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

FELTG Newsletter Vol. X, Issue 3 March 14, 2018

Many of you long-time readers will remember Ernie Hadley. Ernie was a founding member of the Federal Employment Law Training Group and long-time editor of our newsletter. It is our sad duty to report to you that as of last month, Ernie has passed on to the other side. No, silly, not THAT side. Ernie has emigrated to Canada and is now living prosperously on the other side of the Canadian border with his lovely wife Annie. We're sure that there's also a dog and a few cats in that Canadian household, as well. As much as we miss him down here in the Lower 48, we wish him well and we still intend to import his significant training skills to one or more of our periodic FELTG seminars (unless, of course, there's a tariff). But Ernie's not just sitting around drinking maple syrup all day long, singing "O Canada" to the Mounties. He's started a publishing company and he's inviting all of you closeted authors out there to submit manuscripts for possible publican by *Never More Press,* https://nevermorepress.ca. No, he's not interested in your last motion for summary judgment or petition for review. He wants to see your creative fiction or non-fiction, writing that sings and makes people actually *want* to read it, not *have* to read it because it's part of the job. So, fire up those old typewriters and your imagination, and help Emigrant Hadley find a place in the publishing Mecca of Nova Scotia. Just don't steal my personal idea for my next novel. At the end of the story, all the administrative judges peel off their shells to reveal that underneath they actually are aliens from outer space, sort of like the scene in *Men in Black II* in the Truro post office on Cape Cod. Hey, wait a minute. Didn't Ernie used to get his mail in the Truro post office? It's all starting to make sense now.

Bill

COMING UP IN WASHINGTON, DC

Special NEW half-day program:
Sexual Harassment as Misconduct: Defending Your Agency while Protecting Your Employees
March 26

Absence, Leave Abuse & Medical Issues Week
March 27-30

EEOC Law Week
April 9-13

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

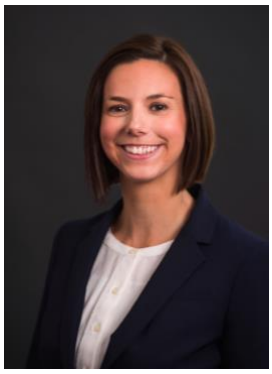
WEBINARS ON THE DOCKET

Handling a Psychiatric Crisis in the Workplace
March 22

Supervising Federal Employees: Important Tools for Managers and Advisers
Session 2, on Discipline, is March 20.

EEOC, MSPB and FLRA Case Law Update
April 5

Settlement Agreements – The Devil is in the Details
By Meghan Droste



Those of you who have read my previous articles will not be surprised to learn that I am fairly detailed-oriented. Others may have a less flattering way of describing my occasionally obsessive interest in the details of things, but I like to think of it as a helpful trait. It improves the outcome of my baking projects and can lead to some fun trivia about The West Wing, the history of the British monarchy, or the origins of the phrase "the devil is in the details" (apparently unknown). It is also a good quality to have as a litigator.

The Commission recently provided us with a reminder of why the details can be so important when crafting and implementing a settlement agreement. In *Nick N. v. Department of Labor*, EEOC App. No. 0120171267 (January 26, 2018), the agency could have avoided the headache of a breach allegation and a subsequent appeal if it had paid attention to the details. In December 2015, the parties entered into a settlement agreement that provided that the agency would permanently reassign the complainant to the position of Senior Compliance Manager. In an attempt to implement the agreement, the agency initially placed the complainant in a temporary Special Assistant position. Special Assistant of course is not the same as Senior Compliance Manager, so the complainant's counsel contacted the agency to request compliance with the agreement. The agency then placed the complainant in a Compliance Manager position.

The complainant filed a breach allegation with the agency because of its failure to place him in a Senior Compliance Manager position. The agency found there was no breach, concluding that it substantially complied with the agreement. On review, the Commission concluded that the agency had not substantially complied with the agreement. It noted that the agency had not provided a "satisfactory explanation" for its refusal to title the complainant's position as Senior Compliance Manager. It went on to conclude that "[t]he Agency has, without explanation, decided to ignore the express language of the settlement agreement and limit Complainant's official title to either 'Compliance Manager' or simply contrive another title for [c]omplainant's position." The Commission ordered the agency to place the complainant in a Senior Compliance Manager position or to provide "a clear explanation for any determination" that caused the agency to title the position as Compliance Manager and allow the complainant to accept the position or reject it and reinstate his complaint.

