Federal Employment Law Training Group

Teaching the Law of the Federal Workplace

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I just can't do it. I know; I know. These days, all the really cool guys are wearing tan shoes with black or blue suits. I see it so much that I think there must be a trend-law or something. Unfortunately, I grew up under a different law, one that said men wear black shoes with black and blue suits. Occasionally a real rebel would wear something called "cordovan," but we traditionalists always saved that color for that pair of tan slacks in the back of the closet. Things are just so different these days. Same for the civil service. Different rules today. It's OK to lie to your employer. Federal employees who are fired don't necessarily get appeal rights outside the agency. One agency can order another agency to propose a removal, even if the employing agency does not believe that removal is warranted. Maybe these are good changes; maybe they are not. Whatever the case, there's no denying that our civil service is in a state of flux not seen since the Civil Service Reform Act was passed in 1978. And here at FELTG, we are honor-bound and committed to keep you up on the coming changes and help you develop strategies for honoring employee rights while protecting our country by holding government employees accountable. As this year draws to a close and 2018 approaches, stay tuned. Come to our seminars, read our newsletter. You may not see tan shoes on all of our instructors, but we guarantee you'll be turned on to the hottest trends in federal employment law.

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

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Could You Fire Matt Lauer?
By William Wiley

Pop Quiz: What do these three individuals have in common?

- Charlie Rose
- Matt Lauer
- Garrison Keillor

Answer: No doubt, a list of very descriptive words came to mind when you were trying to come up with an answer. Well, since this is an employment-law-like newsletter, you might have guessed that is the sort of answer we're looking for. When you come at it from the human resources direction, the answer relevant to all you readers is this:

> *They each were fired within about 24 hours of being charged.*

When this topic came up in one of our famous FELTG seminars a week or so ago, one of the attendees opined that it would be great if we could move that quickly in the federal government when we come across a bad employee.

Well, we can. More or less.

Using the Lauer situation as an example, here's what's been reported:

1. One of Lauer's coworkers, accompanied by her super-duper attorney, met with representatives of the company's human resources office. In that meeting, the former co-worker described in graphic detail unwelcome sexual contact initiated by Lauer.
2. Human resources confronted Lauer with the charge, which he did not deny (or may have even admitted; I can't tell from the news reports).
3. Lauer was then fired.

There's no reason that a good human resources office in a federal agency could not essentially accomplish this same result if there were a sexual harasser in the workplace, with a bit of tweaking to comply with the civil service law.

1. You would have a sworn statement from the victim. That's a preponderance of the evidence. No need for a big investigation or a bunch of witness interviews. It is more likely than not that the event occurred if she said it did, she's credible, and there's no evidence it did not occur.
2. Because it's the federal government, we would have to draft a proposal to remove. That should take maybe 15 minutes: "By this memo, I propose that you be removed based on the following charge. On November 30, 2017, you coerced Vickie Victim into having unwelcome sex with you." Attach to the memo the sworn statement above.
3. Unless you are fortunate enough to work at DVA, you'll need to complete a *Douglas* Factor worksheet. If you can't pump up *Douglas* Factor 1, the nature and seriousness of an offense like this to justify a removal, you need to come to one of our classes. Commenting on all 12 *Douglas* Factors should not take more than 20 minutes.
4. In the proposal notice, above, include a paragraph that places the employee on Notice Leave. That way, you can get the employee out of the work place the same day that you draft the proposed removal which should be the same day you obtain the sworn statement.

In the private sector, where the darned Constitution doesn't apply, they guy stops getting paid that day. However, in the fed, we'll need to give the dude a seven-day chance to defend himself orally and in writing, and can't issue a final decision until Day Eight. At least

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he's out of the workplace all this time. In most cases, we'll have to pay him for another 22 days because the law says so, but he's already fired. In some cases, you'll be able to get him off the payroll on Day Eight if you conclude the misconduct amounts to a criminal assault or some other crime that could involve jail time.

Can your human resources office do this? If not, then you should fix that. Victims in cases like these, as well as the citizens of our great country, deserve swift justice. Does your legal office see a problem with moving this quickly? Then the folks over there need to read a few MSPB cases to find out how expedient this can be.

