Federal Employment Law Training Group
Teaching the Law of the Federal Workplace

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A Final Annual Anniversary?

It all started with a dirty toilet. In the early part of the last century, when a postal worker complained to his Congressman about the unsanitary conditions in the restrooms at a post office building where he worked, the President took offense at the "leaker" and fired him. Under Presidents Theodore Roosevelt and Robert Taft, it was common for civil servants who leaked information to be fired. Federal employment back in the day was at-will, requiring neither good cause nor ANY cause to fire a federal worker. Well, Congress decided it didn't like that. Under the leadership of Republican Senator Bob La Follette, the Lloyd-La Follette Act became law on August 24, 1912. Here at FELTG, we celebrate that anniversary every year about this time because a) this is the law that created the standard for removing a civil servant to be the "efficiency of the service," and b) we will celebrate darned near anything if a party is involved. Unfortunately, this year may be our last party. Congress has been very active recently, creating legislation to reduce civil servant protections. Last month, we saw a bill introduced that, if enacted as law, would take us back to before 1912 and make civil service employment at-will. Perhaps foolishly, here at FELTG we fight against that outcome, arguing that the existing system works just fine for holding civil servants accountable while treating them fairly IF you know what you're doing. Until the day they pry our cold dead fingers from around the Lloyd-La Follette Act, we will be here teaching the law of the civil service. Come join the party before it's too late.

Bill

COMING UP IN WASHINGTON, DC

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

Workplace Investigations Week
October 23-27

Settlement Week: Resolving Disputes without Litigation
October 30 – November 3

JOIN FELTG IN HONOLULU

Developing & Defending Discipline: Holding Federal Employees Accountable
October 4-6

WEBINARS ON THE DOCKET

Good Actions Gone Bad: Avoiding Involuntary resignations and Retirements in Your Agency
August 17 – tomorrow!

Dealing with Violence and Threats of Violence in the Federal Workplace
September 7

Psychiatric Examinations: OPM, the MSPB, and the EEOC

By Barbara Haga

This is the final installment of the review of the case of Ms. Doe, whose employer, the Pension Benefit Guaranty Corporation (PBGC), was concerned about her "unusual and inappropriate behavior." As recounted last time, this led to the PBGC sending her for a psychiatric fitness for duty exam which showed that she was not fit. That determination resulted in an enforced leave action. She appealed that action to the Board and filed another appeal about AWOL that resulted when she did not submit clarifying medical information to explain how her private physician had found her fit for duty. After the two MSPB appeals, there was another case filed with the EEOC about whether the agency's original order, sending her for a fitness for duty evaluation, constituted disability discrimination and/or reprisal.

MSPB Appeal I

Ms. Doe appealed the indefinite suspension action, which placed her in an enforced leave status. She was on enforced leave for roughly thirty days. The AJ overturned the action because of the OPM regulations, ruling that the agency didn't have the authority to order the evaluation on which the suspension action was based. In that appeal, she raised two affirmative defenses – harmful procedural error and disability discrimination. The AJ found that she did not prove either of those defenses.

MSPB Appeal II

The second appeal covered the period of time that Ms. Doe was carried in an AWOL status, after she did not give permission for her doctor to talk directly to the agency's psychologist or report for a psychiatric examination with Dr. Allen. She appealed the AWOL period as a suspension, and in this appeal, she raised a number of defenses: harmful procedural error, "perceived" disability discrimination, retaliation for prior EEO activity and filing of grievances, and whistleblower reprisal. The AJ again overturned the action because there was no authority to order the original examination and that since the action was tantamount to a suspension, she did not receive the necessary due process.

The 1984 Change to the OPM Regulations

The Board ruled on the two appeals in *Doe v. Pension Benefit Guaranty Corporation,* 117 MSPR 579 (2012). The decision includes a lengthy discussion of why the OPM regulations limit the use of ordered psychiatric examinations. It's a good history lesson if you are not familiar with the bad old days when agencies had authority to order psychiatric examinations. I know I was abusing them like crazy. I think I did three or four in my 20 years or so of working for the Navy – and one of them was almost a duplicate of the Doe situation, except that mine preceded the changes in the regulations. The Board quotes from the Federal Register notice from January 1984, when the modified regulations were proposed. OPM wrote, "The Part 339 regulations are explicitly intended to substantially constrain the number of situations where an agency may order an employee to undergo a medical examination." The Board's decision also recounts that there was concern from Congress who had held hearings on the issue of ordered psychiatric FFD examinations, recommending statutory and regulation reforms to *eliminate the potential for abuse* of psychiatric FFD examinations. (My emphasis.)

