Federal Employment Law Training Group
Training By Professionals For Professionals

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There was a lot of talk about the James Comey testimony last week being a "vindication" of certain claims that were made by certain people in The Administration (you know who you are). Here at FELTG, we were pleased about how some of the topics that came up vindicate some of the strategies we've been teaching for many years:

- Supervisors should keep contemporaneous notes when dealing with problem employees.
- *Hillen* Factors are a good way to tell who's lying and who's telling the truth (e.g., reputation).
- "Bias Confirmation" acts to keep people from changing their minds, even in the face of significant evidence contra.

We've always felt that what we teach is important. Seeing some of our principles in play out on live TV, with the Presidency arguably hanging in the balance, made us gosh-darned proud. So, join the crowd. Come to our seminars. Have us come to you with a custom onsite program. You just never know when you might be summoned to Capitol Hill and asked to explain what you know and when you learned it. If that happens, you're going to feel a lot better if you've been trained in management self-defense at one of our federal employment law programs. Lordy, we hope you come.

Take care,

Bill

COMING UP IN WASHINGTON, DC

Employee Relations Week
July 10-14

Maximizing Accountability in Performance Management
July 25

Handling Behavioral Health Issues and Instances of Violence in the Federal Workplace
July 26

Absence, Leave Abuse & Medical issues Week
September 25-29

JOIN FELTG IN SAN FRANCISCO

FLRA Law Week
July 17-21

WEBINARS ON THE DOCKET

Telework and Leave as Reasonable Accommodation
June 22

EEO Counselor and Investigator Refresher Training
Sessions begin June 28

Selecting a Defensible Penalty: Getting it Right the First Time
July 6

Good News, Y'all: Sometimes Telework is NOT a Reasonable Accommodation
By Deborah Hopkins

Out of all the training classes we present here at FELTG, maybe the biggest area where we get questions, comments, complaints, and yes even tears of frustration, is the discussion of telework as a reasonable accommodation for disability. Telework is often an effective accommodation to allow someone to perform the essential functions of her job; it's just fabulous when it works. Sometimes, though, telework is not a good option, yet agencies are afraid to say "no" to someone who brings in a doctor's note that says "Employee X needs to telework because of a medical condition" because they fear getting in trouble if they deny the request or ask for more information.

Does this sound familiar? If so, then it's time to rejoice, because I have a few points to share that will help you legally deny telework as accommodation:

1. When the employee does not have a medically-documented disability. If an employee claims to have a disability and requests telework as accommodation, that employee must provide medical documentation that says they have a physical or mental impairment that affects their ability to perform an essential function of the job. The employee must also explain to the agency how the accommodation (in this case, telework) would allow him to perform that essential function from home. If the person does not provide medical documentation, then you do NOT have to grant him telework because he is NOT qualified. In other words, if he refuses to provide specific medical documentation (diagnosis, prognosis, functional limitations), then he waives his entitlement to the reasonable accommodation process. *See Complainant v. DLA,* EEOC Appeal No. 0120114081 (2013) (employee's medical documentation was vague and did not describe the limitations on her essential functions, so the agency was not obligated to accommodate her request). No documentation, no disability. No disability, no accommodation.

2. When telework is not an effective accommodation. Some jobs can't be done from home because the essential functions require the person to be onsite. In those cases, telework is not an effective accommodation and should not be granted. *See Humphries v. Navy,* EEOC Appeal No. 0120113552 (2013) (telework was not an effective accommodation because face-to-face interaction with clients was an essential function of the employee's job); *Gemmill v. FAA*, EEOC Appeal No. 0120072201 (2009) (telework was not an effective accommodation because the employee needed to access computer systems and confidential documents that were kept securely at the agency facility). If an essential function of the job requires the employee to be at work to do something, and the employee can't be at work to do the thing, and no accommodation at work will allow the employee to do the thing, the employee is not a qualified individual.

3. When an employee has a performance problem. Some employees just can't be successful while teleworking. If an employee is having performance problems in the workplace with direct supervision, you can easily see how granting telework, where the employee does not have direct supervision, might make that performance issue even worse. *See Yeargins v. HUD*, EEOC Petition No. 0320100021 (2010) (agency properly denied telework as accommodation because the employee, an EEO specialist, lacked sufficient knowledge of civil rights laws to work independently). EEOC has also upheld agency denials of telework as accommodation because of past performance

issues that occurred while the employee was teleworking. *See Robinson v. DOE,* 586 F.3d 683 (9th Cir. 2009) (agency properly denied telework as accommodation after the employee demonstrated an inability to satisfactorily perform her job while teleworking; in 477 hours of telework the employee only completed a half-page document work product).

