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

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I am not a fan of self-reflection, especially if I'm the one who is doing the self-reflecting. However, recently I felt a need to look at myself in the mirror and ask, "Who are you?" It started when a class participant used a phrase to describe me that I didn't know. When I looked it up, I found it was a pejorative (insulting) statement. Just a couple of days ago, a fellow attorney used an unknown-to-me phrase to characterize something I had done. When I looked up that phrase, it was also described as pejorative. And finally, at a conference a few weeks ago where I was to speak, a senior HR manager I did not know refused to introduce me. So here I sit, looking in the mirror, trying to figure out what it is that causes such responses. Could it be the work we do here at FELTG? Gosh, I don't think so. We teach managers, unions, and neutrals how the civil service accountability laws work. It couldn't be that. Could it be personal hygiene? Well, my lovely wife tells me I have decent daily toilet practices (for a guy). So probably not that one. Then, I looked in the mirror really hard, and there it was, right in front of me. I am absolutely the least attractive man I have ever seen. The word "ugly" does not fully capture my essence. So as a public service, I have today ordered a bunch of paper bags. I will dutifully wear one whenever I find I have done something objectionable. Consider this my early holiday gift to you. I may continue to occasionally do something that people don't like, but I will be doing it incognito, for the public good. And if you're wondering what that second pejorative phrase was, you just might find it in this month's newsletter. Happy Thanksgiving!

Bill

## COMING UP IN WASHINGTON, DC

***Writing for the Win: Legal Writing in Federal Sector EEO Cases***
February 13-15

***Absence, Leave Abuse & Medical Issues Week***
March 26-30

***EEOC Law Week***
April 9-13

## JOIN FELTG IN LAS VEGAS

***Developing and Defending Discipline***
February 27 - March 1

## WEBINARS ON THE DOCKET

***Handling Difficult Employees: What to Do when it's Personality, not Performance***
December 14

***Discipline Alternatives: Thinking Outside the Adverse Action***
January 23

### *Agency Shows It Would Have Been Undue Hardship to Grant Unpaid Leave to Employee as Religious Accommodation*

**By Deryn Sumner**

Although we see many more cases involving claims addressing the federal government's obligation to accommodate employees with disabilities, the federal government also has an obligation to reasonably accommodate employees' religion. In both types of accommodation, an employer can assert that providing the requested accommodation would pose an undue hardship to the employer's operations. The definition of "undue hardship" when responding to requests to accommodate an employee's religion is less onerous than when responding to requests to accommodate an employee's disability.

The Commission's regulation at 29 C.F.R. 1630.2(p)(1) defines "undue hardship," in considering requests to accommodate disabilities, as "significant difficulty or expense incurred by a covered entity," and lists five factors that should be considered, all of which consider the overall cost to the facility and the agency as a whole, and the impact on the operations and the other employees.

Looking at "undue hardship" under the lens of religious accommodations, the regulation at 29 C.F.R. 1605.2(e), an employer may assert that it cannot accommodate a need for accommodation if it would require "more than a *de minimis* cost" or if it would require a variance from a *bona fide* seniority system.

The Commission recently addressed a claim of religious discrimination in *Allan F. v. United States Postal Service*, EEOC Appeal No. 0120150643 (October 27, 2017). The complainant, who was Muslim, worked as a full-time Mail Handler and submitted a leave form requesting 24 hours of LWOP from October 7-12, 2011 for "religious holiday season." A few days later, the complainant submitted a second leave form requesting 40 hours of annual leave for a "choice vacation." The LWOP request was denied, but the annual leave request was granted. The complainant filed an EEO complaint alleging religious discrimination when his request for 24 hours of LWOP was denied. After receiving a Report of Investigation, the complainant requested a hearing. The Administrative Judge granted summary judgment in the agency's favor, and the agency issued a final action adopting this decision, from which the complainant appealed to EEOC's Office of Federal Operations.

On appeal, the complainant argued, in part, that the agency would have benefited financially by granting the request for LWOP instead of his request for annual leave, and that not being paid during this time was "part of the practice of his faith." You may be asking yourself, why didn't the agency just grant the request for LWOP since then it wouldn't have had to pay the employee? Luckily, the agency articulated a legitimate, non-discriminatory reason for this. The agency denied the request for LWOP because of the needs of the service. If the agency had approved the request for LWOP, it would have allowed another mail handler to be able to take annual leave, which "could have placed them over the maximum percentage of mail handlers off, leading to increased overtime and a financial burden on the Agency." The agency also noted that LWOP is approved based on management discretion, while annual leave is granted in accordance with the collective bargaining agreement.