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!

We take a lot of flak in the fed for not acting quickly to hold employees accountable. The recent incidents reported in the press give us a reason to rethink how we initiate removal actions in egregious circumstances. Here at FELTG, we recommend that you get your best minds together and develop a predetermined procedure with specific assignments and draft templates to deal with issues like these before they occur. Our coworkers who are the victims of sexual misconduct deserve no less.

As my grandmother used to say, "It doesn't do any good to order the fire extinguisher after the fire has started." And as I learned in the Boy Scouts many years ago, "Be prepared." Be ready for things like this to happen, because they are going to happen again, Mister, they are going to happen again.
Wiley@FELTG.com

It's Called Sexual MISCONDUCT for a Reason
By Deborah Hopkins

You probably saw last week that *Time* Magazine's 2017 Person of the Year is not a person at all, but rather is a group of people: "The Silence Breakers," the women who came forward under #MeToo as victims of sexual harassment and assault.

This #MeToo movement continues to reveal more details of sexual misconduct in the workplace, and more horrifying details of sexual misconduct – from the highest levels – are coming out. It may seem like "guilty until proven innocent" is the trend in Hollywood (think Matt Lauer; Kevin Spacey; Harvey Weinstein), but keep in mind that there's a lot we don't know about why those ramifications hit so quickly. There could have been admissions, confessions, or agreements to resign.

What we do know is that because of these front-page stories, there is now a heightened awareness and sensitivity to sexual harassment and related inappropriate conduct in the federal government. Sexual misconduct among federal employees is not anything new,

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but because it's a topic on everyone's minds, it's worth a deeper look today.

First of all, *sexual harassment* is a term of art and while it's easy to allege, it's actually not that easy to prove. There are elements to a sexual harassment claim, and the complaining employee must prove them all in order to prevail. So, there is a LOT of inappropriate conduct that does not rise to the level of Title VII sexual harassment but is **still inappropriate** in the workplace.

What does this mean for you, at your agency? It means you should *not* wait to discipline an employee who engages in inappropriate sexual conduct until a complaint of sexual harassment is filed or proven. The EEO complaint process takes so long, you could have a predator roaming the halls of your agency for years before there's ever a finding. So do not delay.

A lesson we learned from the Postal Service 30 years ago is that an agency can remove an employee for inappropriate sexual conduct, even if the conduct does not rise to the level of Title VII harassment. It bolsters the agency's case for removal if the employee's conduct affects other agency employees, and if the agency has a legitimate concern about incurring potential Title VII liability if it fails to take appropriate action to correct the employee's behavior. *See Carosella v. USPS,* 816 F.2d 638 (Fed. Cir. 1987). Part of an agency's obligation in these cases is to promptly investigate and STOP harassment from occurring, so acting quickly is the best way to protect employees from harm – and to protect your agency from liability.

So, what kinds of cases warrant removal as an appropriate penalty? Let's look at a few.

Supervisor Misconduct

Supervisors are held to a higher standard than co-workers, so if the perpetrator is a supervisor we know that removal can be warranted, especially when there are multiple charges of inappropriate sexual behavior toward subordinates. Last year the MSPB affirmed a supervisor's removal for Unacceptable Conduct where the supervisor made inappropriate comments with sexual undertones to several subordinates, including telling an employee that he was willing to help her cheat on her husband, and telling a different employee that she could take the day off if she was willing to act "a little unprofessional." *Oliveros-Ballon v. USPS,* SF-0752-15-0615-I-1 (April 15, 2016)(NP).

In another recent case, a supervisor's removal was affirmed after she made comments of a sex-based nature and touched an employee on the buttocks on multiple occasions. That's right, female supervisors engage in this type of behavior as well, and are disciplined accordingly. *Reid v. Air Force*, CH-0752-14-0849-I-1 (April 5, 2016) (NP).

Over at the VA, a supervisor's removal was affirmed after he was charged with 20 counts of inappropriate and intimidating sexual comments, sexual conduct, and changes to working conditions, of his female employees. *Alberto v. VA*, 98 MSPR 50 (2004).

