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

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2018!

We are just barely into 2018, and we already know that this will be a year of some major world-altering changes. For the first time since 1959, there will no longer be a Castro in charge of Cuba when Raúl retires as its President. On the other side of the world, Emperor Akihito of Japan will abdicate this year, the first abdication from the Chrysanthemum Throne in over 200 years. And, here in the good old United States, in our dearly-beloved civil service, … who really knows what will happen? Maybe we'll get one, two, or three new Board members at the Merit Systems Protection Board. Maybe we won't get any. Maybe our leadership in the world of civil service law will finally take the bull by the whatever and give us some needed systemic improvements. Or, maybe Congress will just keep chasing this-nit and that-shadow of an issue that crosses its path, much like a dog responds when it thinks it sees a SQUIRREL! The way that time works, we have lots of questions regarding what will happen in 2018, but will have no real answers about what actually did happen until this time next year. So stick with us here at FELTG. Come this time next year, we'll be able to identify all the important abdications for you, perhaps even one or two that you might not have expected at all.

Bill

COMING UP IN WASHINGTON, DC

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

EEOC Law Week
April 9-13

Writing for the Win: Legal Writing in Federal Sector EEO Cases
May 8-10

JOIN FELTG IN LAS VEGAS

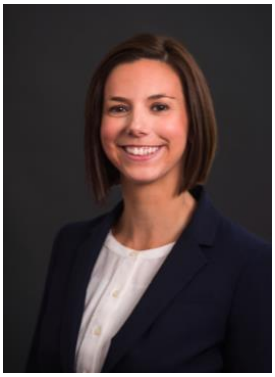
Developing and Defending Discipline
February 27 - March 1

WEBINARS ON THE DOCKET

Discipline Alternatives: Thinking Outside the Adverse Action
January 23

EEO Considerations in Selection and Promotion Cases
February 1

A New Addition to the Newsletter Family



This month, we welcome our newest contributor to the *FELTG Newsletter*, Meghan Droste:

Ms Droste is a senior associate at Wilkenfeld, Herendeen & Atkinson in Washington, DC. She is admitted to practice law in the District of Columbia and the state of Maryland, before the United States District Courts for the District of Columbia and the District of Maryland, and before the United States Courts of Appeals for the District of Columbia Circuit, the Fourth Circuit and the Fifth Circuit.

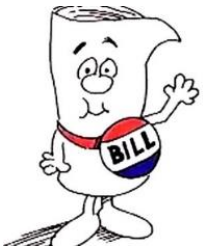
She represents federal and private sector employees in employment disputes before the Equal Employment Opportunity Commission, the District of Columbia Office of Human Rights, federal district courts, and federal appellate courts. Ms Droste has also represented federal agencies before the Equal Employment Opportunity Commission and the Merit Systems Protection Board.

She graduated from The George Washington University Law School, she holds a Master of Science in Justice, Law and Society from American University, and has a Bachelor of Arts in Political Science from Boston University. Prior to joining Wilkenfeld, Herendeen & Atkinson, Ms Droste was an associate with The Law Offices of Gary M. Gilbert & Associates, P.C., where she served as the team lead for the firm's LGBTQ and Gender Issues Practice Group. She also worked as a research fellow and law clerk with AARP's Found Litigation. In law school she represented employees as part of the Public Justice Advocacy Clinic, and served as an Articles Editor on The George Washington International Law Review.

Ms Droste recently published an article entitled *Sextortion as a Tangible Employment Action* in the Maryland State Bar Association Section of Labor and Employment Law Newsletter.

Congressional Health Insurance and Your Children

By "Just a Bill" Wiley



OK, Kiddies, here's how government really works, and you won't find a schematic of this in the back of your high school civics textbook (e.g., "I'm Just a Bill").

1. Way back in 2013, OPM granted an exemption to the requirements of Obamacare to members of Congress.
2. A Senator thought that OPM's actions were unjust, and demanded that OPM produce documents to support how it made the decision to grant the exemption.
3. OPM did not comply. For years.
4. In 2017, the White House nominated a new director of OPM, to replace the acting director.
5. The disappointed Senator, seeing an opportunity to get the information he had been waiting on for since 2013, placed a hold on the OPM director's nomination.
6. About the same time, the White House decided that our great country had too many federal regulations. Therefore, it placed a semi-freeze on the issuance of new regulations by agencies. Agencies that don't happen to have a current politically-appointed head in place had better be darned careful about issuing ANY new regulations by an acting director.
7. Also about the same time, the statutory deadline for OPM to issue new regulations implementing the Notice Leave provisions of the Administrative

Leave Act of 2016 came and went in September 2017.