Now what about the complainant's argument that the agency should have accommodated him by not paying him during this timeframe? The Commission found that the agency made a good faith effort to accommodate the complainant because it granted his request for annual leave during the same timeframe and

provided an alternative to the requested accommodation. The agency was able to show that granting the requested accommodation of LWOP would have created an undue hardship, since there could be an increase in overtime if another mail handler requested to use annual leave during this same timeframe. So, there you have it — a case where the agency showed granting LWOP would have cost more than approving paid annual leave. Sumner@FELTG.com

**COMING TO LAS VEGAS**

***Developing & Defending Discipline: An Accountability Seminar***
February 27 - March 1

Attention supervisors and advisors: join FELTG at the Tropicana Hotel in Las Vegas for a three-day seminar on taking defensible performance-and misconduct-based actions.

This newest program (and one of our most popular) is a must-attend if you have a challenge with even one federal employee in the workplace.

We'll see you there!

***I've Earned My Grumpy***
**By William Wiley**

Questions, we get questions. Some make us laugh, some make us think, and some – like this one – just make us sad. I'll bet that there are a lot of federal supervisors who can relate to this tale of woe from one of our loyal readers:

Dearest Beloved FELTG-

I really enjoy reading this newsletter and I often get re-energized thinking that if I'm following the law (I'm not a lawyer) and the rules, I should be able to discipline and remove poor performers. But in the real world, in my experience anyway, the poor performer files EEO, hires an attorney, our HR staff takes forever to provide timely feedback (I know they are swamped, this is not intended to slam them), and then there is a settlement. Upper management has determined it takes too much time to do it again when he knows we'll lose again, despite how solid our case(s) have been.

Frustrated in Chicago

And our FELTG edgy response:

Dear Frustrated –

Ah, the challenges of running the federal government. Here's an analogy that might help.

Suppose you're playing basketball. The other team scores, and the referee gives you the ball. Do you stand frozen out of fear that the other team might try to block your in-bound pass? Once you get the ball in play, do you stay in your end of the court because if you go toward the other basket, one of those big mean players on the other team might try to get in your way, to steal the ball from you? Do you refuse to move because you're thirsty and your team's water-person is slow in getting you a drink?

NO! You throw the ball into play, move under the other basket as fast as you can, and take your lumps when you shoot a jump shot right in the face of the defensive player. There'll be plenty of

time to down some refreshments once the game is over. Perhaps you'll want to think about getting yourself a new water-person because this one isn't helping you out when you need it.

But you don't play basketball; you supervise a chunk of the federal work force. In fact, you're being paid extra money to perform that oversight function, to hold employees accountable for the work that they do (or, don't do). So, do you hide under your desk when an employee files an EEO complaint against you? NO! Only 1.5 EEO complaints out of every 100 results in a finding of discrimination. Are you afraid of his attorney? NO! They might throw around a bunch of legalese and huff and puff, but the law is on your side. Always keep this in mind: *Congress created the law way back in 1978 so that you could easily fire a bad performer.* Your agency has its own huffing and puffing attorneys to defend you if there's any lawyering that needs to be done. Common sense and the law almost always prevail.

What about your HR department taking a long time to get back to you? Well, if they did a decent job of training you, their desks wouldn't be so swamped. If you have been around long enough to remember the government's attempt to implement Total Quality Management back in the late '80s, you might remember that TQM organizations save money by reducing inspections. They set up procedures to get it done properly the first time. Your HR staff would be highly functioning if they set up training and software to help you draft performance documents yourself. Then, you can initiate your own unacceptable performance removals, copying HR after the fact in case they see something they need to help you correct.

Separately, you might want to think about getting your HR and legal advice elsewhere (find a new water-person). If they are not providing the timely assistance you need, that's a management problem just waiting to be corrected, just as it would be if you had a non-performing contractor. Here at FELTG, we can knock out a PIP initiation letter in about 45 minutes; a proposed removal for failing a PIP in less than an hour. When you think how much money it is costing the government to pay someone who is a non-performer, you begin to appreciate the old adage "time is of the essence."