There are hundreds, if not thousands, of cases that follow this same line of outcome, but hopefully by now you get the idea. Sexual misconduct – regardless of what you decide to call the charge – is nothing new and agencies have been successfully removing supervisors for decades over inappropriate sexual language and conduct in the workplace.

Coworker Misconduct

In the case of a non-supervisor, though, removal is often still an appropriate penalty. Earlier this year, the Federal Circuit upheld a removal for Unacceptable Conduct where the appellant made 10 vulgar sexual comments to female customers and coworkers. *Canarios v. USPS*, No. 2017-1935 (Fed. Cir. 2017) (NP). In another recent case, an MSPB AJ upheld a Conduct Unbecoming removal

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when an appellant made sexual comments and gestures at three coworkers and did not stop after they objected to his conduct. *Adkins v. DOD*, SF-0752-16-0294-I-1 (December 12, 2016) (NP).

A Treasury employee's removal was upheld by the MSPB because he continued to talk to a coworker in sexually offensive and derogatory terms, after being explicitly told by management not to do so. *Lentine v. Treasury*, 94 MSPR 676 (2003). **[Editor's Note: This is critical and sometimes, this is hard. Before we can discipline, the employee has to be on notice of the prohibited misconduct. Some conduct obviously violates accepted norms of behavior and can be disciplined even if we did not tell the employee not to do it; e.g., non-consensual sexual touching. On the other hand, some conduct is not so obviously inappropriate; e.g., touching someone's shoulder. The manner and context of conduct often determines whether the employee should have known not to do it; e.g., was the shoulder touch an "Atta boy/girl" congratulation or was it a "Hey, baby. You got some nice sexy shoulders there." The good news is that a supervisor can establish rules that clarify any gray areas; e.g., "No touching. Anywhere. Any time."]**

This is serious stuff that requires appropriate action.

If you're dealing with a potential sexual misconduct charge, you'll want to pay special attention to these mitigating or aggravating factors in penalty selection for sexual harassment cases:

1. Physical contact
2. Frequency or severity of the conduct,
3. Supervisory status,
4. Clarity with which employee is on notice of rules prohibiting sexual harassment and improper conduct, and
5. The employee's potential for rehabilitation.

See, e.g., Reid, supra.

Is there a correct way to handle in these cases? Yes. The answer is to take prompt, effective corrective action so that these behaviors do not continue. Look to the cases for guidance. And hey, while it seemed for a while that Congress was above it all, we're finally starting to see that in sexual misconduct is a serious offense, and it deserves consequences, no matter who you are. Hopkins@FELTG.com

EEOC Finds Agency Should Have Allowed Employee with Terminal Cancer to Telework
By Deryn Sumner

Last month, the Commission issued a decision modifying a Final Agency Decision which had found no discrimination, and found the National Science Foundation failed to accommodate an employee with stage 4 terminal cancer. This case is notable for a few reasons. One, it is another in a string of cases where the Commission has instructed agencies that it must allow telework as a reasonable accommodation. It is also notable in that it illustrates how long these cases take to process, as this one was filed in 2011, and the Complainant died several years prior to receiving the decision. Finally, this case is notable to me personally as I had the pleasure of knowing and representing the Complainant before her death. Although this case took many years to litigate and my client did not live to see her claims prevail, I am proud to finally obtain justice on her behalf.

The case citation is *Doria R. v. National Science Foundation*, EEOC Appeal No. 0120152916 (November 9, 2017). First, let's

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address the procedural delays. The Complainant filed her formal complaint on November 9, 2011. She received an ROI and requested a hearing before an Administrative Judge. That administrative judge granted summary judgment in the agency's favor on February 9, 2012. The Office of Federal Operations reversed the grant of summary judgment and remanded the case for hearing more than 21 months later in *Doria R. v. National Science Foundation*, EEOC Appeal No. 0120121886 (December 11, 2013). It then took until October 2014, another 10 months, for the case to actually be heard by an EEOC Administrative Judge. It took six years to the day from when the Complainant filed her formal complaint to when the EEOC issued a decision finding discrimination. And the decision is not even final yet, as remedies including compensatory damages and attorney fees have not yet been decided. Although I counsel my clients that the federal sector EEO complaints process takes years, this puts a sobering reality on what a realistic timeframe for processing means.

