Federal Employment Law Training Group
Training By Professionals For Professionals

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I Dream of Douglas. Sad.

When I was a much younger man, if I was lucky I would dream of beautiful cheerleaders who found me to be interesting. In college, my dreams turned to forgetting to go to class, and then being confronted with a final exam for which I was unprepared. Last week, I dreamed of *Douglas* Factors, MSPB's famous penalty defense elements. No kidding. I dreamt I was trying to take a worksheet with only 10 factors and convert it into a worksheet that discussed all 12 factors just minutes before the proposed removal was to be issued. So, I say this to you youngsters out there: Do not stay in this business if you start dreaming about our work. If you have nightmares about going to hearing and then finding out that there are comparator employees that your deciding official knew about and ignored, you are too intense. If you get night sweats dreaming about the selecting official who admits to you that he's been a member of the Ku Klux Klan for 20 years and wonders if that will affect his credibility at the EEO hearing, you need to move on. If your evening stupor includes visions of an OSC investigator sitting on your chest like a legally-trained incubus, find better drugs and seek other employment. Our work in federal employment law is important, whatever role you play in it. However, it's probably best if you can keep it as work and not let it become a calling. Because if it becomes a calling, you may well end up like those of us who teach for FELTG; eating and breathing this stuff, forgoing comfort and sustenance for the perverse pleasure of travelling to you to teach federal employment law, dreaming of ways to more efficiently and fairly hold bad civil servants accountable for their misconduct and poor performance. Life is desperately short. Let us do the heavy lifting for you in civil service law, through training and consulting. You, instead, should have more pleasant dreams than do we. Bill

COMING UP IN WASHINGTON, DC

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 NORFOLK

Advanced Employee Relations
September 12-14

WEBINARS ON THE DOCKET

Understanding Schedule A and Targeted Disabilities: Hiring Federal Employees with Disabilities
July 20

When Employees Leak Information to the Press or Congress: The Latest on Whistleblowing in the Federal Government
August 10

Good Actions Gone Bad: Avoiding Involuntary Resignations and Retirements in your Agency
August 17

Is OFO Trying to Cut Through its Backlog with Shorter Decisions?
By Deryn Sumner

Our colleague and friend Ernie Hadley has preached for years that the EEOC's Office of Federal Operations could get more decisions out in a timely manner if it stopped issuing multipage decisions that ultimately concluded with: we agree with the Agency that there's no evidence of discrimination in this case. As someone who at least skims every one of the thousands of decisions issued by the Commission every year, I agree wholeheartedly with Ernie.

There are three main categories of Commission decisions: (1) cases where discrimination was actually found, and there's a useful discussion of the facts as applied to the law and an analysis that assists us in our mission to figure out what constitutes evidence of discrimination and what remedies are available when it occurs; (2) cases where the agency messed up in dismissing a formal complaint that shouldn't have been dismissed, and the Commission has to reinstate the case and remand it back to the agency for processing, and (3) cases where the EEOC is affirming a FAD or final action from the agency that no discrimination occurred. (And of course, let's not forget the hundreds of decisions every year denying requests for reconsideration filed by either side in an attempt to delay the inevitable.)

The vast majority of decisions issued by the EEOC fall into that third category. Why? Well, employment law is no different than any other area of civil litigation in that most cases settle, especially before getting to the appellate stage. And yes, some employees who aren't able to show that discrimination occurred file complaints. At least as a parting gift, these employees received a five to seven page decision recapping the procedural history and facts of their cases, the appropriate legal standard, and a brief analysis of why they couldn't prove their case. Beneficial, perhaps, for the employee to understand what the Commission's reasoning was, but a lot to slog through for the rest of us.

So imagine my surprise when I checked in on the latest OFO decisions to be published on Lexis, only to find a string of cases issued on June 16 (the latest date available as of my deadline to turn in my articles for the July edition of the FELTG newsletter) succinctly affirming final actions.
These decisions still identify the accepted issues, the procedural history, and the applicable legal standards. Each of these take about a paragraph each. But then, instead of a lengthy recitation of the facts or extensive discussion of why the administrative judge was correct in issuing summary judgment or in finding no discrimination after a hearing, the Commission simply states this:

> Upon careful review of the AJ's decision and the evidence of record, as well as the parties' arguments on appeal, we conclude that the AJ correctly determined that the preponderance of the evidence did not establish that Complainant was discriminated against by the Agency as alleged.