The agency could have avoided the time and expenses of addressing this issue if it had followed the specific details of the settlement agreement. While one word might not seem like much, it can make a big difference. Droste@FELTG.com

What in the World is Going on at MSPB?
By William Wiley

You have to understand the role and the operation of the US Merit Systems Protection Board plays in our country to fully appreciate what is happening there now. You experienced readers will have to forgive us for some basics before we can get to the meat:

- The good citizens of our great country are served by its government. The government is made up of 2+ million civil servants who, to varying degrees, do the best they can to make government work.
- When a federal employee breaks bad (unacceptable performance or serious misconduct), his supervisory chain has the right to fire him. Because he is protected by civil service laws from unfair treatment by his supervisors, that (now former) employee has the right to defend himself in an appeal to MSPB.
- Usually, there are two levels of review at MSPB. First, a Board administrative judge conducts a hearing, then issues a decision based on the evidence and argument as to whether the appellant stays fired or gets his job back. Next, that judge's decision can be reviewed, affirmed, or set aside by the three members who make up the Board itself.
- The Board's members are Presidential appointees, confirmed by the Senate, to serve specific seven-year terms. The terms are independent, and their expiration dates overlap. Once confirmed by the Senate to be a member, the President has the independent authority to designate a member as either the Chairman, Vice Chairman, or simply Member.
- The most recent term expiration occurred a couple of weeks ago, on March 1, 2018. That term currently is occupied by Mark Robbins, an Obama appointee who continued to serve even after the change in administrations. Prior to the expiration of that term, Mr. Robbins effectively could not be replaced by the President. Once that term expired earlier this month, Mr. Robbins could "hold-over" and continue to serve as a Board member for another year. However, the President would now be free to replace him at any time after March 1.

We have had two vacancies at the Board since January 2017. With only one remaining member (Mr. Robbins), MSPB lacked a quorum and could not issue final orders regarding the appeals of judges' decisions. As of today, there are about 875 appeals of judges' decisions that are backlogged at the Board due to this year-long lack of a quorum. Were the White House to nominate just one more member to the Board, along with the 800+ internal votes already cast by Mr. Robbins, that new member could also vote on a case, affirming or setting aside a judge's decision, thereby releasing that appeal from the case backlog.

With that as background, we serious Board watchers – and others who are concerned about an effective civil service – were delighted to see that last week the President announced the nomination of a new Board member, Andrew Maunz, an individual who is a solid career attorney with exceptionally high credentials, to become a final adjudicator of removals from the civil service. FINALLY, after all these months, we expected we could begin to see things start to move at the Board. Appellants would begin to find out if they were to stay fired or were to get their jobs back. Back pay would stop accruing against agencies who might be in a position of losing appeals to the Board. Whether we ultimately were to agree or disagree with the decisions that we expected to see begin to be issued, at least the backlog would start to be reduced, and justice finally would be done.

Not only were we impressed that the White House had selected a highly qualified and experienced individual to serve as a new Board member, the President's respect for the math was also impressive. You see, had the President at the same time nominated TWO new members instead of one, that would have doubled the time necessary for cases to start being voted out and the backlog thereby reduced. It should be relatively obvious that

two people take twice as long to consider and adjudicate an appeal as would one. In addition, three members are more likely to disagree than are two, thereby increasing the amount of time necessary to resolve those disagreements. Yes, many of us were doubly blown away by the move the White House was making to replenish the Board.

And then the fine print of the White House announcement started to seep in.

Thanks to the help of several astute readers of our newsletter, we now see that new member nominee Maunz had been identified to take over the term currently occupied by Mr. Robbins – the term that expired on March 1, 2018, set to expire March 1, 2025. With his confirmation, Mr. Maunz will become the Vice Chairman and displace Mr. Robbins, thereby voiding the internal votes Mr. Robbins has been casting since becoming the sole remaining member of the Board on January 6, 2017. Therefore, instead of us joyfully celebrating that soon we can expect to see final orders flying out of the Board's backlog with two members voting, we started to believe that we would continue to have a one-member, no-quorum Board.

And THEN, late last week, we got another announcement by the President of an intent to nominate a second individual to the Board. If confirmed, Dennis Dean Kirk will become the Board's new Chairman, taking over the vacancy left when the Board's former chairman quit before her term expired in early 2017. That term is set to expire March 1, 2023. Fortunately for us all, Mr. Kirk has federal experience as an attorney and has previously represented before the Board while in private practice. Past presidents have not seen prior federal employment experience as a necessary prerequisite to be a Board member.