- Those new regulations, if implemented properly by OPM, will allow agencies to get potentially dangerous employees out of the workplace during the 30-day notice period of a proposed termination, thereby limiting their ability to kill people.

Which brings us to your children (or to the children you might conceivably have some day). A number of agencies have mistakenly concluded that Notice Leave cannot be used until OPM issues implementing regulations. Of course, that is wrong. As every student learns in that high school civics class we talked about earlier, a bill becomes a law when signed by the President. The effective date of the new law is NOT delayed until regulations are issued, unless the law itself so states. And the Administrative Leave Act of 2016 did not delay its implementation. Therefore, agencies have had the authority to use Notice Leave to get dangerous people out of the workplace since the President's signing of the bill over a year ago.

Unfortunately, you might work in one of those agencies that has not implemented Notice Leave because OPM has not yet issued the regulations it was required by law to issue no later than September. If that is the case, and you are keeping bad employees in the workplace during the 30-day notice period of a proposed removal, you are exposing yourself unnecessarily to a potential 30 days of violent behavior. In our great country, violent behavior sometimes involves guns, explosives, and death.

You can tell we feel strongly about this here at FELTG. We want everybody's children to have a mom and dad to grow up with, to teach them how to live, and how to apply for good government jobs when that time comes. If you are the victim of workplace violence caused by your agency's failure to implement Notice Leave (because we don't have OPM regulations, because we don't have an OPM director, because OPM granted an exemption to Congress relative to Obamacare), our heart breaks.

Government is supposed to work. This is not government working. When you get home tonight, be sure to hug someone close to you. Because you just never know when you'll get the next chance. Wiley@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. From performance and conduct to leave abuse to whistleblower reprisal to defending against frivolous EEO complaints, we've got you covered.

Registration is open. Bill and Deb will see you there!

It's Called a Deadline, not a Whenever-You-Get-to It-Line
By Meghan Droste

Although I have represented both agencies and complainants, I spend most of my time on the employee side of things. As anyone who regularly represents employees will tell you, at

times it feels like the rules only apply to complainants. There are numerous deadlines, including some that feel impossibly short, and if a complainant misses just one, it can be fatal to her complaint. On the other side, agencies miss deadlines with some frequency and it seems like there are no consequences. Fortunately, or unfortunately depending on your perspective, that perception is not (always) right. The case discussed below highlights just how important it is for agencies to meet their deadlines as well.

In *Selene M. v. Tennessee Valley Authority*, the complainant worked for the agency as a contract General Foreman. In 2011, the agency involuntarily reassigned the complainant to a different work location, downgraded her position, and reduced her pay. One month later the agency removed the complainant and permanently banned her from employment with the agency as an employee or a contractor. The complainant filed a formal complaint alleging a hostile work environment and reprisal. Notably, the agency acknowledged in its letter accepting the complaint for investigation that it was a joint employer of complainant.

Following a hearing, the administrative judge entered a finding of sex discrimination and reprisal. The judge ordered the agency, among other relief, to place the complainant in a permanent position with a salary equal to or greater than what she was earning at the time of the discriminatory events. The judge also ordered the agency pay the complainant back pay with related retirement benefits.

The agency attempted to appeal the administrative judge's decision. *Selene M. v. TVA.*, EEOC App. No. 0720150024 (October 18, 2016). I say attempted because although it appears the agency timely mailed its final order to the complainant, it failed to timely mail its final order and appeal to the Commission. The agency explained its 13-day delay as an inadvertent error. The Commission, however, was not moved by this explanation, rejected the agency's appeal, and ordered the agency to take the same remedial actions the administrative judge previously ordered.

Unlike its appeal, the agency timely submitted its request for reconsideration. *Selene M. v. TVA*, EEOC Req. No. 0520170121 (April 11, 2017). In its request, the agency argued that the order to reinstate complainant in a permanent position and to pay related benefits was plainly an error because the complainant was a contractor and not entitled to this relief. The Commission refused to address these arguments, rejecting the agency's request because there was no error in its earlier the finding that the agency's initial appeal was untimely.