In terms of the facts of the case, they are pretty straightforward for the claims on which the Complainant prevailed. Doria R., as the Commission has renamed her, had been diagnosed with breast cancer, which had metastasized in her bones and caused her spine to be very brittle. She had been in a car accident, which further exacerbated her spinal injuries and required surgery, and there was concern that she could become paralyzed if her spine was further injured. The Complainant requested to telework full-time because of her surgeon's concern that she should not commute to work on public transportation due to a risk of further injury. This request was denied because of alleged concerns about the Complainant's productivity on days she teleworked. She then requested one additional day of floating telework per week, which was also denied after the Agency repeatedly requested additional medical documentation.

The Commission noted, "providing disabled employees with the reasonable accommodations of telecommuting is consistent with the Rehabilitation Act's goal of assuring 'equality of opportunity, full participation, independent living, and economic self-sufficiency' for individuals with disabilities." The Commission further found that there was no justification for the Agency to request additional medical documentation, as what the Complainant provided substantiated that she was limited in major life activities and that there was a nexus between the requested accommodation and her limitations. In finding the Agency failed to accommodate the Complainant, the Commission also noted that the Agency did not present specific evidence that the Complainant's productivity was lower on days she teleworked as compared to days she was in the office, that granting additional telework days would have impacted the Agency's mission or would have otherwise caused an undue hardship. The Commission also found that the Agency's 10-month delay in responding to the request for telework, given that the Complainant needed the telework immediately and "each day the Agency failed to provide her with additional telework threated to exacerbate her serious medical condition, to the point of paralysis" rendered the delay unreasonable.

The Commission has clearly indicated to agencies that the days of denying requests for telework on the basis that an agency is not responsible for an employee's commute to work are over. I'm not saying that telework is always an appropriate or effective accommodation. However, agencies should carefully examine such requests based on the Commission's decision here, as well as in *Lavern B. v. HUD,* EEOC Appeal No. 0720130029 (February 12, 2015), and in other recent decisions. Sumner@FELTG.com

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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)

More to Learn from DVA
By William Wiley

Thirty-nine years ago this month, all of us employment law practitioners began reading and re-reading the brand new "Civil Service Reform Act of 1978." So much to know (and not know). New rules, new flexibilities; every agency developed an informal brain trust to figure out how this new law worked and what strategies to employ to take advantage of it.

Our friends at DVA are in the same situation right now. Last summer, Congress created new procedures that DVA could use in lieu of the traditional 5 USC Chapter 75 procedures to hold employees accountable for conduct and performance. Here at FELTG, we've predicted that these new procedures are effectively a test run and will be employed throughout the civil service if they prove to be successful at increasing DVA employee accountability.

Three of the major changes to the accountability procedures that come from the new DVA law are:

- A shortened notice period between the day an employee's removal is proposed and the day the employee can be removed from the payroll (from about four weeks to about three weeks),
- A lowered burden of proof for misconduct removals (from a preponderance of the evidence (51%) to substantial evidence (~40%), and
- A prohibition on a judge or arbitrator from reducing a penalty (no mitigation, no need to justify a penalty using the *Douglas* Factors).

Recently, we got an insightful question from a DVA reader who had read the law more closely than we had here at FELTG:

> *Good afternoon, I'm curious to hear your thoughts as to any benefits VA might have from issuing a 14-day suspension under 752 as opposed to a 15-day under 714. There's MSPB jurisdiction but no penalty mitigation and a lower burden of proof.*

We weren't really sure what the question was all about until we re-read the law. Guess what? These new 38 USC 714 procedures that allow for a lower burden of proof and no-penalty-mitigation apply to removals, demotions, and suspensions IF THE SUSPENSION IS 15 DAYS OR MORE. That means that for a shorter suspension, DVA has to use the old 5 USC Chapter 75 procedures that require a

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preponderance of evidence and penalty-justification.