And finally, if upper management knows that you'll "lose again," it is not basing that conclusion on facts. Yes, the other team will score every now and then, but that doesn't mean we shouldn't be playing the game. Managers who decline to hold employees accountable out of fear of EEO complaints should do us all a favor and quit. We need better managers in government, managers who understand the game of employee accountability. If you can't get them to change their minds, the best advice I can give is to find another job, one where upper management appreciates the role you have as a front-line supervisor, and who isn't afraid to do the job he's being paid to do.

I realize that here at FELTG, we can get a little preachy. Sometimes when I write a piece or teach a class, after the fact I'll realize that I come across as a grumpy old man. Well, I am both old and grumpy. I earned the old by having a lot of birthdays. And I've earned my grumpy by hearing stories like this from supervisors in government during my 40 years in the business.

Look. If you're unhappy because "they" won't let you do your job, then fix your happy. Work

around them, ignore them, or find another job where you can get the support you need. Life's too short to waste it complaining about how bad things are. Fix them or move on. Wiley@FELTG.com

***How Much Workplace Violence Do I Have to Put Up With?***
**By Deborah Hopkins**

Here's a note a reader recently sent:

Dear FELTG,

I work in a federal agency but NOT in a federal building. We don't have metal detectors – just a security person at a reception desk, who is sometimes there and sometimes not. I have never been bothered by working in a non-secure building until recent events in the media – most recently, a few days ago when a man shot and killed three coworkers, and injured two other, outside Baltimore. While we don't know much yet about the shooter, I have to wonder if he had violent tendencies and whether this could have been stopped before it happened.

This leads me to my questions:

1. Can a federal agency fire someone who shows violent tendencies in the workplace?

2. If so, what should the charge be, and how much proof do we need?

Thanks for your help.

And here's the FELTG response:

Thanks for your note. I'm sure you've heard us talk or write about the sad fact that over 400 people die at work every year at the hands of a co-worker. It's a tough reality. Regarding your questions, let's take them in order:

1. Yes. If the employee has engaged in misconduct – broken a rule – you can propose removal if, in doing the *Douglas* analysis, you determine that the misconduct warrants removal. (If you're at the VA, a new law means you don't even have to do *Douglas.*)

2. As far as proof, you'll need a preponderance of the evidence – that it's more likely than not – that the individual did whatever you charged him or her with. The charge you use will depend on the facts of the case. Is the individual assaulting people, threatening people, or destroying property? You want to make sure to select a charge that you can prove. (If you're at the VA, you only need to prove the misconduct by substantial evidence.)

Here are a few case examples where removal for threatening or aggressive-type behavior was appropriate:

**Charge: Unacceptable Conduct**
A letter carrier's removal was upheld after he used profanity toward a co-worker and punched the co-worker in the head. *Davis v. USPS*, 487 F. App'x 571 (Fed. Cir. 2012) (NP).

**Charges: 1) Violation of the Code of Professional Responsibility; 2) Off-Duty Misconduct; 3) Unnecessary Display of a Weapon**
A U.S. Deputy Marshal's removal was upheld for an off-duty altercation. The Marshal had stopped his car in the middle of the street and was arguing with his girlfriend, and when two people he did not know told him to move his

car so they could drive past, the Marshal "slapped" the driver's car, and then pulled out his firearm and pointed it above the driver's head. *Rodriguez v. DOJ*, NY-0752-10-0081-I-1 (2011) (NP)

**Charges: 1) Creating a Disturbance, and 2) Insubordination**
Removal was upheld where the appellant, a Legal Administrative Assistant, refused to comply with an agency police officer's orders, started "flailing" his elbows, and injured two officers who were attempting to take him into custody. *Sousa v. Army*, 108 F.3d 1391 (February 11, 1997)

**Charge: Threatening a Coworker with a Knife**
Removal was upheld for an Army weapons explosives operator, who flipped out the blade of his pocket knife and told a coworker he would cut the buttons off her overalls. Despite his defense that he was joking, the coworker testified she felt threatened, and witnesses concurred. *McGuire v. Army*, 333 F. App'x 528 (Fed. Cir. 2009) (unpublished)

If an agency's charge includes the word "threat," it is wise to be sure a threat has actually been made. The MSPB looks to the *Metz* factors in analyzing charges of threat: 1) the listener's reactions; 2) the listener's apprehension of harm; 3) the speaker's intent; 4) any conditional nature of the statements; 5) the attendant circumstances. *Metz v. Treasury*, 780 F.2d 1001 (Fed. Cir. 1986)

If any of the *Metz* factors are shaky, it's probably best to frame the charge differently. Remember, too, if there's an emergency situation, you can – and should – call 911.