The agency did not take no for an answer, as we learn from the complainant's subsequent petition for enforcement. *Selene M. v. Tennessee Valley Auth.*, Pet. No. 0420170027 (December 15, 2017). Although it implemented some of the relief previously ordered, the agency refused to reinstate the complainant or pay the full amount of back pay and benefits as required by the Commission's orders. In response to the complainant's petition for enforcement, the agency again argued that the relief the Commission ordered was improper. Unsurprisingly, the Commission was not persuaded. It noted in its response to the complainant's petition that the agency was attempting to undo the Commission's decision and orders. The Commission then went further and reminded the agency that its appeal and request for reconsideration were unsuccessful, and there is no further opportunity to litigate or relitigate the matter.

What can we learn from all of this? Deadlines apply to both sides in a complaint, and agencies will be well-served to ensure that they meet them going forward. Droste@FELTG.com

Shall, Will, May, or Must?
By Deborah Hopkins

It's every legal writer's conundrum: when writing a legal document, which word of the following is the strongest to use, imposing a mandatory requirement on the recipient of the document:

A. Shall
B. Will
C. May
D. Must

The answer? D.

The only word of obligation from the list above is *must* – and therefore, the only term connoting strict prohibition is *must not*. The interpretation of everything else is up for debate.

Don't believe me? You don't have to take my word for it. Just about every jurisdiction in this great country has held that the word *shall*, while the most often used of the above, is also the most confusing because it can mean *may*, *will*, or *must*. Our very own U.S. Supreme Court has interpreted the word to mean *may*. In fact, it's so confusing that the Federal Rules of Civil Procedure no longer use the word at all.

We quote Bryan Garner, one of our favorite authors, quite a lot during our legal writing classes because the guy just gets it; he understands what it means to beat your head against a wall trying to get a legal document just right, and understands that sometimes one word can alter the meaning of an entire sentence, paragraph, or document. On the topic of today's article, he says, "In most legal instruments, *shall* violates the presumption of consistency…which is why *shall* is among the most heavily litigated words in the English language." Hahaha. Nothing like lawyers to make black and white seem like all the shades of gray. Isn't this a fun business we're in?

To be fair, it's not really our fault that this confusion exists. We can blame our law school professors: until just a few years ago, even the top tier law schools were teaching students that the word *shall* means *must*. The *Federal Plain Writing Act* only clarified this in 2010, and clearly a lot of us didn't get the note. Props to the FAA, though, as it was the first agency to bring this topic to our attention.

So, realizing that words that sound alike may have very different meanings, let's look at an example from a hypothetical EEO settlement agreement:

A. The agency shall return the complainant to her previous position as a GS-4 File Clerk and the complainant shall withdraw her complaint.
B. The agency will return the complainant to her previous position as a GS-4 File Clerk and the complainant will withdraw her complaint.
C. The agency may return the complainant to her previous position as a GS-4 File Clerk and the complainant may withdraw her complaint.
D. The agency must return the complainant to her previous position as a GS-4 File Clerk and the complainant must withdraw her complaint.

Yep, I'm going with D. Remember, when you want something to be mandatory – like a settlement agreement that requires both sides to do something – use the word *must* instead of *shall*, and you'll have a document that carries with it a firm legal obligation. For more on this topic see the *Federal Plain Language Guidelines* (page 25) and the *Federal Register Document Drafting Handbook* (Section 3).

And if you really can't get enough of this stuff, join us for this upcoming writing workshop in Washington, DC: Writing for the Win: Legal Writing in Federal Sector EEO Cases (May 8-10).

And now, I **must** go. Hopkins@FELTG.com

Who ARE Those People with Pending MSPB Appeals?
By William Wiley

As most of us in this business know, the US Merit Systems Protection Board, our Supreme Court in the civil service, effectively has been shut down for over a year. There are three positions on the Board, we need at least two members to vote on a case for a decision to be issued, and since January 6, 2017, we have had only one Board member (due to the early resignation of the previous chairman).

There are two steps to an appeal to MSPB. After the agency takes an action – say, fires someone – the employee files an appeal with an MSPB judge. That judge conducts a hearing and issues a decision either upholding the removal, or setting it aside. That's the first step.

The second step is that either the agency or the employee can appeal the judge's decision to the three political appointees who sit as the Board. The members can either affirm the judge's decision or change it any way they want. What comes out of all of this is that some removals are upheld and in others, the employee gets his job back with back pay.