4. When another accommodation is effective. More good news: the agency, and not the employee, gets to choose the accommodation, as long as it is effective. *See, e.g., Don S. v. BOP,* EEOC Appeal No. 0120141175 (2016). Sure, a lot of employees request telework as accommodation, but if the employee can perform the essential functions of the job with an accommodation in the workplace, the agency has fulfilled its obligation and is not required to grant telework. *See Complainant v. Army*, EEOC Appeal No. 0120122847 (2014) (though the employee requested telework, the agency effectively accommodated her disabilities at work by providing her with a wheelchair, a special parking spot, and a change in minor job duties she could perform within her medical restrictions); *Dennis v. Department of Education*, EEOC Appeal No. 0120090193 (2010) (an enclosed work area was reasonable accommodation for an employee with perfume allergies); *Gilbertz v. CDC,* EEOC Appeal No. 0120110026 (2012) (providing the employee with a quieter work area was an effective accommodation for the employee's hearing problem).

Now that you know there are times you can deny telework as accommodation, we warn you not to go too overboard with your Telework Denied stamp. There are few things to keep in mind:

1. Telework does not have to be all or nothing. In many cases, telework is an effective accommodation some of the time. If an employee has a job that requires some contact with customers onsite, but other essential functions can be done at home, granting a few hours of telework per week is a reasonable accommodation. See *Petzer v. Department of Defense*, EEOC Appeal No. 01A50812 (2006) (sixteen hours of telework per week was an appropriate accommodation because the employee needed the remainder of the workweek to access databases that were only available at the agency); *Skarica v. DHS*, EEOC Appeal No. 0120073399 (2010) (telework for two hours per day was an effective accommodation because it permitted the employee to use his own private restroom to self-administer a catheter for his medical condition).

2. Telework as reasonable accommodation falls outside general agency telework policies. Telework as reasonable accommodation, in essence, trumps your agency's general telework policy. For example, if your telework policy says employees are only eligible for telework after they complete a probationary period, but you have a probationary employee who requests telework as disability accommodation, you can't just say no because he's a probationer and the policy prohibits him from telework; you have to consider whether telework is an effective accommodation. If there is no other accommodation available, and telework will allow him to perform the essential functions of his job, then you must grant him telework as an accommodation. EEOC Fact Sheet: *Work at Home/Telework as a Reasonable Accommodation*. *See also Dahlman v. CPSC*, EEOC Appeal No. 0120073190 (2010) (agency permitted an exception to its telework policy and allowed a new employee to telework one day per week if, after 30 days, she demonstrated her ability to work independently).

3. The agency's obligation is to accommodate the qualified employee and nobody else. Only qualified individuals with disabilities are entitled to reasonable accommodation. An agency does not have an

obligation to accommodate a non-disabled employee who requests telework so she can better take care of a family member who has a disability. *See Key-Scott v. USUS*, EEOC Appeal No. 0120100193 (2012) (Agency did not violate the law when it denied an employee's request for telework so she could take better care of her disabled son).

Note: please keep in mind that if no other accommodation except telework is effective, a conservative approach that will check the "good faith" box might be to grant the employee a 30-day Telework Trial to see if the employee is capable of successful performance while working from home. With the recent decisions coming out of the EEOC, you just might want to show that you did this before you use that Telework Denied stamp.

There's lots more on this topic (including what your obligations are in accommodating a disabled employee's commute) next week during the 90-minute webinar *Telework and Leave as Reasonable Accommodation*, so if you're interested please sign up. Hopkins@FELTG.com

Field Report from the EEOC's Baltimore Field Office's "Meet the Administrative Judges" Program
By Deryn Sumner

Last month, the EEOC's Baltimore Field Office held an event that provides an opportunity to agency reps, complainant's advocates, and others to informally meet the administrative judges and ask questions. I'll begin this article with two caveats. One, although I have attended the event in the past, I did not attend this year. So my report comes from those in my office who did attend. And two, although these reflect the viewpoints of the administrative judges in the Baltimore Field Office, I think they are good pointers for anyone appearing before the EEOC. However, regardless of what any other administrative judge tells you, always review and follow any requirements set forth by your assigned administrative judge in the Case Management Order and any other orders.