Interesting observations about where we are with all of this:

1. Historically, the designations of Chairman and Vice Chairman have been awarded by the President to the two Board members who are members of his party. As the Board cannot be composed of three members from the same political party, the betting money is that the remaining Member's position will be filled by a Democrat appointed by President Trump (although an Independent or some other non-Republican would serve just as well).
2. The President has appointed the new Chairman to a term expiring in 2023. He had the option of appointing him to the term ending in 2025. One might think the President would have put the Board's chief executive officer into the position with the longer term for the sake of continuity. But, one would be wrong.
3. While appointments could have been made to the Board that allowed Mr. Robbins to continue to hold over and his previously-cast internal votes to count, the White House has selected terms to be filled that displace Mr. Robbins and cancels out all the work he has been doing since January 2017. Whether this was an intentional decision or an oversight, the effect is the same: soon we can expect to have a bevy of new members at MSPB starting to work away at 875+ cases with no voting assistance from any former members.

Gentlemen, on behalf of our little training company, we welcome you to the battle, and wish you the best of luck in helping the civil service protections once again become a reality. Just try not to think about how many pages of reading await you when you have to adjudicate 875 appeals, just to get started in your new job. Wiley@FELTG.com

COMING TO SAN FRANCISCO

Developing & Defending Discipline: An Accountability Seminar
May 15-17

Attention supervisors and advisors: join FELTG at the Marines' Memorial Club in San Francisco for a three-day seminar on all you need to know to help your agency take defensible performance- and misconduct-based actions.

This program is one of our most popular and is a must-attend if you have a challenge with even one federal employee in the federal workplace. From performance and conduct to leave abuse to whistleblower reprisal to defending against frivolous EEO complaints, we've got you covered.

Registration is still open but space is limited. Bill and Deb will see you there!

Animal Kingdom Throwdown: Service Animals vs. Emotional Support Animals
By Deborah Hopkins

Did you see the news a couple of weeks ago where an emotional support dog bit a little girl in the face on a Southwest Airlines flight? Or, how a Spirit Airlines customer flushed her emotional support dwarf hamster down an airport toilet after being told she was not allowed to fly with the rodent? (FWIW, the hamster-bearing passenger claimed a Spirit Airlines employee told her to flush the hamster, but Spirit Airlines has denied this accusation.)

If you didn't catch those stories, you probably at least saw the headline in late January when United Airlines denied boarding to a woman's emotional support peacock at Newark's Liberty Airport. United's statement to the media explained that the peacock "did not meet guidelines for a number of reasons, including its weight and size," a fact which the would-be passenger had been told three separate times before she got to the airport. Should you ever need a bit of trivia for a cocktail party or a game show, in order to accommodate emotional support animals, the airline requires medical documentation at least 48 hours in advance of the flight, at which time they evaluate unusual animals "on a case by case basis." While federal guidelines require airlines to permit passengers with disabilities to board with trained service animals or emotional-support animals, airlines may exclude from flights animals that are too large or heavy to accommodate on board, or animals that could cause a significant disruption of service during the flight.

No doubt about it, emotional support animals are becoming more popular in this country, but they are NOT the same as service animals. According to the ADA National Network, a *service animal* is any dog (or in certain cases, a trained miniature horse) "that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability."

Let's quickly set out some of the differences between service animals and emotional support animals:

Service Animals

- Limited under the ADA to dogs (and in some cases, miniature horses)
- Formally trained to assist people with disabilities
- Do NOT bite or misbehave

- Certified by licensed medical providers
- Perform physical tasks for disabled individuals with vision, hearing, mobility, and other impairments
- Tasks may include pulling or pushing a wheelchair, retrieving dropped items, reminding a person to take medication, pressing an elevator button, alerting at the potential onset of seizures, and alerting at the arrival of visitors.

Emotional Support Animals

- Also knows as comfort or therapy animals
- Can be any animal, really; we've seen various types of birds and fowl, snakes, monkeys, ponies, rodents, cats, even spiders
- Do not undergo formal service animal training
- May bite or misbehave
- Are not certified by medical providers
- Provide companionship
- Help owners by providing emotional support for conditions such as depression, anxiety, PTSD, or mood disorders
- Assist in relieving stress

There is no federal law that requires public organizations or businesses to accommodate emotional support pets, but sometimes people try to take advantage of the service animal stigma by bringing pets into public places and places of employment and hoping people are too afraid to ask if the animal is a trained service animal. It has gotten so bad, in fact, that some state and local laws have made it a crime to try to pass off an emotional support dog or pet as a legally-protected, disability-related service animal.