Every work day of the year, three or four "petitions for review" are filed with MSPB HQ. Those PFRs are filed by either the agency or the employee; occasionally by both, arguing that the judge made a mistake. The effect of this lack of a quorum to review a judge's decision is that PFRs go in, but no decisions on the PFRs come out. If you've ever had a backed-up drain pipe in your home, you have an appreciation for what this is like.

Talking about this mess in the abstract misses the point as to the magnitude of the harm caused by all of this. Utilizing the power of the Freedom of Information Act, we here at FELTG have obtained a profile of all those cases stuck in the pipe at MSPB since January 6, 2017. These are real people with real problems. These are agencies trying to maintain an effective workforce who might be on the hook for ever-increasing back pay and attorneys fees until these appeals are resolved. Keep that in mind as you think about the following select subsets of PFRs now pending for vote at MSPB:

Unacceptable Performers: Of the approximately 750 cases pending a vote by the members as of today, 25 are appeals of the decisions of judges in Chapter 43 unacceptable performance removals. In this time of increased focus on performance accountability, the individuals in these cases deserve an answer, and we practitioners could use all the case law guidance we can get as to how to implement a performance-based removal.

General Misconduct: Legally, these are called appealable "adverse actions." These cases are almost always removals and involve bad behavior such as sexual harassment, falsification of government documents, theft, workplace violence, and just plain not coming to work. Many times, they involve claims by employees of mistreatment based on a disability or race. There are 345 former-employees awaiting a Board decision in these cases. Some appellants no doubt will be entitled to reinstatement with back pay, whereas others will remain fired, thereby allowing the agency to back-fill their positions. Add to these 20 former probationers who are

appealing their removals, and you have about 365 removals that deserve to be decided (one for each day of 2017, if my math is correct).

Veterans: Under two different laws, vets have a special right not to be mistreated because they served on active duty. Because of a lack of a quorum, approximately 80 veterans are awaiting a decision as to whether they have been reprised against because of their service to our country.

Whistleblowers: Woo-whee; Congress does love those who disclose waste, fraud, and abuse in the executive branch. There's even a special legal channel Congress has created for MSPB appeals of individuals who believe they have been reprised against because of their whistleblowing. It's called an Individual Right of Action. Even individuals who simply help someone blow the whistle are allowed to use this specialized process. According to the latest information we can get, approximately 140 of the 750 jammed-up appeals at Board HQ are IRAs. You might think that Congress would be upset that these folks are not getting a final resolution to their claims of mistreatment. Of course, you might also think that Congress would look for common ground and collegial decision-making, but you would be wrong about that, as well.

ALJs: And finally, we see that four of the PFRs currently pending for a vote are proposed disciplines of that unique band of federal employees: Administrative Law Judges. Unlike regular civil servants who cannot appeal until their employing agency fires them (or takes some other appealable action), agencies who employ ALJs have no authority to discipline their ALJ employees. They can only *propose* to MSPB that the ALJ be disciplined, and the Board decides whether a removal or suspension will occur. Unlike the other appeals, there's no accumulating back pay here. HOWEVER, the employing agency has already decided through its own internal processing that these four very important individuals are bad federal employees, but they can't do anything about it until the Board finally acts. Somewhere these four individuals are sitting around drawing a federal salary every two weeks even though their employer thinks they should not.

This number of 750 represents the number of PFRs that have been reviewed by the MSPB career staff and are literally sitting in the front office of MSPB, on pause until just one more Board member is available to sign his or her name to the vote sheet, thereby causing a final Board decision to be issued. If a miracle were to happen and a super-human individual were to be confirmed as a Board member today, and that person miraculously could vote on 750 appeals in 24 hours, then 750 final decisions could be issued the next 24 hours and we'd be back to normal.

But wait; there's more! Separately from the 750 PFRs waiting for a vote before the Board's members, there's another batch of pending PFRs currently being worked on by the HQ Board's career attorney staff; PFRs that could be voted on today if the staff were to present them to the members for vote. When you add that group in, the total number of PFRs pending at MSPB headquarters as of today, extrapolating from our recently-responded-to FOIA request is … (ready the drum roll) … 1,400! That's a full year's worth of cases!