Wow. How crazy is that? If our interpretation is correct, that it is easier to defend a long suspension than it is a short suspension, that throws DVA into a weird strategy position. Our advice would be something like this:

- As a general rule, we can't find any real benefit to a suspension and we find a number of drawbacks. Therefore, we recommend doing away with suspensions altogether and offering the employee a Reprimand in Lieu of a Suspension for a second or more serious offense. (Attend our January 23 webinar on ***Discipline Alternatives: Thinking Outside the Adverse Action*** for more detail on why suspensions really don't work.)
- If DVA wants to suspend in spite of there being no evidence that a suspension corrects misconduct, for non-bargaining unit employees, the shorter 14-day suspension is still the better option as it can be challenged only within DVA, thus avoiding an MSPB hearing.
- For bargaining unit employees, we recommend avoiding short suspensions and using the 38 USC 714 option. We don't want an arbitrator to apply Chapter 75 mitigation and preponderance to a suspension if we can help it.

These are fascinating times in government employment. As we've said often here at FELTG, Congress's piecemeal approach to increasing accountability via segmented legislative action is going to create this sort of nonsensical anomaly. DVA, best of luck in figuring out how to use all of this new flexibility. The rest of the civil service can hardly wait to see how it turns out for you. Wiley@FELTG.com

What to Do if You're the Victim of Workplace Harassment
By Deryn Sumner

First, a joke. My husband and I were walking down the street recently when he turned to me and asked, if Santa Claus knows if you've been bad or good, how did he not pick up on the fact that Rudolph was being bullied by the other reindeer in the workplace? I did not have a good answer for him. But I can share with you the EEOC's guidance on what you should do if you believe you are being subjected to harassment in the workplace.

This article is on the front page of the EEOC's website, which is unsurprising given that every news cycle brings reports of additional celebrities, politicians, directors and CEOs being accused of harassment. I for one am glad that these issues are being brought to the forefront and commend the brave women and men who are risking their careers and personal reputations to speak out against workplace harassment.

But back to the EEOC's tips on how to respond to harassment in the workplace. The first tip is to tell the person who is harassing you to stop, so long as you feel comfortable doing so. Anyone who is familiar with what it takes to establish an actionable claim of harassment knows why this tip is so important. In order to establish an actionable claim of harassment, the complainant must demonstrate that the conduct was unwelcome. Going along with the inappropriate conduct, even if there is an imbalance of power or intimidation, opens the door to a defense that the interactions were consensual and therefore not unlawful.

The EEOC article next tells employees to check and see if the employer has an anti-harassment policy. As employees of the federal government, the answer is yes, and that policy is likely distributed on at least an annual basis. The policy should lay out how an employee can report harassment, but as the

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EEOC's article mentions, you can and should speak to a supervisor (and it doesn't have to be your own supervisor) about the conduct. As we all know, and as the EEOC's article mentions, reporting harassment (either something you've been subjected to, or by opposing harassment you have witnessed) constitutes protected activity for which you are protected from retaliation.

If the Agency does not take appropriate steps to end the harassment, then, the article notes, private sector employees have the option to file a private sector charge and federal employees can proceed with the complaints process. The article is available on the EEOC's website here: https://www.eeoc.gov/eeoc/newsroom/wysk/harassed_at_work.cfm
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The New HHS Requirement for PIP Length
By William Wiley

Recently, the Acting Deputy Secretary of Health and Human Services took the accountability-bull by the PIP-horns. Instead of leaving the length of a PIP to the vagaries of the various supervisors and management advisors within the 80,000-employee agency, effective immediately, PIPs at HHS generally are not to exceed 30 days in length, barring some CBA that states otherwise. In addition, the immediate supervisor administering the PIP is required to decide whether the employee performed acceptably during the PIP and initiate steps to implement that decision within seven days of the end of the PIP, if not sooner.

First, our congratulations to the leadership at HHS. Bravo! A poor understanding of the PIP process and a mistaken belief that somehow a longer PIP is either required by law or better for America has been a long-lasting problem in our civil service. It's absolutely delightful to see an agency taking seriously our government-wide challenges with accountability and implementing a drop-dead easy first step to make things better for agency supervisors who are trying to get done the government's work.