This topic of emotional support animals, while making the news this year, is not new. In a decision from 2006, the EEOC agreed with the Navy after the Navy denied an employee the use of an emotional support dog in the workplace, because there was no connection between the dog's presence and the employee's disability. While the employee was substantially limited in the major life activity of interacting with others, and the dog helped curb her anxiety and stress when she dealt with crowds and strangers, the employee was unable to show that she had to interact with crowds or strangers at work because her job consisted mainly of data-entry tasks. *Struthers v. Navy*, EEOC No. 07A40043 (June 29, 2006).

In another case from several years ago, an agency allowed an employee's emotional support bird to stay at the office, as long as the bird was caged and the cage was kept clean. The employee requested to give the bird free range to roam outside the cage because he thought the bird would be unhappy cooped up, but the agency properly denied this request. *Mermen v. USPS*, EEOC No. 01A13112 (September 25, 2002).

Though there are not a whole lot of legal cases on this topic, we have seen an increasing number of federal employees attempting to bring emotional support animals to the workplace. What does this all mean for you? Here's what you need to know: the EEOC takes that stance that an emotional support animal *may* be a required reasonable accommodation for a qualified individual with a disability, even if it is not a trained service dog. So, whether the animal is a trained service animal or an emotional support animal, your agency has a duty to engage in the interactive process to determine if allowing the animal in the workplace would permit the employee to perform the essential functions of her job without causing an undue hardship.

That's right: even though public places like restaurants, bars, movie theaters, supermarkets, and hospitals are not legally required to provide access to their customers' emotional support animals, federal agencies actually *do* have an obligation to consider options for applicants and employees who

request emotional support animals or service animals in the workplace.

Hope this helps clear up some of the questions you might have. Hopkins@FELTG.com

Tips from the Other Side, Part 3
By Meghan Droste

As spring approaches, notwithstanding the snow that some of you were fortunate enough to get in recent weeks, the stores are filled with Easter-themed candy. My personal favorite is the chocolate egg filled with peanut butter. It is truly the perfect balance of two perfect flavors. Don't believe me? I'll wait while you compare those to the standard peanut butter-filled chocolate cups. See what I mean? (I'll trust that you do.)

Seeing, and trying to avoid eating, too many of these Easter egg candies brought to my mind the other kind of Easter egg – an unexpected feature or item that you might find in a movie, video game, or other media. If you would like an example, Google the word "askew." You'll find that the results page is tilted. An Easter egg in this context is just another type of treat that you might stumble upon. What does all of this have to do with the federal sector EEO process, you might ask? Well, sometimes in the course of an investigation or discovery, I stumble upon what we can think of as an Easter egg – an additional, unexpected cause of action that neither I nor my client had any knowledge of at the outset of the complaint. One good, and unfortunately still common, example is improperly stored medical documentation.

Agencies are required to maintain the confidentiality of any and all medical documentation that they collect from their employees. This means that supervisors, reasonable accommodation coordinators, anyone who touches an employee's medical documentation, must keep that information in a separate, confidential file. The medical documentation should not be stored in the same file as performance evaluations, counseling memos, examples of the employee's work product or anything else that someone might maintain regarding that employee. There is no room for interpretation on this one–the information must be stored separately.

I frequently request copies of personnel files, including unofficial supervisory files, during the course of litigation. Often times, there isn't anything that either helps or hurts the case in any real way. But every once in a while, I find out that the supervisor has comingled my client's medical documentation with his or her notes about my client, or with other unrelated information. When I find that, I automatically seek to amend the complaint, because this is a separate cause of action.

These types of claims are rarely going to end well for the agency. A complainant does not need to prove discriminatory intent or establish that someone who should not have had access to the documentation actually saw it. It is enough to show that someone improperly comingled the records. *See Mayo v. Dep't of Justice*, EEOC App. No. 0720120004 (October 24, 2012) (holding that "[t]he Agency's failure to maintain Complainant's medical information in separate medical files constitutes a violation of the Rehabilitation Act, even in the absence of an unauthorized disclosure").

You can keep me from stumbling upon this kind of Easter egg by establishing a clear procedure for the storage of medical documentation and ensuring that everyone receives regular training on the procedure. Feel free to send the chocolate and peanut butter kind my way!

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 .

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!