If you need to know more about this all-too-important topic, join us for the 2018 webinar series Behavioral Health Issues in the Federal Workplace, or join us for the brand-new two-day program Handling Behavioral Health Issues and Threats of Violence in the Federal Workplace March 6-7 in Honolulu. Hopkins@FELTG.com

**NEW WEBINAR SERIES**

***Handling Behavioral Health Issues in the Federal Workplace***

FELTG proudly presents this four-part series on dealing with behavioral health issues in the federal workplace.

Supervisors, managers and advisors alike will benefit from learning the practical side to something we all deal with.

Join us for one session, or register for them all. Series discounts available.

Session 1: **Handling Behavioral Health: Legal Considerations and Clinical Overview** (February 8)

Session 2: **Successful Management and Supervision of Employees with PTSD** (February 22)

Session 3: **Managing Employees with Substance Use Disorders** (March 8)

Session 4: **Handling a Psychiatric Crisis in the Workplace** (March 22)

***What's a "Factor Other Than Sex" in Equal Pay Act Claims?***
**By Deryn Sumner**

As we've discussed previously in this space, if an employee establishes a *prima facie* claim of sex discrimination under the Equal Pay Act, the agency can assert a defense by pointing to a factor "other than sex" that explains the difference in pay. The agency was able to

successfully make such an argument in *Willa B. v. Department of Veterans Affairs*, EEOC Appeal No. 0120152792 (October 26, 2017). Ms Willa B. worked as a staff psychiatrist and filed an EEO complaint raising 14 issues and alleging race, national origin, color, disability, and sex discrimination, as well as retaliation for prior EEO activity. For purposes of this discussion, we'll just focus on her claim that she was denied equal pay for performing the duties of a GS-15 position, while her counterparts were paid at a higher salary when they had less experience.

First, given the type of position the complainant held, the complainant's salary was determined by a panel. The panel consisted of a chief, another psychiatrist, and an HR employee. The Medical Center Director had the right to approve and change the salary amounts recommended by the panel. The salary was determined in two parts: base pay and market pay. The base pay was determined by prior experience and tenure, and the market pay was determined by the market demand for a psychiatrist of similar education and experience. The psychiatrist also received performance pay, which was an annual one-time payment based on meeting certain criteria during the performance year.

The complainant alleged that she should have been paid more, pointing to two male psychiatrists whom she stated earned more money but had less experience. After holding a hearing, the Administrative Judge found that the difference between the complainant's salary and the two identified male comparators occurred because of factors other than sex.

The first comparator employee had a higher salary because he had been working at the Medical Center for 10 years longer than the complainant. The second comparator employee had been working for the agency since 1997, while the complainant had only worked there since 2006. There was also evidence that five other psychiatrists received higher pay than the complainant, including another female psychiatrist, and that a male psychiatrist earned less pay than the complainant. The Commission agreed with the Administrative Judge's conclusions and affirmed the finding that the agency did not violate the Equal Pay Act with regards to its compensation of the complainant.
Sumner@FELTG.com

***Nibbling in the Dark***
**By William Wiley**

Here's one of the things wrong with Congress that affects you personally.

Recently, we've seen proposed legislation that would change the probationary period for new federal employees. During a probationary period, a bad civil servant can be fired with a snap of the fingers. No procedures, no burden of proof. It's always a good idea for the supervisor to be able to articulate a reason in case the employee files a discrimination complaint. But otherwise, it is a relatively easy process to implement accountability during probation.

The probationary period in the federal service generally is a year long. I tried to do research to find out how long it has been that way, but I could not find when it started. At a minimum, we've had a one-year probationary period for at least 60 years. For what it's worth, my research revealed that in the private sector, probationary periods are usually 30 days, maybe up to 90 days for some more senior positions.

The House Oversight and Government Reform Committee is now considering extending the probationary period from one year to two, The Ensuring a Qualified Civil Service Act (EQUALS). Sounds good, doesn't it? Snappy acronym. Make it easier to fire bad government employees by delaying their property rights

and appeal rights for an additional year after first hire.