The decisions are about three or four pages shorter than we're used to seeing. I have no reason to think that the OFO attorneys who write these decisions are spending any less time considering the arguments on appeal and properly determining whether the case was appropriate for summary judgment. I do hope that these summary decisions allow the Commission to focus more resources on the cases where there is evidence of discrimination. I have the list of my cases for potential candidates, should anyone at the Commission be interested. Oh, and if you'd like to see examples of these shorter decisions, *see, e.g. Rosemarie G. v. FDIC*, Appeal No. 0120151691 (June 16, 2017); *Reginald B. v. Dept. of Commerce*, Appeal No. 0120170496 (June 16, 2017); *Monroe M. v. Dept. of Veterans Affairs*, Appeal No. 0120151174 (June 16, 2017).
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[Editor's Note: Hopefully, once MSPB gets operating again, the new members will conspire to do something like this with those overly-long non-precedential decisions some bright mind over there came up with several years ago. Maybe even adopt FLRA's style of putting all the citations to case law into footnotes where they don't distract from reading the rationale. There's just so much room to make our business better and America great again.]

The EEO Supervisor Who Never Heard of a Targeted Disability
By Deborah Hopkins

A few weeks ago, I was talking shop with a colleague, and he mentioned that he'd recently run into an agency EEO supervisor who had never heard the term *targeted disability*.

"C'mon," I said, "There's no way that's right."

"Right or wrong, it's the truth," replied my colleague.

"Okay," I said, "Maybe she is at least familiar with the term *predictable assessment*?"

"Nope," my colleague said, "Not that either."

"Ok, how about Schedule A?"

"Negative."

Holy moly. If an EEO supervisor doesn't know this stuff, then how many of our readers might not know it either? I think it's time for a "read and learn" session.

Targeted disabilities are the most severe types of disabilities, and they include:

- Blindness
- Deafness
- Partial and full paralysis
- Missing extremities
- Dwarfism
- Epilepsy
- Intellectual disabilities
- Psychiatric disabilities

Individuals with these disabilities typically have the greatest difficulty finding employment, so the federal government places a special emphasis on recruiting, hiring, promoting and retaining people with targeted disabilities.

The related term *predictable assessment* comes out of 29 CFR § 1630.2(j)(3): the "inherent nature" of certain impairments will "virtually always be found to be a substantial limitation." Thus, these conditions always rise to the level of disability under the ADA.

Section 501 of the Rehabilitation Act of 1973 charges federal agencies to promote the hiring and retention of individuals with disabilities in two ways:

1. To be a model employer of individuals with disabilities through use of meaningful affirmative hiring, placement, and advancement opportunities; and
2. To ensure employment non-discrimination and reasonable accommodation.

Schedule A hiring authority allows agencies to provide job opportunities to individuals with targeted disabilities by appointing qualified individuals to federal jobs non-competitively, thus eliminating the need to post a job opening or certify a certain number of candidates for an open position. Schedule A also allows for hiring readers, interpreters, and personal assistants for employees with severe disabilities as reasonable accommodations.

From a practical perspective, this means that if a candidate with a targeted disability appears to be qualified for a funded vacancy, and the supervisor wishes to hire this individual, the agency does not need to issue a job

announcement. But, Schedule A applications can be accepted after the job announcement closes, up until the position is actually offered to someone.

Earlier this year, the EEOC released a final rule, "Affirmative Action for Individuals with Disabilities in Federal Employment." Beginning in 2018, agencies will be required to incorporate affirmative action into hiring and advancement plans: 12 percent of employees should be people who have disabilities, and 2 percent of employees should have targeted disabilities. Agencies will be required to report their statistics to the EEOC, and will furnish copies of their hiring/promotion plans to EEOC for approval.

This is an important topic that some people seem to have missed. There's a lot more that goes into Schedule A hiring, and FELTG is holding a webinar on this topic July 20 (that's tomorrow!), so if you're interested there's still time to register. Hopkins@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.

OPM Doesn't Care if You are Killed
By William Wiley

Regular readers of our newsletter will remember the celebration we had when Congress created a new type of paid leave status back in December: Notice Leave. The problem we've been having for several years has been a conflict between two competing interests:

1. The interest of not paying employees to not work by putting them on administrative leave for months and years, and
2. The interest in getting potentially dangerous employees out of the work place where they might kill somebody once their removals are proposed.

Here at FELTG, for nearly 20 years, we have come down on the side of the protection of the government's workplace by using administrative leave during the 30-day notice period that precedes a removal for misconduct or performance. To us, reducing the opportunity for workplace violence is more important than a few days of administrative leave.

Unfortunately, we don't get to make the rules. The rule makers at OPM and on Capitol Hill have come down on the side of theoretically protecting the federal fisc by ordering that the use of administrative leave be restricted even if it endangers the lives of federal workers and the public. Yes, you're reading that correctly. OPM's regulations for many years have said that normally an employee whose removal has been proposed will remain in his regular job during the notice period.