Hopefully as you read through this list, you used your imagination to picture members of each group. These are real people with significant legal rights who were hired to do real work for the government. It's unfair to them and it's unfair to us citizens, who appreciate an effective government, that these appeals are not being decided. Hopefully, the White House will soon see the righteousness in nominating a new member to the Board, someone who can hit the ground running, deciding along with the current Acting-Chairman whether the judges who heard these appeals initially made the right or the wrong decision.

And White House, if you're reading this here article, please immediately nominate ONE not TWO new members. 'Cause if you name two, it's going to take twice as long to get concurrence with Chairman Robbin's existing votes. Nominate one new member now, clear the backlog, then name a second (and then a third to replace Mr. Robbins once his term expires at the end of next month). Wiley@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)

Tips from the Other Side
By Meghan Droste

Welcome to the first edition of Tips from the Other Side—insight from a complainant's counsel that I hope will help those of you who process complaints and represent agencies before the EEOC. In this column I will share some of the things that I look for when representing complainants, mistakes that I regularly see agencies make, and other tips that should make your jobs easier, even if it makes mine harder in the process.

For this month's column, I am going to focus on the always riveting topic of document retention. As anyone who attended my presentation during the fall 2017 *EEOC Law Week* can tell you, I get very excited when I have a non-selection case and I find out that the agency has destroyed the documents related to the selection process. Why is that? Because I know two things: 1) the agency may have a difficult time articulating a non-discriminatory reason for its decision not to select my client, and 2) I have a chance of prevailing on a motion for sanctions.

Dear readers, this is such an easy one. Retain the documents. I'll say it again, retain the documents. Share this advice with everyone at your agency—retain the documents. This isn't just good advice, it is a requirement. Pursuant to 29 CFR § 1602.14, agencies are required to preserve selection records for at least one year after the selection decision is made, or, if an applicant files an EEO complaint, until that complaint is fully litigated.

If being required to do it is not enough to convince you, think of the consequences. EEO complaints can take years to litigate. It is not out of the realm of possibility for a complaint to go to hearing two years after the agency decides not to select the complainant. It is also not out of the realm of possibility that by the time the hearing occurs, the selecting official, or anyone else involved in the selection, does

not remember anything about the complainant, or the selectee, or even the position. If the selection documents—resumes, scoring sheets, ranking lists, notes of any kind—still exist, these can help refresh the recollection of the agency's key witnesses. Without these documents, the agency may find itself in the position in which it cannot articulate a legitimate, non-discriminatory reason for not selecting the complainant. For example, in *Hollis v. Veterans Affairs*, EEOC App. No. 01934600 (May 3, 1994), the agency destroyed the interview notes and the selecting officials testified that the complainant answered questions poorly but could not recall which ones. The administrative judge concluded that the agency was not able to articulate a non-discriminatory reason for its selection decision.

Another consequence may be sanctions. The specific sanction will depend on the facts of the case; it might be an inference that the complainant performed best in the interviews, or that the complainant provided certain information in his application. Although sanctions do not guarantee that a complainant will win, why take the risk of being disadvantaged with an adverse inference that could have been avoided?

If you have specific questions or topics you would like to see addressed in a future Tips from the Other Side column, email them to me: Droste@FELTG.com

The Dangers of Charging Intent
By Deborah Hopkins

One of the more interesting – and precarious – challenges that attorneys, HR practitioners, and supervisors in our business come across in misconduct cases is a word that you probably remember from way back in your Criminal Law class, if you went to law school: *intent*. Proving intent can be difficult, and while in the criminal world lesser-included offenses automatically apply (for example, if you can't prove Murder 1, Murder 2 is a lesser-included offense that rides along with the Murder 1 charge), in the business of federal employment law, failing to prove intent might just cause you to lose your entire case – even if you have incontrovertible video evidence and 100 witnesses who can swear that the employee engaged in misconduct.

In our business, labeled charges (for example, falsification; theft) come with an element of intent, and the intent has to be proven by a preponderance of the evidence. So, how does one prove intent? Well, unless we have an appellant who admits they intended to tell a lie or to permanently deprive someone of something, intent is proven by considering the totality of the circumstances. *Naekel v. Transportation,* 782 F.2d 975, 978 (Fed. Cir. 1986)*; Boo v. DHS*, 2014 MSPB 86.

When it comes to intent charges, we have a few common categories that are worth exploring. Today we'll cover deceit/falsification and insubordination. In the next newsletter we'll tackle threat and willful misconduct.