So, OPM's response was basically to eliminate psychiatric examinations, not to build in procedural protections to deal with potential abuse. That's all fine on paper, but what is an agency supposed to do when dealing with someone in Ms. Doe's situation? You have someone reporting to work who is engaging in

bizarre behavior which is at best distracting others, and you can't reason with the individual because she is not in touch with reality. Yes, you could take progressive discipline on the underlying misconduct, but the agency would be trying to handle responses and grievances from an employee the agency has already concluded is not in a position to effectively deal with such matters.

The Board concurred with the AJ on the issue of the ordered examination, stating that the agency could have offered the appellant a psychiatric evaluation pursuant to 5 CFR 339.302, but that they did not have the authority to order it. The Board also concurred with the AJ that the AWOL could not be sustained.

The Disability Discrimination Issues

MSPB remanded the disability discrimination issues back to the AJ, although there is lengthy discussion about the matter in the portion of the consolidated decision relating to the enforced leave action. The AJ found on remand that the agency regarded her as disabled, but did not prove that the agency's actions constituted disability discrimination. The Board's 2016 non-precedential decision supported the AJ's determination. *Doe v. Pension Benefit Guaranty Corporation* DC-0752-09-0881-B-2, DC-0752-10-0223-B-2 (2016).

We won't spend a lot of print on what the MSPB said on this topic, because the EEOC's decision on this case has been issued. *Marya S. v. PBGC,* Petition No. 0320160066 (2017).

Did the Ordered Exam Violate the ADA/Rehabilitation Act?

No. What did the EEOC say on the topic? That medical examinations and disability-related inquiries may only be made when it is job-related and consistent with business necessity per 29 CFR 1630.13(b), 1630.14(c). What does that entail? The employer must have a reasonable belief, based on objective evidence, that (1) an employee's ability to perform essential job functions will be impaired by a medical condition, or (2) an employee will pose a direct threat due to a medical condition. What is objective evidence? Reliable information, either directly observed or provided by a credible third party, that an employee may have or has a medical condition that will impair her ability to perform essential job functions or will pose a direct threat. The employer has the burden of showing that the inquiry or exam is job-related and consistent with business-necessity.

The EEOC concurred with the MSPB finding of no unlawful discrimination. Here's the paragraph that sums it all up:

> Upon review of the record, we find that the Agency lawfully required Petitioner to undergo the Fitness For Duty Exams (FFDEs) because it had a reasonable belief, based on objective evidence, that she would pose a direct threat due to a medical condition. Specifically, the record reflects that, in her February to May 2009 email and in-person interactions with Agency employees, Petitioner 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 towards her. In addition, the record reflects that, after reviewing those emails, an Agency medical professional determined that Petitioner exhibited paranoid behavior, could be a danger to herself or others, and should undergo a FFDE. Moreover, the record reflects that the Agency relied on that determination in ordering Petitioner to

undergo a June 2009 FFDE. Further, the record reflects that the Agency ordered Petitioner to undergo a follow-up FFDE in October 2009 to resolve conflicting information between D2's June 2009 FFDE report and D3's September 2009 medical report. Finally, to the extent that Petitioner argues that the Agency's actions related to the FFDEs constituted harassment on the basis of disability, we decline to make such a finding based on our determination that the FFDEs were lawful.

Where does that leave us?

Knock, knock. OPM? Is anybody home? Your 339 regulations prevent agencies from utilizing medical examinations that the EEOC has said are not a violation of the Rehabilitation Act. We could use some help here. Haga@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.

Something to Chew On: OFO Issues New Digest of Notable Cases
By Deryn Sumner

On August 10, 2017, the EEOC's Office of Federal Operations announced the issuance of its most recent digest of notable cases, constituting the third volume for fiscal year 2017. The digest highlights and summarizes notable cases issued by the EEOC in recent months. The cases are organized by subject area and this edition includes a special article on disparate treatment. Disparate treatment is likely the most common theory of discrimination we see as federal sector practitioners and it is, at its core, the most logical theory of discrimination. When you speak to an individual who believes they have been treated poorly in the workplace and you ask why they think it is discrimination, most often they will point to co-workers not of their protected class whom they believe are treated better by management, in support of their claims. However, as we know, there are definitions that must be met to determine who is a proper comparator employee, for purposes of establishing disparate treatment, and this article highlights some recent cases on the subject.