If we need to explain to you why this is foolish, you must be new. Does anyone REALLY think that the employee is going to produce usable work once notified of his impending removal? Is it REALLY a good idea to allow an about-to-be-fired individual to have 30 days of access to sensitive government documents and personal citizen data? Does anyone REALLY believe that a civil servant who is about to be terminated is not under the biggest stress of his life (and we all know what stress does to making sane decisions)?

Congress's creation of Notice Leave, we wrote, was the best Christmas present any civil servant could have asked for. Finally, we had a method specifically designed to protect federal employees from getting killed by a stressed-out coworker who has a pending removal over his head. With no limitation on how long Notice Leave could be used, we could, for the first time in history, hand the employee a proposed termination, escort him out the front door and bar him from returning, and still

protect his right to receive a salary for the duration of the notice period without using administrative leave.

Well, leave it up to OPM to screw up a perfectly fine opportunity. Rather than taking the new law, concluding that when an employee's removal is proposed it categorically "jeopardizes the government's interest" (statutory standard) to keep him in the workplace for 30 days, and issuing a regulation to put that into effect, OPM has taken just the opposite approach. Last week it proposed a regulation that will make it nearly impossible for an agency to protect itself by putting a failed employee on Notice Leave.

Here's what OPM's policy should say, according to FELTG:

> **5 CFR 630.1505 Administration of Notice Leave**
>
> (a) Whenever an agency proposes the removal of an employee, normally it shall place the employee on Notice Leave. Retaining such an employee in a work status jeopardizes the government's interest in the safety and integrity of the federal workplace. The authority for imposing Notice Leave should be delegated to the lowest reasonable level within the agency.

Here's what OPM has proposed otherwise. We've restructured the requirements for clarity and emphasis on the ridiculous burden that OPM is creating:

> **5 CFR 630.1503 – 1506**
>
> Prior to placing an employee on notice leave the agency may not establish a categorical policy and must document the following for each incident of notice leave:
>
> (1) The reasons for initial authorization of the notice leave, including the alleged action(s) of the employee that required issuance of a notice of a proposed adverse action;
>
> (2) The basis for the determination that the employee's retention in a work status would:
>
> (i) Pose a threat to the employee or others;
>
> (ii) Result in the destruction of evidence relevant to an investigation;
>
> (iii) Result in loss of or damage to Government property; or
>
> (iv) Otherwise jeopardize legitimate Government interests.
>
> (3) An explanation of why any of the following options are not appropriate:
>
> (i) Keeping the employee in a duty status by assigning the employee to duties in which the employee no longer poses a threat,
>
> (ii) Allowing the employee to voluntarily take leave (paid or unpaid) or paid time off, as appropriate under the rules governing each category of leave or paid time off;
>
> (iii) Carrying the employee in absent without leave status, if the employee is absent from duty without approval; and
>
> (iv) For an employee subject to a notice period, curtailing the notice period if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, consistent with 5 CFR 752.404(d)(1).
>
> (4) When making the decisions above, the agency must document its consideration of:
>
> (i) The nature and severity of the employee's exhibited or alleged behavior;
>
> (ii) The nature of the agency's or employee's work and the ability of the agency to accomplish its mission; and
>
> (iii) Other impacts of the employee's continued presence in the workplace detrimental to legitimate Government interests.

(5) When deciding whether an employee's presence is detrimental to government interests, the agency must document consideration of whether the employee will pose an unacceptable risk to:

(i) The life, safety, or health of employees, contractors, vendors or visitors to a Federal facility;
(ii) The Government's physical assets or information systems;
(iii) Personal property;
(iv) Records, including classified, privileged, proprietary, financial or medical records; or
(v) The privacy of the individuals whose data the Government holds in its
systems.

(6) And if documenting the rationale for each particular grant of Notice Leave isn't enough, the agency also has to document:

(i) The length of the period of notice leave;
(ii) The amount of salary paid to the employee during the period of leave;
(iii) The reasons for authorizing the leave:
(iv) Whether the employee was required to telework under during the period of the investigation, including the reasons for requiring or not requiring the employee to telework; and
(v) The action taken by the agency at the end of the period of leave.