Deceit/Falsification

In order to prove Falsification, the agency must prove that the information given by employee is:

1. Either
   - False,
   - Misleading, or
   - Incomplete,
2. Given with the intent to deceive, and
3. For private material gain

Boo, supra.

All of these elements are required, so just because an agency can show that an appellant has provided incorrect information, this proof in itself does not control the question of intent for purposes of adjudicating a falsification charge. *Reid v. Navy,* 118 MSPR 396 (2012) (intent may be negated if there is evidence the appellant does not believe he has done

anything wrong). Because we're talking about circumstantial evidence, intent may also be inferred when the misrepresentation is made with a reckless disregard for the truth, or with conscious purpose to prevent the agency from learning the truth. *Crump v. VA,* 114 MSPR 224, ¶ 6 (2010).

One of the common ways agencies lose the intent argument is when an employee makes a good-faith explanation for the behavior that seems deceitful, and the agency still decides to charge the employee with falsification. A reasonable good-faith belief in the truth of a statement precludes a finding that an employee acted with deceptive intent. *See, e.g., Leatherbury v. Army,* 524 F.3d 1293 (Fed. Cir. 2008) (appellant who requested mileage reimbursement to which he was not entitled had a reasonable good faith belief that he could seek reimbursement, therefore he could not have been reckless with regard to the truth because of that reasonable good faith belief).

The absence of a credible explanation for the incorrect information can constitute circumstantial evidence of intent to deceive. *Crump, supra* (the totality of the circumstances and lack of plausible explanation showed the appellant falsified his educational background, a medical record, and information related to a military leave request with the intent to deceive or mislead).

If your intent to deceive evidence is shaky, consider charging lack of candor, which is a more flexible charge that need not require proof of intent to deceive. *See, e.g., Ludlum v. DoJ*, 278 F.3d 1280 (Fed. Cir. 2002). And always remember, you can pump up the penalty by putting intent in the Douglas analysis; if you lose it down there, your case isn't necessarily dead.

Insubordination

Insubordination is "The willful and intentional refusal to obey an authorized order of a superior that the superior is entitled to have obeyed." *Phillips v. GSA*, 878 F.2d 370 (Fed. Cir. 1989), which is a distinct charge from failure to follow a policy, *Brown v. Air Force*, 95 FMSR 5182 (1995).

Here are examples of a few cases where agencies were able to prove the intent element in insubordination charges:

- Refusal to comply with a supervisor's order to go home, *Ziegler v. Treasury*, DC-0752-11-0645-I-1 (2013)(NP).
- Disobedience of an order to be vaccinated against anthrax, *Mazares, Jr. v. Navy*, 302 F.3d 1382 (Fed. Cir. 2002).
- Refusal to answer a supervisor's questions in connection with a work assignment, *Shaw v. Air Force*, 98 FMSR 5373 (1998).
- Refusal to submit to drug testing, *Watson v. Transportation*, 91 FMSR 5447 (1991).

And here are a few that agencies lost:

- A brief delay in providing information sought in connection with an investigation, *Milner v. Justice*, 97 FMSR 5455 (1997).
- Refusal to comply with an order that would have placed the employee in imminent danger of serious injury, *Washington v. VA*, 91 FMSR 5486 (1991).
- A sincere but unsuccessful attempt to comply with an order, *Forgett v. Army*, 90 FMSR 5329 (1990).
- Failure to comply with an order or direction that is not sufficiently clear, *Drummer v. GSA*, 84 FMSR 5706 (1984).

If you're having trouble on the intent evidence in these cases where you want to charge insubordination, consider instead charging something like failure to follow orders, which does not require willful refusal to obey an order but just requires proof the employee did not do what he was told to do. See *Hamilton v. USPS*, 71 MSPR 547 (1996).

The bottom line in labeled charges that contain an intent element: be sure you have a preponderance of the evidence on intent, because if you don't, you lose the whole thing.
Hopkins@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
May 8-10

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

Don't Confuse News Articles with Legal Analysis
By William Wiley

Oh, boy. Civil service stuff above the fold recently on page A-1 of the *Washington Post*. Career government employees don't often rise to that level of awareness in the public eye. Sadly, the article published the last week of 2017 focused on an aspect of federal employment that we wish wasn't so noteworthy: sexual misconduct in the federal workplace.