The digest also addresses cases where the Office of Federal Operations reversed dismissals of claims and reinstated them for processing, awards of attorneys' fees and costs, certification of class complaints, compensatory damages, and findings on the merits. Of particular note is *Dona A. v. SSA*, EEOC Appeal No. 0120150376 (March 29, 2017), where the Commission found the Administrative Judge acted properly in dismissing the complainant's hearing request because the complainant failed to respond to discovery requests. Although the complainant argued that she was hospitalized due to a medical condition, the Commission found persuasive that neither the complainant nor her attorney notified the agency of her hospital stay for more than three weeks after the deadline to respond to the Agency's discovery requests had passed. The Commission addressed similar conduct by a complainant in *Alfred S. v. Social Security Administration*, EEOC Appeal No. 0120140900 (January 6, 2017), where the complainant failed to respond to discovery for more than a year and the administrative judge dismissed the hearing request as a sanction (which I assume is more of a function of the administrative judge being too overwhelmed

with other cases to address a pending motion to compel than anything else).

The Commission also chose to highlight its decision in *Jeremy S. v. Department of Veterans Affairs*, EEOC Appeal No. 0120142917 (February 9, 2017), where the Commission found the agency's failure to start an EEO investigation until 322 days after the formal complaint was filed, worthy of default judgment in the complainant's favor. The Commission noted that this particular agency had been subject to default judgments at least three times for the exact same conduct: failing to initiate an investigation within 180 days.

Turning to findings of discrimination, the Commission summarized its decision in *Marine V. et al v. Social Security Administration,* EEOC Appeal No. 0720170001 (March 20, 2017), which found the Agency discriminated against multiple employees on the basis of age by basing selections for a Claim Representative position solely on an exam score without taking into consideration qualifications, job performance, appraisals, or experience with the Agency. The Commission also discussed three findings of disability discrimination, religious harassment, and sexual harassment and retaliation.

The digest is available here: https://www.eeoc.gov/federal/digest/vol_3_fy17.cfm. Sumner@FELTG.com

Managing the Suicidal Employee in the Federal Workplace
By Shana Palmieri

Shana Palmieri is a Licensed Clinical Social Worker and a FELTG instructor who specializes in training agency employees and supervisors how to handle behavioral health issues and threats of violence in the federal workplace.

FELTG recently offered its first full-day training on the topic ***Handling Behavioral Health Issues & Instances of Violence in the Federal Workplace***. A portion of the training covered how to react and steps to take if an employee has a psychiatric crisis in the workplace. Numerous questions came up during and after the training about just exactly how to handle an employee disclosing direct or indirect suicidal threats. I felt it pertinent to offer some clarification and further guidance given that there is not one specific answer, and often the best way to react depends on the circumstances of the specific situation.

An employee directly or indirectly reporting suicidal ideation should always be taken seriously, but it is not always the case that an employee needs to be rushed off urgently to the emergency room for an emergent psychiatric assessment, or forced to take leave pending medical clearance in the instance of reported suicidal ideation. Each instance should be evaluated independently to determine the best course of action in order ensure the safety of the employee.

Tips & Recommendations

- Take all threats of suicide seriously. Do not ignore threats or make assumptions that nothing bad will happen.
- Supervisors & managers should work in collaboration with Human Resources Staff and EAP to determine the best course of action.
- If the employee is in imminent danger (actively attempting to harm themselves in the workplace, or reports an imminent plan), call 911 for immediate assistance.
- If the employee is not in imminent danger, work collaboratively with the employee to provide options for the employee to obtain the needed services (EAP, provide suicide hotline phone

number, provide local mobile crisis hotline number, refer to mental health professional).

- It is a case-by-case decision to determine if the employee will need a medical clearance to return to work. This should be carefully evaluated based on the circumstances and the severity of the situation. Remember the purpose of an emergency department evaluation is to determine if an individual needs emergent inpatient psychiatric hospitalization, not to determine if the employee can return and complete the duties associated with their employment.
- Develop an open culture and awareness in your organization to support the mental health of your employees. Consider developing a mental health awareness program.

Available Resources

Suicide Prevention Resource Center
www.sprc.org

The Role of Managers in Preventing Suicide in the Workplace
http://www.sprc.org/sites/default/files/resource-program/Managers.pdf

The Role of Co-Workers in Preventing Suicide in the Workplace
http://www.sprc.org/sites/default/files/resource-program/CoWorkers.pdf

Partnership for Workplace Mental Health
www.workplacementalhealth.org

ICU Awareness Campaign
http://www.workplacementalhealth.org/Employer-Resources/ICU

National Suicide Prevention Lifeline
1-800-273-8255

County Crisis Hotlines & Services

Check in your county and identify the phone number for the crisis hotline number. Most counties have a crisis hotline and often a mobile crisis team that can come out in the community to complete a crisis assessment and provide recommendations.