It Can Be Bad; It Can Be Good: Part II
By William Wiley

Several weeks ago, we distributed an article explaining how an employee engaged in misconduct could be handled well, compared to a series of missteps that amounted to doing the wrong things. In response, we got an outpouring of requests (2) that we do the same bad-thing/good-thing comparisons for an employee who has not a misconduct problem, but rather is a poor performer. There are two different laws that come into play depending on the type of problem employee we have. For purposes of the comparison, we are relying on 5 USC Chapter 43 and 5 CFR Part 432 for the performance action.

So here's our list of bad-choice/good-choice options. On the left, you'll see a list of actions we have seen historically that supervisors think they have to take when faced with a poor performer. On the right, you'll see our FELTG approach that cuts right to the chase and empowers the supervisor to respond much more efficiently when an employee is a non-performer:

- **Supervisor provides the employee a performance plan at the beginning of an appraisal year or when the employee enters a new position.**
  - *Absolutely essential*. We cannot use the unacceptable performance procedures to hold the employee accountable unless there is a current performance plan in place.

- **Training**
  - *Not required*. Employees are hired with the expectation that they can do their jobs. However, to be safe we do allow the employee around 30-45 days to get used to any new performance standards.

- **Counseling**
  - *Not required*.

- **Written Warning**
  - *Not required* and generally a bad idea because the employee can claim reprisal or discrimination.

- **Letter of Expectation**
  - *Not required*. Causes the process to be drawn out for no benefit.

- **Reprimand or Suspension**
  - *No.* These are tools for dealing with misconduct, not poor performance. They should *never be used* for poor performance under 5 USC Chapter 43.

- **Initiation of an Opportunity to Demonstrate Acceptable Performance (aka, a PIP)**
  - *Absolutely correct*. Once the employee has been on a plan for several weeks, and the supervisor determines (not proves) that performance is at the Unsatisfactory level on just one critical element, an opportunity period should be initiated.

- **The Opportunity Period is Set for 60-120 Days**
  - *Never*! These periods should be 30 days.

- **The employee files a traditional race/sex/age discrimination complaint, and the agency requires the supervisor to produce evidence that the initiation of the opportunity period was warranted.**
  - *Wrong.* EEOC has held for years that the implementation of an opportunity period is not an adverse employment action, and thereby it cannot be the basis of a discrete-act EEO complaint.

- **The supervisor leaves the employee alone during the opportunity period to give him an opportunity to perform.**
  - *Wrong*. The supervisor meets with the employee periodically during the 30-day period and gives the employee assistance by providing critical feedback.

- **The supervisor grants the employee's annual leave request, thereby causing the period to be extended.**
  - *Wrong*. Any annual leave or LWOP request should be denied or canceled if previously approved. In comparison, sick leave must be granted if the employee is sick. The PIP period can be extended to make up for any sick leave used.

- **Because the employee presents evidence that he's disabled and his disability caused the poor performance, the supervisor cancels the opportunity period.**
  - *Wrong*. Disability accommodation is relevant for the future, not the past. The correct approach is to pause the opportunity period, engage in a discussion with the employee to determine whether there's an accommodation that will allow him to do his job, then provide the accommodation and re-start the demonstration period.

- **Because the employee's medical documentation establishes that he cannot perform some essential function, the supervisor removes the function.**
  - *Wrong*. The supervisor does not need to remove the essential function. The supervisor now needs to terminate the employee for Medical Inability to Perform, if accommodation and reassignment are not possible.

- **If the employee performs successfully during the opportunity period, he's off the hook.**
  - *Wrong*. The employee must maintain acceptable performance for the next 11 months after completion of the 30-day period. If the employee again becomes unacceptable, immediate removal is warranted without another opportunity period.

- **If the employee performs unsuccessfully, the supervisor gives the employee written notice that he has failed the demonstration period, and that a proposed removal will be issued soon.**
  - *This is the stupidest thing I have ever heard,* yet I know some practitioners who do this. If the demonstration period is failed, removal should be proposed within five days.

- **If the employee performs unsuccessfully, the supervisor proposes a removal or demotion.**
    - The much better strategy is to *propose removal*. If there is a demotion position available, the supervisor should offer it to the employee as a voluntary alternative to removal and get it in writing. That way, the demotion cannot be challenged on appeal.

- **Removal will be proposed only if there are boxes and boxes of documentation of non-performance during the opportunity period.**
    - *Wrong*. Removal can be proposed even if there is just a bit more than a speck of proof; a little more than a jot or a grain. This is called "substantial evidence" and it's all that's required to remove a poor performer.