With those qualifying statements out of the way, here are the highlights of what the Administrative Judges discussed during the event in Baltimore.

- When responding to discovery requests, make sure you are not just providing boilerplate response, as that's not really a response, and the administrative judge may conclude that your side has waived its right to fully respond.
- Before filing a motion to compel discovery, make sure you have had substantive meet and confer communications. Some judges in Baltimore require you to have discussed the deficiencies by telephone before filing a motion. And some judges (including several in the Washington Field Office) require that you convene a telephone conference with both the other side and the administrative judge before filing a motion to compel.
- If you do end up filing a motion to compel, parties should list the interrogatory in question, provide the other side's response, and explain why the response is deficient and why the information being requested is material to your case. Although you should attach the relevant documents, make sure you have argued your points in the motion.
- When filing a dispositive motion, include an enumerated statement of facts and

include all facts that you are referencing in your argument and analysis in this statement of facts. The analysis section will be much shorter if you have already stated the facts.

- If you haven't received a ruling on a dispositive motion and there's a hearing date approaching, make a request for an oral argument on the pending motion or request a status conference.
- Remember that under the revised MD-110, agencies must ask administrative judges for permission to obtain medical documents from *pro se* complainants.

I don't know if other EEOC field or district offices hold such events. If they don't, they should, as it is an excellent opportunity for a dialogue about what is important to everyone involved in the federal sector EEO process. Sumner@FELTG.com

JOIN FELTG IN NORFOLK
Advanced Employee Relations
September 12-14

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

Well, We Never Saw This One Before
By William Wiley

Here at FELTG, we've seen a lot of things. In fact, sometimes we smile when someone comes up to us at a seminar and says, "I have a very unusual situation." Ha, ha, ha, we chuckle silently. It might be unusual to you, Buddy, but we've seen it all before. As Farmers Insurance says in their TV ad, "We know a thing or two because we've seen a thing or two." Yeah, us too.

So the incoming question below took us back a bit. We're comfortable with the answer, but we have to admit, we've not run into this situation before. And there's certainly no case law to rely upon. From a long-time reader:

> Dear FELTG-ites,
>
> I am a LER Specialist at a federal agency. While assisting a manager in addressing the poor performance of an employee, we discovered that the employee's work was being completed by a full-time union official. When confronted, the employee admitted the union rep had done the work for him. After confronting the union official about the misuse of official time, he declared that official time was necessary to assist one of the unit's members. How should I approach taking action against the union official?

Our FELTG response:

Dear Loyal Reader-

The answer as far as we're concerned is strictly political.

- We discipline to correct behavior. In other words, we don't do it to punish. Therefore, if you can stop the union official from doing this again, you have done America a service.
- The harm to the agency as to a loss of time is not significant. One way or the other, the union official was not going to be doing his regular government job. In fact, one could argue that he actually did the agency a service because instead of doing union business, he was doing productive agency work. Maybe he should get a Special Act award.

  - That last sentence is a joke, by the way :).
- We'd say you have three options:

1. If you want to keep your union/management relationship low key, you write the official a big fancy letter from the head of labor relations that tells him that doing what he did is harmful to the agency and that you will not tolerate it in the future. If he wants to do government work, he can cut back from full time union representation and return to his regular position.
2. If you want to fire things up a bit, or don't really care about the tenor of your relationship with the union, you can discipline the union official with a Reprimand. He will then file a ULP or a grievance, and you'll be off to the races. Make sure you AWOL him for any time he spent doing this guy's work so that he loses pay.
3. Or, you can ignore the union official. Focus on the employee who misled his supervisor by having someone else do his work. That, combined with unacceptable performance just might warrant a removal. If I thought about it longer, I might even conclude that if all this occurred during a PIP, you could discount the work done by the union official, fail the employee during the PIP, and have yourself a nice easy 432 removal. Take this route and I guarantee that the union official won't try this again.

I have been doing federal employment law for 40 years. This is the first time I have run into this one. Thanks for making my day.

