat. Can you forward a question to him to better explain how the routine use of "notice" leave is warranted in view of the strict criteria described in Administrative Leave Act of 2016. P.L. 114-328?

And here's our always-helpful and enlightening (to us) FELTG response:

In response to the question about using Notice Leave, yes, in our opinion it should be a routine practice whenever an employee is put on notice that removal has been proposed. It is easy to reach the reasonable conclusion that an individual whose removal has been proposed is going to be under a lot of stress and be focused on his own well-being. Individuals in situations like that sometimes react in dangerous unexpected ways. News reports of workplace violence often state that the employee who was violent was previously seen as mild-mannered with no obvious psychological problems. According to the Bureau of Labor Statistics, about two people per workday are killed in our country by a co-worker.

Separately, it is reasonable to conclude that an individual who is confronted with the imminent loss of employment would consider ways to gain financially from his remaining days as a federal employee. Perhaps there is data in the agency's computer system that, if downloaded, would be of value to criminals. Maybe there are office supplies and equipment that could be the basis for the start of self-employment, or simply for sale on the web or at a garage sale. I've even seen individuals who have been told that their removal is proposed suddenly suffer a job injury, thereby entitling them to workers' compensation payments.

Finally, keep in mind that the proposing supervisor has said in the notice letter why the individual should no longer remain as a federal employee; e.g., there's a loss of trust or he has failed his performance improvement plan. Keeping someone like that in the worksite doing his job after the supervisor has concluded that the employee can't do his job makes no sense and might undermine some of the statements made in support of the removal penalty in the *Douglas* Factor analysis.

Once we grasp these disadvantages to allowing employees continued access to a federal workplace when their removal is proposed, it's a straightforward manner to conclude that one or more of the criteria for enforcing Notice Leave has been met. At a minimum, we can categorically conclude in a removal action that keeping the individual in the workplace after his removal is proposed "jeopardizes the legitimate government interests" of maintaining a safe workplace, one of the four statutory criteria.

Separately, I consider the following:

- The employee cannot directly challenge the placement on 30 days of Notice Leave. Why would I not do it?
- Even if somehow after the fact a decision was made that the employee should not have been placed on Notice Leave, no harm – no foul. That finding, were it to occur, would not cause the removal to be set aside as it is not a harmful error. In fact, I can think of no remedy.
- This isn't some bureaucratic check-the-box issue. This can be a life and death situation. If I place the employee on Notice Leave and remove him from the workplace, I may have prevented some pretty bad things from happening. If I do not place the employee on Notice Leave, although it does not happen often, he just might kill someone.

I have absolutely no problem selecting the option that possibly could save a life. The law is worded to allow me to exercise my judgment to do that, and that's what I would advise anyone in a proposed removal situation. To do otherwise would be short-sighted. And, deadly.

Hope this helps. Wiley@FELTG.com