Employee Assistance Program
Ensure employees have easy access and awareness to the employee assistance program.

Comments may be directed to Hopkins@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!

Such a Fundamental Question
By William Wiley

These days, the very foundations of our civil service are being reconsidered. Are the rights of our citizens being served by the federal government greater or less than the rights of individual civil servants employed by that

government?

For example, consider a hypothetical situation in which the individuals appointed and hired to run a government agency have decided that an employee of that agency is not doing his job, perhaps is even engaging in dangerous conduct. If they decide to fire that employee, should another government entity – one not responsible for the output of the government – be empowered to require the employing agency to keep the individual at work? Keep in mind that the agency who knows him best and is accountable for his actions has decided he should be fired. Should our system allow for that decision to be overridden, even if only temporarily?

Well, that's what we have today. OPM, an agency that provides no services directly to the general public, has promulgated a draft rule requiring agencies to keep employees at work for three to four weeks after the decision to fire them has been made. OSC, an agency not responsible for government efficiency, accountability, or costs has the authority to stop the removal of a bad employee if it believes it is "probable" that the removal is not based on merit. The employing agency that is accountable for the employee's conduct has already determined that it is at least "more likely than not" that the employee should be fired. OSC, who has no skin in the game, comes along and concludes that it is "probable" that the agency has acted unfairly.

Is this how government should work? Because if it's not, then Congress should be addressing this issue legislatively. As the Secretary of the Department of Veterans Affairs has been quoted as saying recently, when confronted by a stay order obtained by OSC to block the removal of a senior manager, "No judge who has never run a hospital and never cared for our nation's veterans will force me to put an employee back in a position when he allowed the facility to pose potential safety risks to our veterans."

That's EXACTLY the issue Congress needs to be addressing. Who should be running the government? Managers responsible for the work of government or adjudicators who are not? Wiley@FELTG.com

The Supervisor who Threatened to "Skull F*ck" his Employees
By Deborah Hopkins

Lately, FELTG has begun offering classes on dealing with threats of violence in the federal workplace. It seems that there's a workplace shooting just about every day, and if you can believe it, government workplaces (including state and local) experience about twice the amount of workplace violence as do private sector employment facilities.

Violence should be taken seriously and in my humble opinion, violence in the workplace is usually a first-strike-and-you're-out offense. Even threats of violence should be taken seriously. It's just not worth it to gamble with people's lives. Aaron Alexis, the contractor who committed the Navy Yard mass shooting in 2013, had a history of violent behavior in the Navy – violent behavior that went uncharged and therefore was under the radar when he applied for his contractor job.

Here are some recent cases where agencies removed employees for violent behavior, and the removals were upheld.

Removal for conduct unbecoming a supervisor was upheld when evidence showed the supervisor threatened multiple employees with the comment, "I'll skull f*ck you." *Hamel v. DHS*, DE-0752-15-0039-I-2 (July 31, 2017).

Removal for conduct prejudicial to the best interests of the service was upheld where evidence showed that an employee: 1) Upset that her leave request was denied, pulled a gun from her car and showed it to the supervisor who had denied the request, and 2) Stood at the door to her supervisor's office, pointed her finger at him and made a noise as if she were firing a gun. *Hicks v. USDA*, AT-0752-16-0105-I-1 (September 16, 2016) (NP).

Removal for patient abuse was upheld where the employee, a certified nursing assistant, slapped a patient in the face after he bit her finger. *Mitchell v. VA*, DC-0752-15-0645-I-1 (May 27, 2016) (NP)

Removal was upheld where the appellant, upset about unresolved leave and pay issues, wrote a letter to her Congressman complaining about the agency and asking "Must more blood [ ] be shed before changes occur?" The appellant also asked a high-level supervisor if she recalled the shootings at Camp Lejeune and Fort Hood and then told her that her first- and second-level supervisors should be careful and should leave [the appellant] alone. *Jolly v. Army*, AT-0752-15-0013-I-1 (April 15, 2016) (NP).