By the way, folks. If you've seen that Farmers Insurance ad mentioned above, you know that the stories are told as the old guy walks the young guy around the Farmers "Hall of Claims" museum that is dedicated to all the surprising accidental mishaps that Farmers has insured over the years. That got me thinking; wouldn't it be cool if we had a museum like that for all the crazy things that federal employees have done that got themselves fired? I can just see the tourists lining up on The Mall now. Wiley@FELTG.com

COMING UP IN WASHINGTON, DC

Employee Relations Week
July 10-14

As an Employee Relations Specialist, you never know what personnel issues might land on your desk in any given day.

Let FELTG's *Employee Relations Week* help prepare you for all those challenges, including:

- Principles of federal employee relations
- Leave administration
- Performance Issues and EEO topics
- Discipline issues
- Medical issues
- Separations, retirements, and more

Registration is open now. We hope to see you there!

Psychiatric Examinations - One More Time
By Barbara Haga

Last month I wrote about "unnecessary barriers" that are included in agency performance plans and union contracts, that inhibit the ability of an agency to take action on performance problems. This month we're going to take a look at the OPM regulations on medical examinations. Talk about some "unnecessary barriers." So, President Trump, if you want

some more things to put on the list of what is getting in the way of doing what needs to be done, here's one for you.

Quick Review – Physical Examinations

OPM's medical examination regulations set conditions for when physical and psychiatric examinations may be ordered and offered. If you've been a FELTG reader for a while, you have heard one or more of us discussing how the OPM regulations are more restrictive than what the EEOC would say about a medical inquiry being job-related and consistent with business necessity. To sum up the regulations quickly, these are the conditions where a physical examination can be ordered (5 CFR 330.301(b)-(d)):

1) The applicant or employee has applied for or occupies a position that has medical standards and/or physical requirements, or is covered by a medical evaluation program.
2) An employee who is receiving COP or compensation from OWCP may be required to report for an examination to determine medical limitations that may affect job placement decisions.
3) An employee is being released from her competitive level in a RIF. She may be required to undergo a relevant medical evaluation if the position to which she has assignment rights has medical standards and/or physical requirements that are different from those required in her current position.

That's it. Number 2 is not going to come up that often and Number 3 is exceedingly rare, so the authority to order physical examinations really boils down only to Number 1. That means that for all of the white-collar jobs that don't have medical standards for their work (like Criminal Investigators, Firefighters, and Air Traffic Controllers do) or physical requirements set in their jobs (like an HR specialist who has to be able to drive a government vehicle to travel to remote sites that he is responsible for servicing), there is no way to require the employee to report for medical examination.

This lack of authority ties management's hands no matter what kind of problems the employee is having on the job – whether it is an IT Specialist who can't be regular in his attendance or a technician reporting to duty after a recent diagnosis of MRSA.

Quick Review – Psychiatric Examinations

The regulations on psychiatric examinations (5 CFR 339.301(e)) are even more restrictive. These may only be ordered if the job says you have to be sane to do it, and there aren't many. Okay, I embellished a little. The regulation says that a psychiatric examination or psychological assessment is part of the medical standards for a position having medical standards or required under a medical evaluation program. What kinds of jobs would these include? Criminal investigators, police officers, and other similar positions.

The only other time that a psychiatric examination can be ordered is when the agency had authority to order a physical exam, and that physical exam doesn't give an explanation for behavior or actions that may affect the safe and efficient performance of the applicant or employee, the safety of others, and/or the vulnerability of business operation and information systems to potential threats. So, we would be limited to jobs that fall under Number 1 in the prior section for this authority to apply.

A Glimmer of Hope

Imagine my excitement in December when OPM put out proposed 339 regulations. I was hoping that all of the pages of print pointing out that the regulations were too restrictive and prevent agencies from dealing with real workplace situations in an effective way were finally going to bear fruit. It didn't take long to

realize that this was not to be. The final regulations were effective on March 21, 2017. They were caught up in the review of regulations by the incoming administration. Unfortunately, these weren't stopped. So, the conditions described above for ordering exams are virtually the same as they were before the revision.

What's the Big Deal?

If you have ever had the unfortunate experience of working on a case where the employee continues to report to work when he is clearly not able to perform, you will appreciate why these restrictive regulations are a problem. When all of the suggesting and brilliant written notices you can come up with have not convinced the employee that something has to be done to resolve the situation, what are you supposed to do?