They tell you that once you graduate from law school, you won't see the world the same ever again. For example, a normal person who is not encumbered by a legal education, upon seeing a car wreck, might think, "Oh, those poor people! I hope no one's injured. I need to call 9-1-1 and then see what I can do to help out." The first thoughts of a lawyer, upon seeing the same car wreck, might well be, "The west-bound vehicle was negligent in not slowing down for the yellow light, but the north-bound vehicle was speeding. Looks like contributory negligence to me. And the pain and suffering suffered by the by-standers who saw the incident is probably a significant consequential damage. I wonder how many business cards I have with me?"

This same automatic-legal-brain thinking comes into play when you read the *Post's* article. First, the subtitles to the piece about sexual misconduct at the Department of Justice: "Systemic Issues in Harassment Cases: Report details a lack of disciplinary action." From this, one might conclude that the article will be addressing sexual harassment as it was described in a recently-released DoJ IG report. Well, not exactly. For example, here are some of the primary incidents reported as described in the IG report:

1. A supervisor sending harassing emails to a subordinate who had ended a sexual relationship the two were having.
2. An employee who groped the breasts and buttocks of two coworkers.
3. A supervisor who had consensual sex on several occasions in his government office.

If you've been to any of our FELTG seminars regarding sexual harassment (and we have done BUCKETS of them recently), you no doubt learned that the law defines sexual harassment in part as "unwelcome" sexual conduct. Clearly, the first two incidents meet that definition. However, nothing in the description of the third incident described the acts as being "unwelcome." If they were not, then there's no sexual harassment.

"What? You mean it's OK to have sex in a government office? Why wasn't I informed?" No, Poopsie. That's not what we mean. If you've been to the FELTG seminar where we teach how to discipline a civil servant, you would have learned that if you have a rule, and an employee violates the rule, you can discipline the employee. Also, you've learned that in addition to published official rules (e.g., agency policies), you also can enforce "common sense" rules, also known as "rules of society." Unless you have tolerated workplace sex in the past, it's fair to say that you have a "common sense" rule that having sex in a government office is wrong. Therefore, the supervisor in incident number three above can be disciplined, but not for sexual harassment. Instead, the discipline should rest on the common-sense rule that federal employees are not to have sex in their offices. (You experienced practitioners are probably already thinking that the secondary charge should be "Waste of Government Time" if the acts occurred on the clock rather than after hours. See what I mean about a bit of legal education changing how you think?)

The next legal bump those of us with civil service experience run into is the suggestion in the article that although some of the offending employees were counseled or reprimanded, they should have been suspended or demoted instead; i.e., the agency did not select a severe enough punishment given the nature of the misconduct.

Again, experienced practitioners know that suspensions often hurt the agency more than they hurt the employee. The agency must forgo the employee's services for the duration of the suspension, and often coworkers suffer by having to perform the work that the suspended employee normally would have performed. If discipline is intended to correct behavior rather than punish the employee, a suspension is of questionable value. As for a demotion, if an agency were to reduce an offending employee in grade, the agency would then have to accept lower-graded work from the individual. Well, maybe the agency doesn't NEED lower-graded work. Maybe it needs the higher-level of work the employee is already performing. The somewhat cavalier conclusion that DoJ didn't do enough because it did not suspend or demote the offensive employees fails to acknowledge the reality of the federal workplace.

Finally, the last wrinkle in the analysis in the article is the criticism that some of the offending employees received subsequent performance awards after the misconduct occurred. That might well be a concern and something that should be addressed. But stay with me: you can't blame DoJ for giving awards based on performance without consideration of any misconduct. Read OPM's award regulations at 5 CFR 451. According to OPM, awards are to be based on the employee's performance plan or perhaps other goals set in advance. You'll find **no** OPM guidance regarding the consideration of misconduct when making award decisions. The famous *Douglas* Factors that were developed by MSPB as guidance for agencies when selecting the appropriate level of discipline for misconduct, tie performance awards into the disciple-penalty determination as a mitigating factor. However, nothing from MSPB, OPM, or the courts requires that misconduct be considered when determining a performance rating.

The article in the *Post* highlighted several incidents of discipline-worthy sexual misconduct. Perhaps in retrospect DoJ should have been more aggressive in its responses to the incidents. Just be careful when assessing an article in the media that discusses civil service law. Not all sexual conduct in the federal workplace is sexual harassment, and disciplinary decisions relative to sexual misconduct are more challenging to make than simply saying that the offending employee should lose some pay. Wiley@FELTG.com