Well, why the devil are they doing this? Seriously. Enacting legislation is hard. Subcommittees, committees, witnesses, reports, bicameral legislature so that it has to be done twice. If you're going to go to all this trouble, shouldn't it be for something really worthwhile?

Look. There's nothing really wrong with extending the probationary period. Given this area of increased accountability in the civil service, this proposal would increase the pool of easy-to-fire federal employees. But we can't really say that this particular pool of employees was causing us a problem anyway. If you look through MSPB's decisions, you won't find a whole bunch of employees who could not have been terminated during the first year of service because they were good employees, who then suddenly in the second year of employment became worthless dirt bags. MSPB's data base supports the gut feeling that most of have in this business. If we've mistakenly hired an individual who demonstrates he is a bad employee, those shortcomings show up in the first year. If they do not, I know of no studies that show he is more likely to mess up in the second year than he is to mess up in a subsequent year.

Sure, some individuals get though probation and then demonstrate unacceptable performance the next year. However, my experience is that had the immediate supervisor been more careful, that unacceptable performance would have been detected during the first year. If it was, and the supervisor did not act proactively to terminate the employee during probation, it's not the one-year law that's a problem; it's poor management that's the problem.

Maybe we do need new laws to make it easier to fire bad government employees. Maybe we even need to do away with civil service protections altogether, allowing agencies without MSPB (or other) oversight to provide due process prior to termination. Perhaps it's time to void the concept of a protected federal work place and shift completely to an employment at-will federal government workforce. Here at FELTG, we're committed to an efficient accountable government. If that involves a protected civil service, that's great. If it involves a different way of providing government services, we're open to that, too.

The problem that Congress is causing you is that it does not take the time and effort to answer these fundamental questions as to how our federal government should be run; who should be employed to provide government services, and how they should be managed. Instead, it nibbles around the edges of our system. It thinks that increasing the probationary period by a year will make a difference. It reduces the notice period for a removal in DVA to 22 days compared to 30 days in all the other agencies. It empowers OSC to order agencies to propose the removal of whistleblower-reprising supervisors. These may or may not be decent ideas in isolation, but they do NOTHING to positively affect the structural design of our civil service.

Hey, Congress! Here's a brilliant idea. Reserve a conference room somewhere, get a bunch of flip charts and coffee pots from the supply room, and stick the best and the brightest civil service scholars and practitioners in there with a lock on the door. Tell them that they won't again see the light of day until they come up with a comprehensive plan for civil service over-haul. Over time, maybe they'll decide that what we have now isn't all that bad after all. Or, maybe they'll decide that we need to scrap the whole system and just hire and fire civil servants like they hire and fire employees in the private sector: at will. Or, something in between. But at least we'd get a soup-to-nuts overview of what we want our government to be rather than this nickel-and-dime approach

we've been seeing recently with these pitiful excuses for civil service reform.

Nibbling is bad if you're on a diet trying to lose weight. It's also a bad way to run the civil service. Wiley@FELTG.com

### *Carelessness in the Workplace*
**By Barbara Haga**

This month we are branching out from negligence to the larger issue of careless work performance by a Federal employee.

**High Voltage**

We're going to begin with the case of the very scary High Voltage Electrician. The case is *Kaminski v. Navy*, 56 MSPR 393 (1993). High voltage basically means enough electrical energy that voltages high enough to inflict harm on living organisms.

The first important consideration in this case is the nature of the work of a High Voltage Electrician. The OPM Job Grading Standard for WG-2810 describes the work of the High Voltage Electrician as "installing, testing, repairing, and maintaining high voltage electric power-controlling equipment and/or distribution lines. The work requires knowledge of electrical principles, procedures, materials, and safety standards governing electrical systems above 600 volts." The standard mentions that the typical work situation for this series is work in substations/power-generating facilities and on electrical distribution lines. Clearly, the worker in this category is not installing outlets in a building or maintaining wiring on a ship. This is a higher level of electrical work and the ramifications of mistakes are much more severe.