The Pension Benefit Guaranty Corporation had just such a problem. The case is *Doe v. Pension Benefit Guaranty Corporation,* 117 MSPR 579 (2012). Their GS-13 Administrative Officer was exhibiting "unusual and inappropriate behavior." Through emails and in-person interactions with agency employees, she accused them of breaking into her home, providing information to a transit officer about her location on a train, orchestrating things to happen to her at work and outside of work, listening to her work conversations, communicating with each other at work via earpieces, observing her at work via hidden cameras, and having a hidden agenda toward her.

An Administrative Officer job wouldn't normally have physical requirements that would have allowed the agency to order a physical exam to rule out physical causes of her behavior. The agency asked a Federal Occupational Health medical professional review the statements. The medical professional determined that the employee exhibited paranoid behavior, could be a danger to herself or others, and should undergo a fitness for duty exam.

PBGC had authority under their union contract to do the examination, and so they sent the employee to be seen by a mental health professional. The answer that came back was that she was experiencing a psychotic delusional disorder and was not fit.

The consequences of ordering that examination must seem never-ending to the PBGC staff. There was another Board ruling in 2016 and an EEOC decision in February of this year on this case. Check back next month for the next chapter. Haga@FELTG.com

DON'T MISS THIS WEBINAR

Telework and Leave as Reasonable Accommodation
June 22

Despite what recent EEOC decisions might have you thinking, there are times you can deny telework as accommodation for a disability. There are also times you'll need to grant telework because it's the only effective accommodation. What do you do when an employee with a disability Is gone from work - lot?

How do you know what to do, when it comes to reasonable accommodation?

Join FELTG for a 90-minute webinar devoted entirely to the challenges and solutions when handling two of the most common (yet often frustrating) types of reasonable accommodation requests: Telework and Leave.

Check out our website for all the details, and register before space runs out!

Establishing a Successful Good Faith Defense to Compensatory Damages in Failure to Accommodate a Disability Cases
By Deryn Sumner

Section 102 of the Civil Rights Act of 1991 allows for the agency to escape liability for compensatory damages where the agency failed to accommodate an employee's disability, if the agency can demonstrate it made a good faith effort to accommodate the complainant. Such determinations are factually-based, but can be an effective tool in settlement negotiations if the agency can demonstrate that it attempted to accommodate the employee, even if those efforts were ultimately not successful.

However, many times the Commission will hold that an agency can't make such a showing. For example, failing to engage in the interactive process and sending an employee for an unlawful fitness-for-duty examination means you can't raise a good faith defense, *see Arnold C. v. USPS*, EEOC Appeal No. 0120093856 (November 3, 2015), removing the complainant from employment instead of accommodating her kills a good faith defense, *see Geraldine B. v. Veterans Affairs*, EEOC Appeal No. 0120090181 (October 13, 2015), and not responding to a complainant's emails requesting an accommodation certainly prevents an agency from arguing that it acted in good faith, *see Complainant v. Homeland Security*, EEOC Appeal No. 0120132360 (July 9, 2015).

Let's explore a recent decision from EEOC's Office of Federal Operations addressing this defense.

In *Joi J. v. Veterans Affairs*, EEOC Appeal No. 0120150921 (March 3, 2017), the Commission found that the agency failed to provide an accommodation to complainant by not allowing her to be exempt from on-call duties in her position as a Certified Registered Nurse Anesthetist. The Commission found it persuasive that the agency could not establish how allowing this accommodation would have caused an undue hardship, noting that the complainant had been exempt for more than two years. The Commission also found that the agency failed to accommodate the complainant when it did not consider reassignment after concluding that she could not be exempt from her on-call duties. The agency argued that a search was not necessary because "Complainant produced no evidence that such a search would be fruitful." The Commission was not convinced, and noted, "because the Agency had access to information about vacant jobs and jobs that were likely to become vacant, the Agency had an obligation to conduct a job search, and it is uncontroverted that it did not do so. Further, more than two months elapsed between the March 20, 2013, submission of Complainant's reasonable accommodation request and supporting medical documentation and the Agency's June 7, 2013 denial, and there is no explanation for the delay by the Agency. Accordingly, we do not find that the Agency made prompt 'good faith' efforts to reasonably accommodate Complainant. Therefore, the Agency is not insulated from providing Complainant with an appropriate award for compensatory damages based on our finding that it violated the Rehabilitation Act."

This isn't to say that the defense can't be asserted, but the agency must be able to show that it really did attempt, in good faith, to accommodate an employee in order to escape liability for compensatory damages. Sumner@FELTG.com

The Fate of Political Appointees
By William Wiley

Oh, so many questions do we get. And this one is asking to peer into the secret world of political appointment.