In its preamble to these proposed regulatory changes, OPM opines the reason it is requiring that all other conceivable options short of Notice Leave be exhausted and documented rather than simply implementing Notice Leave commensurate with the proposed removal: during the notice period by avoiding Notice Leave if possible, the agency can "continue to benefit from the employee's skillset and abilities to further the agency's mission." Well, that's just stupid. Think who these people are who have had their removals proposed. They are almost always civil servants who have:

1. Already engaged in misconduct so bad that their supervisors have decided, after doing a *Douglas* factor analysis, that these bad hombres should be fired,
2. Performed so poorly as to be determined to be unacceptable, given a month or better to improve their performance, and still continue to be unacceptable performers, or
3. Have such bad medical infirmities that they cannot perform their job.

And OPM wants us to keep these people in the workplace "to continue to benefit from their skillset." We think that somebody at OPM needs a better skillset if they're going to be drafting regulations in this area.

Here's another part of the preamble we just love. OPM says that prior to implementing a period of Notice Leave, the supervisor should consult with their human resources office or general counsel. Well, why? I have held each of those positions in my career. Here at FELTG, we have trained thousands of human resources specialists and agency attorneys over the years. And you know what? We have never, ever met anyone in one of these positions who has been trained in how to predict future violent behavior. I was a psychologist before I became an employment lawyer. Any trained mental health worker who claims that he can predict with certainty whether an individual will engage in future violent behavior is engaging in malpractice.

We know better. We read report after report of workplace killings and see that in many (if not most) of them, the perpetrator had no history of violence or mental disorder, and often was well liked by coworkers. Those of you who have lived around the Beltway might remember the workplace killing that happened several years ago at the Lululemon store in Bethesda. There were two young women involved. When Worker A told Worker B that Worker B's theft of clothing had to be reported to management, Worker B began stabbing Worker A. While conducting the autopsy, the coroner reported over 300 stab wounds in Worker A's body. Without exception, Worker B was described by friends and coworkers as mild-mannered, polite and cheerful, with no history with the police or of violence.

OPM's draft regulations, by referring the matter to untrained attorneys and human resources practitioners for advice, is taking the decision away

from the person in the best position to make the decision: the immediate supervisor. That supervisor also happens to be in a position where she is most likely to be the victim of any workplace violence that results from a proposed removal. Years ago, I had a supervisor-client in an agency who called me in tears. I had advised her to put the employee on administrative leave once she issued the proposed removal. Unfortunately, when she tried to put that in the draft proposal letter, the human resources specialist advising her told her that he "would not let her do that," that he "could tell who was going to be violent," and then went back to the HR office where he was safe behind two locked doors.

I have never felt closer to whacking an HR specialist in my life.

We cannot imagine what public good is served by OPM's placement of these significant limitations on an agency's authority to impose Notice Leave. It cannot be the saving of tax dollars. The employee gets paid whether at work or on Notice Leave. So that isn't it.

Maybe it's the perceived value of having the employee's work product during the notice period; work product from someone who is either a) medically unfit, b) a proven non-performer, or c) a rule-breaker. With that, let's play a little mind game:

- First, based on your experience in the civil service, place some dollar value on the work product you estimate you're going to get from someone who falls into one of these three categories, after you've told him that he probably will be fired within 30 days. Put that number here and call it Value A: $_____.

- Next, place some dollar value on your life. And the lives of the other employees in the immediate vicinity of your office. And the members of the public wandering around your facility. And the super-secret information maintained by your agency in your data files. And avoiding the disruption to government operations that might be caused by workplace violence. Place that number here: $_____. Now, multiple this last number by a percentage that represents the likelihood, in your opinion, of violence erupting from an employee who gets a proposed removal (e.g., 1%, 5%, 50% … whatever). Put that number here and call it Value B: _____.

If your Value B is larger than your Value A, you will agree with FELTG's proposed optional regulation that would allow immediate supervisors to impose notice leave with the least constraints possible under the law.

If your Value A is larger than your Value B, you have an exceedingly unique view of life, and you should apply to work at OPM, if you do not already.

OPM! For god's sake, this is life and death stuff we're talking about here!

Did you not hear about the coworker murders in the rampage at the Washington Navy Yard not long ago? Are you ignorant about the history of people like Nidal Hasan, the psychiatrist who shot 43 coworkers in a government workplace in 2009? Are you unaware that the Bureau of Labor Statistics says that every week day in America, two people kill a coworker?

These proposed regulations were drafted by someone who either:

A. Has never spent any time in a federal workplace, or
B. Doesn't care that they are putting lives in danger for the sole benefit of … I have no freaking idea.

Here's a reality check. In our FELTG seminars, this topic often comes up when we are working with a group of supervisors. We have never met a supervisor who thought it was a good idea to hand an employee a proposed removal, then keep the employee in the workplace for another 30 days. Certainly, that would not happen in a private sector company. OPM, if you care at all about the lives of federal employees and do not agree with what we've written here, check it out for yourself. Pull together a group of front-line supervisors from agencies throughout government. Ask them two simple questions: "How many of you think it is a good idea to keep an employee at work once his removal is proposed?" Then, "How many of you think that an employee should be removed from the workplace once she receives a proposed removal?"