Violent behavior also creates potential EEO issues. A supervisor's failure to take prompt and effective corrective action, when a coworker made racially discriminatory threats of violence against the complainant, created agency EEO liability amounting to $125,000, and created severe health problems for the complainant: anxiety, difficulty concentrating, a loss of appetite, high blood pressure, severe headaches, relationship problems, loss of motivation to work, insomnia, weight gain, and paranoia that the coworker would physically harm his family. *Vaughn C. v. USAF*, EEOC Appeal No. 0120151396 (April 15, 2016).

I have a bunch more, but you get the idea. There's just no place for people like this in the federal civil service.

In case you're interested in learning more, FELTG is offering a webinar on the topic: Handling Violence and Threats of Violence in the Federal Workplace on September 7. You really can't afford to miss this one. Hopkins@FELTG.com

Procrastinators Beware: OFO Cracks Down on Granting Extension Requests

By Deryn Sumner

Sometimes we all just need a little more time, which is why requests for extension were created. For years now, the EEOC's Office of Federal Operations has made such requests a simple affair. Email the designated email address (OFO_extensions@eeoc.gov) and plead your case for more time. This would typically result in receipt of a form letter granting you an extension to get your appeal brief together (and maybe even come up with some cogent arguments while you're at it). I'd never heard of any request for a reasonable amount of time being denied until a few weeks ago, when someone in my office circulated the response they had received after requesting a few extra weeks to submit an appeal brief:

> "To ensure that the Office of Federal Operations (OFO) is able to resolve federal sector appeals as efficiently as possible, we are only granting extensions of time to file a brief when the party can demonstrate that they were incapacitated during the regulatory time frame for doing so, or for some other serious intervening event. On the rare occasions that OFO deems that an extension is warranted, it will be limited to ten (10) business days."

Now, I understand and appreciate that the Office of Federal Operations wants to expedite processing of appeals. I'm all for it and as I mentioned in last month's newsletter, I'm happy to provide the Office of Federal Operations with a list of appeals that have

been pending for a while that still need a decision. However, the move towards requiring such a strong showing in support of an extension request seems to fail to appreciate the nature of litigation and the all-consuming nature of hearing and trial work. In reality, granting the parties with a reasonable extension of time, between 30 and 60 days, to submit an appeal brief will not substantively slow down the processing of these appeals. Applying the standard of incapacitation, especially when most requests for extension are likely filed by attorneys, seems unnecessarily harsh. Being in back-to-back hearings and depositions is not being incapacitated in the traditional sense, but it does prevent an attorney from being able to meet other deadlines to draft filings, such as appeal briefs. Given the period of time that it takes between noticing an appeal and getting a decision, which in my experience has been more than two years, denying requests for a month or so of extra time is not going to expedite processing all that much, and does serve to discourage federal sector attorneys from being able to take on appeals when they have other cases pending.

I hope the Office of Federal Operations will revisit this policy and revise it to be more in line with the reality of litigation practice. Sumner@FELTG.com

You Aren't Going to Like This
By William Wiley

OK, kiddos. Everybody and their mother are re-considering the legal underpinnings of our civil service, and what can be done to make them better. Here at FELTG, we never shy away from giving out opinions, so here's another one.

First, I need to premise the following by saying emphatically that I have no problems with unions in a government workplace. I believe that unions provide an important service for employees and overall make for a stronger government. I may have a bone to pick about certain union tactics or specific union cases, but as representatives of the interests of civil servants, I got no problem.

With that disclaimer, consider the following hypothetical. Let's say that you're the mayor of a small town. You have one stop sign. So you send your only law enforcement officer out to determine whether your citizens are obeying the law by coming to a complete stop at the stop sign, because you're concerned about citizen adherence to the law.

After a couple of weeks, the cop reports good news to you. Apparently, all the citizens are law abiding. They all stop at the stop sign, and he hasn't had to issue a single ticket to anybody. You are very pleased, you're proud of your citizens, you tell the cop he has done a good job, and tell him to move on to other matters where he might not find as much law abidance. You need income for your town, but you clearly aren't going to get it by issuing tickets for not coming to a full stop at a stop sign.

Now, let's tweak things a bit. Let's say that the only source of income for the town, and payment of the cop's salary, is based on the income from tickets issued to people who disobey that stop sign. If you tell the cop this sad fact, that if he doesn't issue any more tickets, he won't get paid, what do you think the cop will do?

A. Continue not to issue any more tickets. Or,
B. Find some reason to issue tickets because his children are hungry and baby needs a new pair of shoes.