**Careless Workmanship**

Kaminski was a High Voltage Electrician at Port Hueneme, California. He was removed for three charges, the first of which was careless workmanship. The others were AWOL and failure to follow his supervisor's orders. In the initial decision, the AJ sustained all three charges. The careless workmanship charge was supported by four specifications: (1) While operating a forklift, the appellant negligently severed a valve on a transformer, causing 50-200 gallons of dielectric fluid containing a toxic to spill into the San Diego Bay, (2) he spilled nuts and washers into a transformer that he was repairing, (3) while traveling from one building to another, he lost nine pairs of high voltage rubber gloves, and (4) he filled a diesel truck with unleaded gasoline.

Two of the specifications were sustained. The agency proved that Kaminski spilled the nuts and bolts into the transformer. The AJ found that the appellant, as a journeyman Electrician, should have been aware of the serious consequences of spilling small metal objects into a transformer, and sustained that specification. The Board wrote,

> Furthermore, the appellant was employed as a high voltage Electrician, and any mistakes made in such a position could be fatal to both the appellant and his co-workers. In this connection, we note that the appellant's supervisor testified that the nuts and washers spilled into the transformer could have caused it to explode.

A co-worker testified that he did not want to work with Kaminski because he was afraid "to get killed." The charge regarding putting the unleaded gasoline in the diesel engine was sustained. I read about what happens when gasoline goes in a diesel engine. The minimum requirement is draining the tank if the engine was never turned on. That's an

expensive repair by itself. If the engine was started and the truck driven, then problems mount up which could result in very expensive engine repairs.

The other two charges were not sustained. Just to be clear about the significance of the first charge, we would need to know about dielectric fluid. Dielectric fluid is used to prevent or rapidly quench electrical discharges. It is used in high voltage applications such as transformers, capacitors and high voltage cables to provide electrical insulation and to serve as a coolant. Dielectric fluids range from mineral oil to benzene. In Kaminski's case, the dielectric fluid that spilled into the bay contained a toxin. But, Kaminski didn't just spill the fluid, he was charged with hitting the transformer with a forklift which severed the valve and that allowed the dielectric fluid inside to go into the bay. Unfortunately, the AJ wasn't convinced that Kaminski was responsible, ruling that the Navy failed to prove by preponderant evidence that Kaminski was responsible for the severing of the transformer valve.

The AJ also did not sustain the charge related to the loss of the nine pairs of high voltage gloves because there were a number of theories, including theft, to explain the disappearance of the gloves from the appellant's truck. I checked a vendor of safety and industrial equipment website today and found that they are selling high voltage gloves in $50 to $100 range, although there were some that were over $200. In 1993 prices let's say they were worth $50 a piece. That charge is loss of material worth $450 dollars. Compared to the other three charges in this case, that one was chicken feed. I think the agency would have been better off leaving that one out.

**The Penalty**

With three charges sustained, but half of the specifications of one of them not sustained, the AJ mitigated the removal to a ten-day suspension. This took place in spite of the fact that Kaminski had already had a 30-day suspension for misuse of a government vehicle just a few years earlier, during his brief four-year career. The Board overturned the AJ's mitigation and reinstated the removal.

Their reasoning is interesting and is helpful for agencies considering misconduct that isn't worthy of a removal in each instance but where there are several instances of careless work performance. The Board wrote in the Kaminski decision that the two sustained specifications, spilling the nuts and bolts into the transformer and putting the gasoline in the diesel engine "… indicates that the appellant's carelessness fits into a pattern of behavior that presents a safety risk to other employees." So, several specifications of not following instructions where there are safety concerns attached, or poor decisions that did not take into account agency requirements for completing work, or similar failures or omissions might add together to form a pattern of behavior that would support an adverse action. Haga@FELTG.com

**[Editor's Note: Two take-aways from this case. First, although it's not supposed to, the Board sometimes reaches for mitigation when a number of *specifications* that are brought are not affirmed on appeal. MSPB's caselaw establishes that it will independently consider whether mitigation is warranted if one or more CHARGES fail, but not SPECIFICATIONS. Unfortunately, the Board's judges do not always see a distinction. As Barbara points out, sometimes it's a good idea to consider reducing your case to the most serious specifications. Secondly, the Board's decision to overturn its judge's mitigation reaffirms that it is a rare case indeed in which a removal is mitigated to a suspension if there is a prior suspension in the record. Not always the case, but a good argument for building progressive discipline into a removal.]**

**Join FELTG in Washington, DC, for a BRAND NEW writing class**

***Writing for the Win: Legal Writing in federal Sector EEO Cases***
February 13-15

This writing-based workshop program tackles some of the most important documents EEO Specialists and Agency Counsel write, including:

- Letters of Acceptance/Dismissal
- Final Agency Decisions
- Motions for Summary Judgment
- EEOC Appeals
- Settlement Agreements

*Registration is open now for this limited-enrollment class. Guarantee your seat ASAP!*

### *Where to Begin When You Start to Calculate Back Pay*
**By Deryn Sumner**

We've discussed a few times how important it is to value a case, even if you represent the agency, and even if you think your case is a slam dunk. Nothing is predictable with certainty in litigation, and you don't want to have to inform your settlement authority or client that you don't know how much the agency is liable for because the agency lost the case. We typically discuss this in the context of requesting information about compensatory damages during discovery. You don't want to be caught unaware of the types of pecuniary and non-pecuniary damages a complainant intends to seek.

But another large source of monetary damages that the agency can be on the hook for is back pay. Although an exact accounting of how much back pay would go to a complainant may be well beyond the wheelhouse of you as the agency representative, you should have a general idea of the overall amount. And so how do you start with such calculations?

Well, of course, this is only going to apply in cases where pay is at issue, such as non-selections at a higher grade and terminations. First, figure out what the relevant timeframe is and what the employee was earning at the time and what he or she would have earned if what is being claimed in the formal complaint is proven. The OPM website has salary scales for many years — don't forget to account for locality pay!

The Commission's Management Directive 110, Chapter 11 spells out aspects that should be considered in calculating back pay. Remember the guiding principle: the goal of remedies is to place the complainant as closely as possible in the position he or she would have held but for the discrimination. Thus, back pay calculations should consider any step increases, pay differentials, overtime that would have been earned if the employee had been in the position, and any other pay differential, such as premium pay. Back pay also includes other benefits of employment, such as leave, health insurance contributions, and retirement contributions.

You should also consider whether subsequent events impact an award of back pay, such as subsequently receiving a higher paying job, being unable to work because of a medical condition, or voluntary retirement or resignation from a job. Benefits such as unemployment compensation should not be deducted from back pay. However, worker's compensation benefits may be deductible, depending on the type.

If an employee has been terminated from employment, he or she must take efforts to mitigate damages before the EEOC (the same does not hold true before the MSPB). Again,

you should use the discovery process to find out about these efforts.

The goal here is to have a sense of how much the agency could be on the hook for should it not win its case. Even if you don't know down to the penny, having a general range can be essential for settlement discussions and accurately valuing your case.
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***The Future of the Civil Service?***
**By William Wiley**

Here's how we learn to do things in the federal civil service:

1. Congress passes civil-service-related legislation that the President signs into law.
2. Agencies read the law, take their best guess at what the details are, then start doing stuff (e.g., firing bad employees, if that's what the law is about).
3. The employee appeals the agency's action (e.g., the firing) and the US Merit Systems Protection Board, then the courts, tell us whether the agency did the right thing, or misinterpreted the law.

If you are a regular reader of our fabulously free FELTG newsletter, you might remember that the President earlier this year signed into law a major revamping of the disciplinary procedures that apply to most DVA employees, 38 USC 714. The purpose of the legislation was to make it easier for supervisors at DVA to hold employees accountable for misconduct by making it easier to discipline them.

Our hard-working friends at DVA then began working on how to implement the new procedures. That's Step 2, above. Just recently, we started getting elucidating decisions from MSPB (Step 3), and they look awfully good if you're a fan of employee accountability. Here's what we now know about the new law that applies to most DVA employees:

- **No *Douglas* Factor Analysis Required** – Experienced practitioners know that in most all other agencies since the early '80s, when an agency fires an employee for misconduct, it has to prove by a preponderance of the evidence that the penalty is not overly severe. To do this, the deciding official has to evaluate and document the 12 *Douglas* Factors that are relevant to a penalty decision, plus consider any other mitigating factors that the employee might provide in response to the proposed removal. In the cases we help agencies with here at FELTG, half of the time and effort in a removal action goes into developing this part of the agency's defense. As importantly, penalty defense is an area of the removal that is fraught with the potential for due process violations. In the first initial decision issued by an AJ at the Board applying the new law, although DVA conservatively included a *Douglas* Factor analysis in its removal, the judge effectively ignored it. She noted that since 38 USC 714(d)(2)(B) prohibits the judge's mitigation of the penalty, a *Douglas*-defense was irrelevant to upholding the removal once misconduct was proven. *Akinpelu v. DVA*, DA-0714-17-0474-I-1 (October 31, 2017)(ID).