We guarantee you the answers you get will support what we're saying here.

Here's another reality check. Congress passes laws that control the civil service. Yet, very few members of Congress have ever worked as civil servants or really know much what it's like to try to run a federal agency at the front lines. We can't expect them to appreciate all the nuances of what we are trying to do and what life is really like out here in the trenches.

But we should expect that from OPM. As I understand government, that is the agency that is supposed to take laws passed by Congress and build regulations based on them that actually work, consistent with the flexibilities within the law. OPM has not done that here, and instead is in the process of creating a dangerous workplace that could never have been the intent of Congress when it created Notice Leave. We cannot move toward the goal of increasing the accountability of the civil service if OPM issues regulations that make supervisors fear for their lives when they try to fire a bad employee. That is EXACTLY what these proposed regulations will do.

Your comments are due to OPM by August 14, https://www.gpo.gov/fdsys/pkg/FR-2017-07-13/pdf/2017-14712.pdf. Union folk, form the picket lines at 1900 E Street, NW; FELTG will march with you.

It's your life. Decide how much effort you want to put into defending it. Wiley@FELTG.com

Important Development from OFO Regarding Calculation of Compensatory Damages Awards

By Deryn Sumner

The Civil Rights Act of 1991 amended Title VII to, in relevant part here, allow successful complainants to recover compensatory damages for the emotional and physical impacts of workplace discrimination. The Act placed a cap on how much can be recovered, and employers with more than 500 employees face a maximum payout of $300,000 for compensatory damages. Once the EEOC's Office of Federal Operations began considering cases where compensatory damages were available as a remedy a few years later, the Commission developed the framework still in place today: consider the nature, duration, and severity of harm to determine the appropriate award of non-pecuniary compensatory damages, and then make sure that award is not "monstrously excessive" on its own and is consistent with the amount awarded in cases with similar harm.

This formula worked well until more and more time passed since the 1991 effective date and, with inflation, the statutory cap of $300,000 became worth less and less. Also, those amounts awarded in similar cases started to become less appropriate over time, if the cases relied upon were issued more than a few years prior. Sure, the complainant in a 2007 case had similar evidence of harm and got $50,000. Shouldn't my client in 2017 get more than that given that it's ten years later? That argument has been made for years by attorneys for complainants and it finally got a foothold in a decision issued on June 9, 2017.

The Commission exercised its authority to issue a *sua sponte* decision reopening and reconsidering a prior decision in *Lara G. v. USPS*, Request No. 0520130618 (June 9, 2017). Way back in 2009, an administrative judge issued a decision finding the agency subjected the complainant to retaliatory harassment. Along with other remedies, the administrative judge awarded $100,000 in non-pecuniary compensatory damages. After the agency issued a final action accepting the finding of retaliation but rejecting the award of remedies, the case came to the Office of Federal Operations on appeal. The complainant argued that the award should be adjusted to reflect present-day dollar value of the precedent cited in support of the award. In a 2011 decision, the Commission found the administrative judge acted appropriately in awarding $100,000. The complainant then requested reconsideration arguing, "the Commission's policy of requiring [Administrative] Judges to issue awards consistent with prior Commission cases works an injustice to present-day complainants due to the inflationary devaluation of prior awards." In March 2012, the Commission denied the request for reconsideration.

However, after the complainant alleged that the agency failed to fully comply with the Commission's Order, the case came back to the Office of Federal Operations as part of a Petition for Enforcement. After that, the Commission notified the parties in October 2013 that it intended to reconsider the case on its own motion. A mere three and a half years later, the Commission issued its decision and given the importance of its holding, I'm including a block quote of its analysis:

> Some courts, when considering whether to reduce compensatory-damage awards, have considered the present-day value of awards in comparable cases. For example, in EEOC v. AIC Security Investigations, Inc., 55 F.3d 1276 (7th Cir. 1995), the court determined that a $50,000 compensatory-damage award was not excessive when compared to prior awards of $40,000 and $35,000. Noting "that those awards were several years ago, and thus the current value of those awards is considerably greater," the court stated that the "[c]omparability of awards must be adjusted for the changing value of money over time." Id. at 1286. See also Deloughery v. City of Chicago, 2004 WL 1125897 at 7 (N. D. Ill. 2004) (in decision reducing jury's $ 250,000 compensatory-damage award to $175,000, court noted that older comparable award "should be converted to current dollars"), aff'd, 422 F.3d 611 (7th Cir. 2005) (district court acted within its discretion where remitted award was sufficiently comparable to awards in other cases in the circuit).
>
> Similarly, when determining an award of non-pecuniary compensatory damages, the Commission may consider the present-day value of comparable awards. Thus, an AJ who is awarding damages should consider the amounts that the Commission awarded in prior cases involving similar injuries and should determine whether circumstances justify a higher or lower award. The AJ should adjust the award upward or downward according to the relative severity of the complainant's injury. The AJ may then take into consideration the age of the comparable awards and adjust the current award accordingly.
>
> In this case, the AJ determined in October 2009 that Complainant's injury was comparable to that of a complainant who was awarded $95,000 in September 2003. The AJ awarded Complainant $100,000, which is $5,000 more than the comparable award. It is not clear whether the AJ, in reaching her determination, took into consideration the time that had passed since the $95,000 award. Given the nearly six-year interval between the comparable award and Complainant's award, we find it appropriate to increase Complainant's award by an additional $10,000. Therefore, we find that Complainant should receive $110,000.00 in non-pecuniary compensatory damages. Accordingly, we will modify the ordered remedy to reflect this increased award.

So a mere 18 years later, the complainant received an additional $10,000 in non-pecuniary compensatory damages. Was it worth it to the individual complainant? Likely not. However, expect to see this case heavily relied upon by complainants' counsel in arguing for upward adjustments to compensatory damages awards. Sumner@FELTG.com

COMING TO ATLANTA

Developing & Defending Discipline: An Accountability Seminar
September 27-29

Attention supervisors and advisors: join FELTG in Atlanta for a three-day seminar on taking defensible performance-and misconduct-based actions.

This class sold out in 2016, so register before it's too late!

We'll see you there!

Learn to Avoid Unjustified Gambles
By William Wiley

So many questions, there are. This month, we got a good one from a long-time reader about the use of Letters of Warning. The writer was being advised (accompanied by legal citations) that a Letter of Warning was considered as prior discipline by MSPB, although we teach in our fantastic FELTG seminars that it is not. Here's our response:

Dear Poorly-Advised FELTG-Constitute:

In each of the three cases cited by your advisor as evidence that a Warning is prior discipline, the letter of warning considered as prior discipline is a "letter of warning in *lieu of suspension*." These are effectively suspensions, not simply administrative letters of some type. USPS is the defendant agency in these cases and has wisely bargained for this particular type of punishment in its national labor agreement. MSPB has found these letters to be prior discipline in other agencies besides USPS, but only **IF** they are developed through agreement with the employee and the employee specifically accepts them as alternative discipline constituting prior discipline for the purpose of progressive discipline. Otherwise, they are referenced in disciplinary letters for establishing notice (*Douglas* factor 9) and nothing else. They simply are not discipline.

Discipline was defined for us in *Bolling v. Air Force,* 9 MSPR 335 (1981). In that decision, the Board said that to be countable as discipline for progressive discipline purposes, the instrument must be in writing, stored in a system of agency records such as the OPF, and grievable. Back in 1981, the only widely accepted instrument that did that was the Reprimand. Letters of Caution, Letters of Warning, Letters of Expectation, etc., were used in varying ways by some agencies with many agency policies not allowing them to be grieved, and usually not storing them in the OPF. Therefore, the Reprimand developed universally as the first step in progressive discipline.

Of course, nothing stops an agency from coming up with an instrument, calling it anything it wants to call it (e.g., a Bad Day Memo), defining it as a disciplinary act in a policy statement, and ensuring that it meets the *Bolling* criteria. However, few if any have done that because there really is no legal benefit to adding to the list of disciplinary tools; Reprimand, Suspension, and then Removal are perfectly adequate for holding employees accountable and sooooo much simpler than trying to deal with poorly defined, confusing, additional discipline tools.

In a related arena, the courts have had to decide whether letters like Warnings and Cautions are "personnel actions" for an individual to be able to claim whistleblower reprisal. Well, sometimes yes and sometimes no, depending on the specific language, not the title of the document. They do not rise to the level of being a personnel action if they only admonish the employee to act in a particular manner, do not accuse her of anything wrong, and do not restrict her behavior. *Ingram v. Army*, Fed. Cir. No. 2015-3110 (August 10, 2015). Otherwise, they do. If a Letter of Warning accuses the employee of misconduct, it is a personnel action for a whistleblower reprisal claim. However, if there is no policy allowing it to be grieved or retained in a file system like the OPF, then it is not discipline.

Isn't this crazy?