Dear FELTG Know-it-Alls:

I have a question about something you posted in your 5/24/17 post entitled, "Big News in Whistleblower Land."

Your post stated that Principal Deputy Special Counsel Mark Cohen is set to become Acting Special Counsel after June 14--the end of Special Counsel Lerner's holdover period. However, how are political appointees like Mr. Cohen permitted to stay beyond the tenure of the politically-appointed agency head?

My recollection is that all of the political appointees under the last two Special Counsels left when the agency head left. That office did not have any political appointees again until Ms Lerner joined OSC in 2011. I don't understand why it would not be the same with Ms Lerner. Thank you for any clarification you can provide.

Best regards, A Confused Reader

And our always-insightful FELTG response:

Dear Confused Reader-

There's nothing automatic about the end of a political appointee's status as an employee. When a new agency head replaces the outgoing political appointee, the fates of the remaining political appointees are in the hands of the new appointee.

For example, I was a political appointee under the Chairman at MSPB. When his term expired, the Vice Chairman automatically became the Acting Chairman. She asked me to stay around as an adviser to her, which I did. I've known of political appointees who have held over like that under six different agency heads, serving as a political appointee under five Presidents for nearly 30 years.

At OSC, there is no individual identified to automatically replace the Special Counsel once her term is up. Therefore, it is up to White House personnel to decide who will be the acting agency head. They could have picked an old senior career guy who then would have decided what to do with the holdover political appointees. Instead, the White House chose to appoint a holdover political appointee, Mark Cohen. If Henry Kerner is confirmed as the new Special Counsel, he will then decide what to do with the Obama holdover politicals.

Many subordinate political appointees realize that their time is short when an agency head departs. Smart ones start looking for replacement employment long before that happens, as there's no way to tell what will happen when the new agency head arrives. That's why you often see the whole team of political appointees leave an agency when the agency head leaves. They are reasoning that it is better to control one's own fate than to leave it up to vagaries of the political processes.

Want to be a political appointee at OSC? Now's your chance. Make friends with Henry Kerner and you could well be the new deputy (if your politics are right).

Best of luck. Wiley@FELTG.com

Backlog Cases Sitting at MSPB due to Lack of another Member as of Today
609

When is Front Pay an Appropriate Remedy?
By Deryn Sumner

Although not addressed very often in decisions awarding remedies, front pay is an available remedy in federal sector EEO complaints. As Management Directive 110, Chapter 11 tells us, it is only appropriate in very limited circumstances: (1) when there's no position available to which an employee can be reinstated; (2) where a subsequent working relationship would be antagonistic; or (3) where the employer has a long-term resistance to anti-discrimination efforts. In order to receive a front pay award, the complainant must be able to perform work, but cannot do so because of circumstances external to the complainant.

For example, in a case that did not address the award of front pay, but rather a procedural issue, the Commission noted an administrative judge's finding in *Mason H. v. Veterans Affairs*, EEOC Appeal No. 0120170667 (April 13, 2017), that the agency had poisoned the employment relationship with the complainant so much "that a reasonable physician in his situation would seriously consider suicide." The decision does not go into such detail about the underlying allegations, but it appears the agency accused the complainant of using illegal drugs when he had not, and accused him of patient endangerment, both serious accusations for anyone, but particularly a physician. **[Editor's Note: In my humble opinion, a federal agency should not be holding that "reasonable" people in this situation, physician or otherwise, "would seriously consider suicide." I was a psychologist before I was an employment lawyer. The definition of "reasonable" does not include serious suicide consideration.]**

Being able to return to the workplace is a key part of being eligible for an award of front pay, as the complainant in *Nicole T. v. Department of Defense*, EEOC Appeal No. 0120143019 (January 11, 2017) learned. Although the administrative judge found that the agency failed to accommodate the complainant and sent her home from work, undisputed medical evidence established that within three weeks of being sent home from work, the complainant was unable to work and had not presented evidence that she could return to the workplace. The complainant had subsequently filed for disability retirement. As the complainant could not demonstrate an ability to work, besides compensatory damages, the Commission only awarded her the back pay for those three weeks and no front pay.