- **Need Prove Only One Charge** – For almost 40 years, agencies have had the burden of proving all the charges brought or risk losing the removal penalty. Multiple charges demonstrate the seriousness of what the employee has done and why removal is warranted. As we've taught in our FELTG seminars for nearly 20 years, it is paramount that the agency in defense of its removal prove by a preponderance of the evidence that the employee's

misconduct is serious enough to justify the firing. In the second initial decision issued by the Board under DVA's new law, we learn that is no longer the situation in that agency. In that case, DVA brought seven charges against the employee ranging from having unauthorized guns, to failing to follow instructions, to engaging in hostile behavior. The judge reasoned that because DVA's burden of proof is the *substantial* level rather than the higher *preponderance* level, "if the agency is able to meet its burden of proof with respect to any one charge in a multi-charge disciplinary action, that will be sufficient to affirm the removal." The judge then picked two of the charges (one for back-up, I guess), adjudicated them, and affirmed the removal. Again, no *Douglas* Factor analysis. *Kneipp v. DVA*, PH-0714-17-0405-I-1 (November 2, 2017)(ID).

- **Decisions Under this Law are SHORT** – Four pages and each of these judges was done. Compare that to the last initial decision you got under 5 USC Chapter 75.

Oh, I can just hear those wimpy weak-kneed practitioners now; "But Bill, these are just a couple of decisions from two judges of the many judges at MSPB. They have no precedential value, so why should we get all excited for DVA?" Well, Potato Head, if you had been an MSPB insider as I was for nearly a decade, you would know that no Board judge issues a decision in cases this important without the draft decision being reviewed and approved by the Chief Judge for the region. MSPB AJs are not statutorily-delegated independent adjudicatory authority as are ALJs. The Chief Judge of the region (aka the Regional Director) has the authority and responsibility to make certain that AJ decisions are "correct" before they are issued. These two decisions are from two different regions under the auspices of two separate chief judges. In my opinion, they speak for more than just the two judges involved.

Think these new principles through together. Hypothetically, DVA has an employee who breaks a rule; say, comes to work an hour late, and is thereby AWOL. DVA management decides to fire the employee for the hour of AWOL even though the employee has been a good employee for 20+ years, was under a lot of stress the morning he was tardy, and other employees under the supervision of the Deciding Official have come to work late without being fired. At any other agency in government, this kind of removal most likely would be reversed. At DVA under 38 USC 714, it's a slam-dunk affirmed termination.

By the way, if you're sitting there all smug thinking that this approach will never be found to satisfy due process by the courts, you would be mistaken. This lower burden of proof, requiring that only one "charge" be proven to be substantial evidence that removal is warranted, coupled with no-*Douglas*/no-mitigation has been the law for 40 years when you defend a Chapter 43 unacceptable performance removal.

What does all this mean for you? You don't work at DVA. Why do you care that their ability to hold bad employees accountable just got humongous-ly easier for the supervisor? Well, my friends, think of it this way. If you're the Secretary of any other agency in government, when you notice that your political-appointee buddies over at DVA are removing employees who do bad things left and right without the worries like you have concerning losing a big one and being embarrassed all over the *Washington Post*, how long would it take you to get to your oversight committees on Capitol Hill and ask for the same me-too authority? If you're an employment law practitioner working nights and weekends to stay even with your case load, and you see your counterparts at DVA taking up golf and spending time with

their kids, are you not as jealous as a person can be? Should we call around the agency car with the siren and red lights for you to go up to The Hill, or will you be helicoptering in instead?

Here at FELTG, we take no position as to whether this is the direction that our civil service should be going. Whether it likes it or not, DVA is the canary in the coal mine on this reduced-rights approach. If the new law continues to result in MSPB decisions that allow supervisors greater control over employees who do bad things, unless there's a ground swell of objection other than from the usual suspects, we predict that someday this will be the extent of civil service protections. The future is now, at least over at DVA. Our FELTG-congratulations for this initial success and our ever-lasting thanks to the outstanding practitioner who flagged these decisions for us. We are, after all, in this together.
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