By far, the best approach is to stop doing Warnings, Cautions, Counselings, or anything else that smells like discipline, but may or may not be. They have NO value in progressive discipline and they confuse those who do not know our law. More dangerously, they may inadvertently become something we must

defend against as a personnel action for reprisal purposes, all the way through MSPB (discovery, depositions, hearings, petitions for review) to federal court.

Here at FELTG we strongly recommend that you get the word out and stop doing warnings or cautions. They are an unjustified gamble. If you want to put the employee on notice of his misconduct (*Douglas* factor 9), do it in an email without calling it anything. Emails in general are not grievable nor do they have much potential to become "personnel actions" if there are no threats or accusations. If you want to discipline, use a Reprimand. Nothing less. Hope this helps. Wiley@FELTG.com

Accommodating Employees with Disabilities During Litigation
By Deryn Sumner

When we think of accommodating employees with disabilities, we often think of it only in the context of what accommodations the employee needs to perform the essential functions of his or her job at work. However, when employees with disabilities file EEO complaints, it often reasonably follows that these individuals need accommodations to participate in the litigation of their EEO complaints. The EEOC's Administrative Judge's Handbook (available at https://www.eeoc.gov/federal/ajhandbook.cfm) notes that "[a] party, witness or representative appearing before the Commission may be entitled to a reasonable accommodation for a disability. The Administrative Judge may order the agency to provide the accommodation." But what recourse does a complainant have when he or she is not provided an accommodation during litigation of a case?

The EEOC's Office of Federal Operations considered such a situation in *Davina W. v. Social Security Administration*, EEOC Appeal No. 0120162615 (January 18, 2017). There, the complainant worked as an attorney for SSA in Atlanta, Georgia and had previously settled a prior EEO complaint in 2009 that allowed her to work at an alternate duty station on certain days and have a flexible start time due to her disability. This didn't appear to improve the complainant's work situation, as she subsequently filed two more EEO complaints. After the agency completed an investigation and the case was before an administrative judge, the agency sought to depose complainant.

The complainant requested that as a reasonable accommodation for her disability, the deposition begin in the afternoon, that she be granted frequent breaks, and given the late start time and need for frequent breaks, noted that the deposition could be conducted over two days. The complainant stated she needed these accommodations due to medication she took in the morning that took five hours to kick in and resulted in severe abdominal pain and retching and her need for frequent restroom breaks. According to the decision, the agency declined to start the deposition at a later time or conduct it over two days, and alleged that that the complainant refused to cooperate with the agency's attempts to depose her.

The complainant filed an EEO complaint alleging that the agency failed to provide her an accommodation or engage in the interactive process with her regarding her deposition, and the agency discriminated against her when an agency official suggested that she consider disability retirement if she required a reasonable accommodation for her deposition.

The Commission found that these allegations should not have been considered separate complaints, but they should have been addressed by the presiding administrative judge in her case, noting its concern that the administrative judge "did not address Complainant's clear request for an accommodation during her deposition." The Commission noted that the administrative judge has a duty and obligation to

accommodate parties and witnesses and remanded the complaint for a hearing.

I share the Commission's concern that the administrative judge did not address the complainant's clear request for accommodation. The complainant was not seeking to be excused from deposition entirely, but rather to have the deposition start late enough in the day and provide enough restroom breaks to accommodate her medical condition, which appears reasonable and would have met the agency's goal of obtaining the complainant's deposition testimony. Instead of being required to file a separate EEO complaint to address the issue, the administrative judge should have considered it as part of overseeing processing of her existing EEO complaints. Sumner@FELTG.com

Psychiatric Examinations, the MSPB, and the EEOC
By Barbara Haga

Last month I began recounting the case of Ms Doe, whose employer the Pension Benefit Guaranty Corporation (PBGC), was concerned about her "unusual and inappropriate behavior." We pick up the case with the documentation of the issues with Ms Doe's behavior and the medical review of that information. Some of the specifics below come from the subsequent EEOC decision issued earlier this year, *Marya S. v. PBGC,* EEOC Petition No. 0320160066 (2017).

Documentation

Between February and May 2009. the agency had evidence of multiple exchanges that depicted several instances of behavior that seemed to indicate that there was an issue with her mental status. These were recorded in e-mails and statements from those who participated in them. They included the following:

- Ms Doe sent an e-mail to the Deputy IG claiming her home had been broken into several times since she released information to the IG office. Ms. Doe asked if any member of the Deputy IG's staff had been in her home without her consent.
- Ms Doe sent an e-mail to her supervisor accusing the supervisor of harassing her and alleging that the supervisor had called a transit officer the previous evening and provided him with the number of the train car in which Ms Doe was riding. She went on to say that "I pray that whatever stronghold has you captive will set you free." She copied EEO, the CIO, the DCIO, and the OIG on this e-mail. Ms Doe went on to say that according to the rumor mill the supervisor was trying to get rid of her.
- In a meeting with her supervisor, Ms Doe accused the supervisor and another official of listening to her conversations and stated that she knew about the "ear piece". Following the meeting, Ms Doe sent an e-mail to her supervisor in which she said that she hoped the supervisor had presented herself well in front of the hidden camera.