In response to this recent change, we got a question from a Concerned Observer (CO) who wondered if this change comported with due process. Separately, our CO wondered if the notice period in a removal was long enough to satisfy due process if it was only seven days. Apparently, in the CO's agency, employees who were having their removals proposed were routinely being given 14 days to respond. Our response follows and may be helpful to those of you considering whether to follow the shorter-PIP lead of HHS:

> As for the length of the response period in a removal and due process, the Constitutional due process requirement says that the citizen has to be given an opportunity to defend himself from the government before the government can take his property. Congress defined the length of an appropriate due process response period in 1978 when it passed the Civil Service Reform Act. Therein, it defined the reasonable response period to be seven calendar days, 5 USC 7513(b)(2). In the 40 years since then, no court nor the MSPB has ever held that seven days is a violation of due process and thereby an inadequate period of time to respond. Not. Ever.
>
> In fact, there are situations in which the law allows for an even shorter response period. In a statute that applies only to law enforcement officers, if a LEO is found guilty of a felony, there is a LEO-specific statute that says fewer than seven days still satisfies the minimum due process requirements. Bottom line: There is no legal reason to give more than seven days' notice in a proposed removal action.
>
> As for whether a PIP longer than 30 days will increase the chance of

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success before the Board, in 40 years, a longer PIP has never improved the chances of agency success. Not. Ever. Of all the federal employees fired in the past four decades for poor performance, none has ever been put back to work on appeal to MSPB because the PIP was not longer than 30 days. In fact, in the history of our great country, going back to the Articles of Confederation, only one performance removal was reversed by the Board because the PIP was too short. That was when the Department of Agriculture used a three-day PIP back in the ’80s. Bottom line: I was chief counsel at MSPB for nine years. I’ve reviewed thousands of terminations on behalf of the Board’s Chairman. I know this stuff cold. A longer PIP does not help you.

In fact, a longer PIP makes you look foolish and like a waster of taxpayer dollars. Here’s why:

- We hire employees who claim they can do a job. Unless specified as selected for a trainee position, new hires have to meet job qualification requirements when first employed.

- Newly hired employees have to be given a couple of months to get used to a new position. MSPB calls this a warm-up period. After that, they should be fully functioning, successfully performing employees.

- Prior to PIPing an employee, the supervisor has to have observed enough job deficiencies to reach the conclusion that the employee is performing unsuccessfully; that even though the employee said he could do the job when hired and has been given 60 days or so to get used to the job, he can’t do it. In the private sector, most employers would fire the employee at this point.

- However, by law prior to firing a failing career federal employee, we have to give him an opportunity to demonstrate that he actually can perform, even though it appears he cannot. 5 USC 4320(b)(6). The law doesn’t say to “improve” to acceptable performance. This is not a “developmental” period. The law says to “demonstrate” acceptable performance. So, if we have an employee who said he could do the job when hired, and he has demonstrated to his supervisor he cannot do his job and does not deserve to be paid every two weeks because of his non-productivity, how much more Federal money should we spend to allow the guy to demonstrate whether he can do his job? We look foolish if we give more than 30 days. If the government were being run like a business, the individual would be given much less than that.

As for the seven-day decision-making period in the HHS Secretary’s new instruction, ask yourself this: If a supervisor has already decided an employee is a poor performer (a prerequisite to initiating a PIP), and has observed the employee closely and counseled the employee during the PIP (a requirement for a valid PIP), then how much more time does the supervisor need to decide whether the employee should be removed, given that each day the supervisor waits beyond the PIP to initiate a decision is a waste of taxpayer dollars?

In our practice here at FELTG, when we work with a supervisor to PIP an employee, the supervisor makes the

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> decision on day 31 of the initiation of the PIP. Seven days, frankly, is generous. Put another way, a supervisor who cannot decide within a week of the end of the PIP whether we should keep paying an individual who has already demonstrated he does not deserve to be paid probably should be PIPed himself. Holding employees accountable is a fundamental obligation of every federal supervisor.