If you are dealing with a claim for front pay in one of your cases, you must read the Commission's 2011 decision in *Knott v. USPS,* EEOC Appeal No. 0720100049 (July 5, 2011). There, the Commission addressed an administrative judge's award of front pay "from the issuance of his decision to the time Complainant either finds comparable work or reaches full retirement age." The decision includes substantial discussion of the record that led to this award and is required reading for anyone facing this issue. Sumner@FELTG.com

What the Devil are Essential Functions?
By William Wiley

I wish I was as smart as Ernie Hadley and Deb Hopkins. Ernie and Deb teach the fabulous FELTG *EEOC Law Week* seminar at least twice a year. A big part of that program is an explanation of an agency's obligation to accommodate an employee's disabilities. To understand that responsibility, an agency practitioner must be able to identify the "essential functions" of the position occupied by the disabled employee.

So exactly what is an "essential function"? As Ernie and Deb explain it, summarizing from 29 CFR 1630.2(n)(2), here are factors to consider in determining if a job function is an *essential* job function (rather than just a non-essential function):

- The reason the job exists is to perform that function
- There are a limited number of employees available to perform the function
- The function is highly specialized such that incumbent is hired based on expertise or ability to perform that function

To determine which functions are essential and which are not, Ernie and Deb summarize from 29 CFR 1630.2(n)(3) to identify relevant factors:

- Employer's judgment on functions that are essential
- Written position description
- Essential function must be one that the employer requires employees to perform
- Time spent on function
- Size of the employer's available workforce
- Employment history of other employees previously or currently in the position at issue
- Consequences if not performed, and
- Terms of collective bargaining agreement

Once we identify a job's essential functions, we then have the employee take those functions to her physician for assessment. The physician's assessment involves the answering of three questions relative to each impacted essential function:

1. What is the expected duration of a medical limitation that would prevent the employee from performing the function?
    - This information helps the agency determine whether the medical problem actually meets the legal definition of "disability" and if so, what accommodation might be reasonable.
2. Is there an accommodation that the agency can provide that might help the employee perform the function?
    - If the physician says "no," and the agency cannot identify an accommodation after discussing the matter with the employee, then the next step is to try to find the employee a vacant position in which he can perform acceptably with the disability.
3. If the physician recommends an accommodation, what is it and how will it allow the employee to perform the function?
    - The physician's recommendation is a good starting point, but of course, as Deb points out in the first article in this edition of our newsletter, the agency retains the right to determine which accommodation it will provide if more than one is reasonable.

And here's where I hit a disconnect between what EEOC's regulations say we are to do and the reality of getting an analysis from a health care provider. It seems that EEOC wants us to identify a job duty as an essential function, one that might be found in a position description; e.g., "cases mail" from the position description of a mail carrier. But if we ask the physician to tell us if the employee can "case mail," how does the physician know what the physical and mental requirements are to do that work? Does it involve moving things around? If so, what size and weight might those things be?

I was working with a client several weeks ago, a client trying to figure out how to accommodate a disabled employee. The client dutifully read the employee's PD, considered the factors listed at 29 CRR 1630.2(n)(3), and determined that an essential function of the position was "timekeeping audit." As I was drafting the memo requesting that the employee obtain his physician's analysis of the function in consideration of the employee's

disability, I was struck by how little information we were providing to the health care provider, information on which we are asking the provider to base a medical determination critical to the employee's continued employment prospects. I guess the provider could ask the employee what the physical and mental requirements are to "audit timekeeping," but do I really want the employee providing that information to the physician? Shouldn't it be management who decides what the mental and physical requirements are of a position?

So instead of just telling the physician that the employee needed to perform the essential function of "timekeeping audit," I came up with the following derivative functions:

1. Must be able to think objectively and analyze mathematical information.
2. Must be able to communicate orally and in writing.
3. Must be able to work in stressful situations sometimes involving confrontation with coworkers.

These functions seem to me to be different from what EEOC is asking for. They are not "the reason the job exists," but rather physical and mental tasks the employee must perform to accomplish the job. Still, they seem to me to be more realistic requirements to ask the health care provider to assess than simply saying "cases mail."

Fortunately, Ernie and Deb understand EEOC regulations better than do I. They do a terrific job of explaining this stuff to our seminar participants. As for me, thank goodness they can do it so that it is not an "essential function" of my position. If it were, I would need to be on the lookout for a vacant job into which I could be reassigned where I don't have to understand EEOC.

Now, wouldn't that be just lovely.
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