Medical Reviews

After the meeting with the supervisor in May 2009, the supervisor consulted with HR regarding the situation. HR forwarded the information to Federal Occupational Health (FOH) and an FOH physician completed a worksheet indicating he had spoken with HR regarding Ms Doe's paranoid behavior and would recommend a fitness for duty examination (FFDE). That physician had contact with Dr. Hibler, a psychologist, who would ultimately conduct the FFDE stating that the real issue was whether Ms Doe was a danger to herself or others.

On May 28, 2009 PBGC ordered Ms Doe to undergo a fitness for duty exam with Dr. Hibler, and placed her on administrative leave pending

the results. Dr. Hibler's report of the examination stated that Ms Doe was experiencing a psychotic delusional disorder and was unfit. He recommended that Ms Doe "not be considered for potential return to the workplace until a treating practitioner advises that she is stable and has the resources sufficient to perform her duties." He also suggested a follow-up FFDE at that time to objectively determine her emotional status and readiness to perform her duties.

Enforced Leave

Upon receipt of Dr. Hibler's medical determination, PBGC utilized indefinite suspension procedures to put Ms Doe out of her own sick leave. The action issued on June 29, 2009 stated that the condition which would end the enforced leave was that she submit documentation from her health care provider confirming that (1) her condition had stabilized, (2) she was no longer a danger to yourself or others in the workplace, and that (3) she was fit to return to work.

Ms Doe replied to the proposal asking for administrative leave for another two to three months so that she could locate a new primary care physician and make an appointment with a psychiatrist. The agency declined to grant further administrative leave and put her on enforced leave in August 2009.

Medical Clearance to Return to Work

Ms Doe submitted a report in September 2009 from Dr. Schell (a psychiatrist) which stated she "… does not have a history of being a threat to others and is not a present danger to herself or others. She is able to return [sic] to work without restriction." PBGC removed Ms Doe from enforced leave status and placed her on administrative leave pending Dr. Hilber's review of Dr. Schell's report.

Dr. Hilber's letter dated September 14, 2009 regarding his review of the submitted documentation, stated, "Dr. Schell's report does not contain details and an explanation that would be needed to sufficiently understand [the appellant's] fitness for her return to work (whether with or without accommodation)." Dr. Hilber recommended that Ms Doe be reevaluated by an independent medical examination sponsored by PBGC so that the perspectives offered by Dr. Schell are considered by an evaluator of the same professional discipline.

PBGC did as Dr. Hilber suggested and notified Ms Doe that she had two options: 1) to submit medical information that cured the deficiencies in the report Dr. Schell submitted or 2) submit to a follow-up examination with Dr. Hilber and a psychiatric evaluation with Dr. Allen. Ms Doe chose the first option and submitted a progress note from Dr. Schell. Dr. Hilber reviewed the note and found that it did not address the deficiencies noted earlier. On October 1, 2009 PBGC ordered Ms Doe to undergo the evaluation with Dr. Hilber on October 8, 2009 and an appointment with Dr. Allen on October 9, 2009.

Ms Doe attended the appointment with Dr. Hilber. He found that she was still evidencing severe mental illness. He went on to say that she was "too fragile to be safely returned to the workplace." Ms.Doe did not attend the appointment with Dr. Allen.

PBGC followed up with a notice to Ms Doe advising that she had two options, 1) to give consent for Dr. Hilber to consult directly with Dr. Schell to resolve the deficiencies in the medical report and evaluate her for return to work, or 2) undergo the psychiatric evaluation with Dr. Allen. Ms Doe was given a deadline of November 6, 2009 to advise HR or her choice of option. She was notified that if she did not elect one of the options and timely notify HR her status would be changed to AWOL. Ms. Doe did not comply and her status was changed to AWOL beginning on November 9, 2009.

What Came Next?

Ms. Doe filed two MSPB appeals, one on the enforced leave action and the second on her placement in AWOL status. She later filed an appeal with the EEOC of the MSPB decision which found that there was no disability discrimination or retaliation in the PBGC's actions. We will review the decisions next time, and return to the issue of the problem with the OPM medical examination regulations. Haga@FELTG.com