In summary, trained practitioners know how to deal with poor performers:

1. Once the employee has demonstrated unacceptable performance on a critical element, the supervisor initiates an opportunity period to allow the employee to demonstrate whether he can perform.
2. During the 30-day demonstration period, the supervisor provides the employee specific information as to how he is performing relative to the failed critical element. The supervisor collects evidence of unacceptable performance that is occurring during the period.
3. The HR advisor or attorney works with the supervisor throughout the demonstration period to make sure that all the necessary evidence is being collected, and that the supervisor is aware of what he will be issuing once the period is completed.
4. If the demonstration period is failed, the supervisor issues a proposed removal based on evidence a bit more than a scintilla. If the demonstration period is completed successfully, the supervisor issues a warning to the employee that his removal will be proposed immediately if his performance again becomes unacceptable during the remainder of the year.

Yes, appeals, grievances, complaints, and ULPs happen, but that's the price we pay for a protected civil service. If you know what you're doing, you can keep them down to a minimum, and always win them. As we've been screaming at the tops of our little FELTG-voices for nearly 20 years, it's not the system that is a problem as much as it is a lack of people who understand the system.

Come to our training. Learn the program. Be a Performance Management Superstar. We love this stuff. Wiley@FELTG.com

The "Reasonable" Aspect of Reasonable Accommodation: What Does Reasonable Really Mean?
By Deborah Hopkins

There's yet another recent EEO decision that makes me ask the question, "When it comes to providing reasonable accommodation to an individual with a disability, how far does an agency need to go?"

And the answer, based on this particular case: pretty darn far.

Here's what happened. The complainant, a management and program analyst for the FBI, had exhibited some attendance issues and so the FBI issued a notice of proposed removal. In response to the notice, the employee disclosed that she suffered from major depressive disorder and anxiety disorder, and those disabilities were the cause of her attendance

issues. She asked the FBI for an accommodation that would allow her a flexible amount of time (the language in the case is "daily variable schedule") to complete her scheduled 80 hours of work per pay period. She even provided medical documentation that said she was "chronically sleep deprived" and a flexible schedule would provide her with a medical benefit.

The FBI supervisor, probably trying to be nice (because there is no legal requirement to cancel proposed discipline after the disclosure of a disability), held the removal in abeyance for 90 days and granted the complainant a "gliding schedule" that would allow her to report to work any time between 8:00 and 9:30 a.m. Despite this accommodation, the complainant was still late for work 21 times during the 90-day period. According to the agency, the complainant blamed several of her late arrivals on child care issues.

So, after the 90 days elapsed, the agency removed the complainant for AWOL and she filed a reasonable accommodation claim and requested a Final Agency Decision. The FAD found that Complainant was not denied a reasonable accommodation, and so she filed an appeal to the Office of Federal Operations.

The EEOC found that the FBI did not grant a reasonable accommodation and remanded the case (5 years later!), citing a few reasons:

- The complainant contacted her supervisor on 18 of the days she was going to be late, and the agency did not consider granting the complainant leave as accommodation for her tardiness in those instances, instead marking her AWOL.
- The child care issues were related to the underlying disability.
- A maximum flexible schedule would have been an effective reasonable accommodation, and the agency did not demonstrate why the complainant needed to arrive to work by 9:30 a.m.
- The agency did not demonstrate that granting a maximum flexible "gliding" schedule would be an undue hardship.

When I read the case, I don't see anywhere that the employee requested a "maximum gliding schedule" for the agency to consider. She asked for a "daily variable schedule" which it appears the agency offered her, by allowing for a 90-minute window in which to arrive. But what do I know?

Yep. The EEOC said that the complainant's oversleeping was a result of her disability and the underlying cause of her attendance issues, so therefore she was not AWOL when she didn't get to work on time and didn't call in, and the agency should not have expected her to arrive by 9:30 each day. *Davina W. v. FBI*, EEOC Appeal No. 0120152757 (December 8, 2017). **[Editor's note: The supervisor might have been able to defend his actions in this claim if he had kept notes of the harm that occurred each time the employee was late. That's something we've been teaching for nearly 20 years. Contemporaneously document your reasons for doing something adverse to an employee, especially if it has the potential to show up as an issue in an appeal/complaint.]**

I guess that's what you get for being a nice supervisor and holding a removal in abeyance, huh? Hopkins@FELTG.com