Well, if you picked A, you are an idiot. Life doesn't work like this. Humans act to preserve themselves. Survival of the fittest. Read Darwin if you didn't pay attention in college. Or, Maslow if you skipped psychology class. We

have no sympathy for you and wish you a speedy and painless exit from this world of federal employment law. Sad.

Now, take the correct answer of this hypothetical to the federal workplace in a unionized setting: B. Management should never take a disciplinary action that is not warranted. That's the law, just like stopping at the stop sign is the law. If management takes a disciplinary action and the reviewer of that action (the cop) has no incentive to find fault, then the action will be affirmed. However, if the cop knows that his salary depends on sometimes finding that management screwed up, the action on occasion is going to be reversed. No matter what, sometimes management is going to lose.

Take this hypothetical situation into a real federal workplace, where the employees are unionized, and in 1978, Congress said that they have the right to challenge serious discipline to either an MSPB judge or to an arbitrator. An MSPB judge gets paid no matter what she decides. There's no quota of affirmance and reversal. When I was chief counsel to the Board chairman in the ’90s, we had a judge who affirmed agency removals 100% of the time, for at least 18 years of her career. She was seen as a good judge who got paid every two weeks, just like every other federal employee.

But what if the employee chooses an arbitrator? When an employee selects arbitration instead of an MSPB appeal, the union has an equal say in who the arbitrator will be.

> *Pop Quiz:* Do you think that the union will agree to an arbitrator who always affirms management's removal actions, or do you think that the union will only agree to an arbitrator who sometimes holds for the employee?

Again, if you believe that the union will agree to a cop who never issues tickets, you are an idiot. OF COURSE, when given a choice, as unions always are, the union will look to select an arbitrator who sometimes finds fault with an agency's removal, even though agencies by law are required to always remove employees only for just cause.

Here's our FELTG opinion, for what it's worth, and remember you are paying nothing. Unions of government employees serve an important purpose in our society. However, the removal of federal civil servants for misconduct or performance should not be subjected to the oversight of individuals who are motivated to set aside removals. They should be reviewed only by individuals who have no vested interest in the result, such as MSPB judges. Any system otherwise, as is the current civil service labor law, should be modified to recognize this reality.

Until then, get used to it. Wiley@FELTG.com

Compensatory Damages Case Law Update: Sang G. v. Department of Homeland Security
By Deryn Sumner

As part of our continuing discussion of recent decisions on compensatory damages from the EEOC’s Office of Federal Operations, I bring you *Sang G. v. Department of Homeland Security*, EEOC Appeal No. 0120151360 (July 28, 2017). This case addressed both an award of compensatory damages and of attorney’s fees to a complainant who was successful in bringing a claim of discrimination and received a FAD from the agency finding retaliation. The complainant worked as an Immigration Enforcement Agent and had been terminated during his probationary period. He filed an EEO complaint alleging discrimination on the basis of race, color, parental status, and reprisal. There were fourteen issues raised as part of his formal complaint, the most

egregious being a claim that the Firing Range Instructor "freely used the word n**** on several occasions." In the end, the Agency issued a Final Agency Decision finding the complainant established retaliation when he was placed on administrative leave, suspended of his authority to carry a firearm, and terminated during his probationary period.

The Agency reinstated the complainant and investigated the complainant's entitlement to compensatory damages and attorneys' fees. After considering the evidence presented, the Agency issued a second FAD finding $15,000 in non-pecuniary compensatory damages was sufficient.

The complainant filed an appeal to OFO and the Commission agreed that $25,000 was more appropriate, given the circumstances at hand. The complainant stated that after his termination, he was not able to afford mental health treatment and "his resultant inability to obtain new employment served as a constant reminder of the Agency's actions and exacerbated his depression over an extended period of time." He also asserted that he experienced extreme anxiety and panic attacks, could not sleep, and drank to excess.

The Commission noted that the complainant presented evidence to demonstrate he endured emotional distress that resulted in him separating from his wife and losing respect from his son. This, coupled with the complainant's inability to obtain health care, warranted an increase in the award from $15,000 to $25,000.

This award seems low, given the harm claimed by the complainant because of his termination from the Agency. I wonder if the fact that the complainant was unable to obtain mental health treatment due to his lack of health insurance impacted the amount of the award he received.

The decision also addressed the complainant's appeal of the award of attorneys fees, which the Agency had reduced by 75%. The Commission found that this reduction was unwarranted and increased the amount from $6,379.35 to $25,517.39 to compensate the complainant for attorneys fees and costs. Sumner@FELTG.com