A large part of the length-of-PIP issue was caused by OPM. Way back in the early ’80s, OPM in its regulations coined the term “performance improvement period.” That’s of course, where we got the acronym “PIP” and those initials have come to be widely used throughout government since then. Unfortunately, the law that was passed in 1978 never called for an “improvement” period. Instead, it specifically called for a “demonstration” period. 5 USC 4302(b)(6). Those are two fundamentally different concepts. Want me to demonstrate whether I can play the piano? In 20 seconds you will know I cannot. Want me to improve my piano playing? That, my musical friend, will take weeks and months. (Dr. John is my New Orleans idol, musically and sartorially: https://www.youtube.com/watch?v=YcvudjjnFdo)

Sometime in the ’90s, OPM saw the error of its ways. Its regulations no longer call for an improvement period. Instead, they mimic the law and call for a “demonstration opportunity,” 5 CFR 432.104. Unfortunately, “DO” has not caught on and we continue to use the misnomer “PIP”, thereby mischaracterizing the purpose of the period and causing confusion as to a proper length.

As we have said many times, because of the frustration that Congress has had with our seeming inability to hold federal employees accountable, we are on the verge of losing our statutory civil service protections. In addition, a number of agencies are looking at serious reductions in the number of individuals they employ. Can you spell RIF? If your agency is routinely using PIPs of more than 30 days, then you are contributing to the problem. You are failing to efficiently hold employees accountable for non-performance, and putting yourself in a position in a RIF to release highly-productive junior employees because you have a crowd on more senior non-performers who will be retained in a reduction in force.

Keep PIPs, response periods, and decision-initiating periods short and America will be the better for it. Wiley@FELTG.com.

Attention Attorneys and EEO Practitioners:

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!

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EEOC's 2017 Performance and Accountability Report
By Deryn Sumner

The Equal Employment Opportunity Commission recently issued its Performance and Accountability Report for Fiscal Year 2017. You can find the complete report here: https://www.eeoc.gov/eeoc/plan/upload/2017par.pdf

The bulk of the report focuses on the efforts made by the EEOC on obtaining relief for victims of discrimination in the private sector and before state and local governments. According to the report, the EEOC secured $484 million in monetary relief in fiscal year 2017, and $86 million in monetary relief for federal government employees and applicants. The report also referenced the reduction in pending private sector charges in what the Acting Chair of the EEOC diplomatically called a "resource-constrained environment." The report also discusses advances in modernizing the private sector charge processing process by moving more aspects of the charge processing process to online. To that I can only offer my congratulations, and a hope that the EEOC will move towards modernizing more of the federal sector process in 2018 and beyond, including allowing complainants and their representatives access to the FedSEP (Federal Sector EEO Portal)system.

In terms of the federal sector process, the EEOC offers the following statistics for fiscal year 2017:

- The EEOC resolved 4,284 appeals of agency decisions, including 85% of appeals that were more than 500 days old at the beginning of the fiscal year;
- The age of those cases still pending at the Office of Federal Operations was reduced by 13.6%;
- The EEOC categorized 100% of the pending appellate case inventory and 98.2% of new inventory into a new case management system;
- With regards to cases pending at the hearing stage, the EEOC asserts that 70.1% of these cases had an initial status conference in FY 2017. The Commission noted that this metric will not reach 100% as not all cases require initial status conferences;
- The Commission updated and released guidance including *A Guide to Assist Federal Agencies to Provide Personal Assistance Services; Bathroom/Facility Access and Transgender Employees; and Proposed Enforcement Guidance on Harassment that Creates a Hostile Work Environment*;
- Finally, the EEOC issued 68 findings of discrimination (note, this refers to decisions from the Commission's Office of Federal Operations, not initial decisions issued by administrative judges).

I appreciate the EEOC's transparency to federal government employees and the federal taxpayer as to its progress on efforts to eradicate workplace discrimination.
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And with that, my friends, the FELTG Newsletter takes a break until next year. We hope that you will as well, celebrating whatever traditions float your boat this time of year. Come 2018, if there's still a federal civil service, we'll still be here, trying to help you fine folks understand it and use it for the betterment of our fellow citizens. We may not always say what you'd like to hear, and we may not always get it exactly right (darned alcohol), but at least we're still here trying.

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