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

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The other night, I was thinking about Stormy Daniels. No, not that way, silly. I leave those dreams to other men. I was thinking how cool it is to have a first name that's an adjective: "Stormy." In contrast. "Bill" signals nothing about a person. Might as well call me "Ugh." But call me "Stormy" and you've already got an indication of the kind of person I am. Same goes for other cool adjective first names like "Happy," "Sleepy," "Grumpy," and "Sneezy." So, what would your adjective first name be? Perhaps you'd like to be called "Punctual" Jones. Or, maybe "Notorious" Wilson. The options are endless. You could change it anytime you wanted to just by buying a new name tag to wear on your governmental shirt. Here at FELTG, if we had to pick an adjective first name it probably would be "Lawful-FELTG." Not that we are a particularly law-abiding organization (have you seen our expense reports?). Rather, we are an organization that lives and dies by what our civil service laws are. In addition, we might like to be called "Scientific-FELTG" because we don't teach anything that is not based on independent study by specialists. We are believers in data, and that's what science is all about. Just as importantly, we would be honored to be called "Practical-FELTG." That's because we teach a lot of things that you can learn only from being out there in the field, where government really happens. So, if you dream of Stormy, in either a good or bad way, who could blame you? We just hope that you'll dream of us every now and then, as well. We may not be as exciting as Ms Daniels, but night visions of us won't be getting you into trouble with your significant other.

Bill

COMING UP IN WASHINGTON, DC

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

EEO Refresher Training
June 13

Federal Workplace Challenges: Behavioral Health Issues, Threats of Violence, and Coworker Conflicts
July 17-19

JOIN FELTG IN ANCHORAGE

Managing Federal Employee Accountability
July 23-27

WEBINARS ON THE DOCKET

Successful Management and Supervision of Employees with PTSD
February 22

Supervising Federal Employees: Important Tools for Managers and Advisers
Series begins March 6. Discounts available.

A Hidden-in-Plain-Sight Management Tool: Reassignment

By Deborah Hopkins

Reassignment is a management tool that often goes under-utilized in the federal civil service. Some people think it only applies to reasonable accommodation cases; others believe that it's a way to punish bad employees. Bill and I had quite a lively discussion during *MSPB Law Week* last month (you can join us for the next round, in Denver June 4-8), so I thought I'd use this newsletter as a way to share some questions and answers that came up in class.

Question: What exactly is reassignment?

Answer: Reassignment is a permanent transfer of an employee to another job in the agency, anywhere in the world, to a job at the same grade level. If you like fancy legal words, here's the language about reassignment out of 5 CFR 210.102(b)(12): "A change of an employee, while serving continuously within the same agency, from one position to another without promotion or demotion." This may include changes in pay based on locality, and it may include a different job series.

Question: When can a supervisor unilaterally and legally reassign an employee?

Answer: Basically, whenever she wants to – if she has a reason to.

Federal supervisors have authority under 5 USC 7106 to run the government and determine the day-to-day operations of the federal agencies in which they work. This includes hiring people, assigning work, directing employees how and where to work, and reassigning employees. 5 CFR 335.102.

If a supervisor has a legitimate, business-based reason for reassignment, then the supervisor can order the employee, with appropriate notice, to another job in the agency, anywhere in the world. *Note*: When an agency reassigns an employee outside her commuting area, that employee will generally get reimbursed for moving expenses.

One of the very first cases after the MSPB was founded tells us that the only limitation on a supervisor's decision to reassign is that the reason is "bona fide and based upon legitimate management considerations in the interest of the service." *Ketterer v. USDA,* 2 MSPB 459 (1980). Even better, once it is established that the reassignment was a proper business decision, the MSPB will *not* review the underlying reasons why management exercised its discretion in directing the reassignment. *Id.*

Reassignment is not limited to use only after an employee fails a PIP. It can be directed at any time, for any bona fide reason.

Question: So, a supervisor can reassign a really bad employee, or a really good employee?

Answer: You betcha. You can reassign your best employee to another office because you need the best employee you've got in that position, or you can reassign your worst employee to another job because she isn't cutting it in her current place and you think she may do better elsewhere.

Either way, you have a bona fide reason. Pretty cool, huh?

Question: Is reassignment an entitlement?

Answer: No, unless your union contract says so (this is rare), or unless the reassignment is being used as a disability accommodation.

Question: What if the employee doesn't want to be reassigned?

Answer: Too bad. He has to go, if you tell him to. In fact, removal is warranted for an employee who refuses to accept a directed reassignment. Foundational MSPB case law backs up the stance that removal is not "unreasonably harsh" for a refusal to go where he is ordered. *Nalbandian v. DOI,* 25 MSPR 691 (1985).

Here's a bonus, too: to justify a removal, you don't have to do *Douglas* factors if you charge Failure to Accept a Directed Reassignment. Instead, you just need to apply the two-prong test from *Ketterer*, above: (1) Show your bona fide reason for the management-directed reassignment, and (2) Show that removal will promote the efficiency of the service. Your burden in this disciplinary action is a preponderance of the evidence (unless you're in the VA, in which case it's a lower burden of substantial evidence).

Question: Can union contracts limit reassignment authority?

Answer: A collective bargaining agreement cannot prohibit management-directed reassignment, but it may dictate *how* the reassignment is implemented; for example, it may require the agency give the employee 120 days' notice.

Question: Can an employee challenge a reassignment?

Answer: Yes, he can. Here are the various routes to challenge a management-directed reassignment:

- Administrative grievance procedure
- Negotiated grievance procedure, if he's in the union
- EEO complaint, if he thinks the reassignment was motivated by his protected class
- Office of Special Counsel, if he thinks the reassignment was motivated by the fact that he's a whistleblower
    - MSPB Individual Right of Action appeal, if OSC declines to investigate

Question: What about reassignment as reasonable accommodation?

Answer: Due to space restrictions, let's tackle that in another article. See elsewhere in this newsletter for the article *Reassignment as the Accommodation of Last Resort.*

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COMING TO SAN FRANCISCO

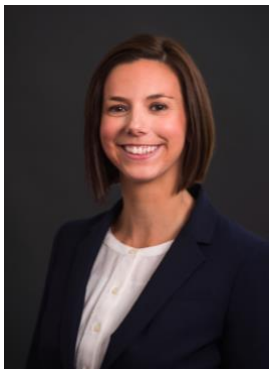
Developing & Defending Discipline: An Accountability Seminar
May 15-17

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!

Affirmative Defenses: Making the Complainant Whole
By Meghan Droste



In the era of the #MeToo and #TimesUp movements, there has been a lot of discussion of what constitutes harassment, what we are no longer willing to tolerate or excuse, and who is experiencing harassment. To a certain extent, we have also started discussing what should happen once an allegation is raised, but most of those conversations have centered around very prominent men either losing or quitting their jobs. That can't be the end of the conversation. We need to continue talking about what employers are obligated to do once they learn that someone has been harassing a subordinate or a coworker. From an agency's perspective, this conversation is essential not only to ensuring that the victim of the harassment can go back to focusing on her work instead of being harassed, but also so the agency can ensure it has done everything it is required to by law.

In 1998, the Supreme Court decided a pair of cases—*Burlington Industries, Inc. v. Ellerth* and *Faragher v. Boca Raton*—in which it addressed the concepts of vicarious and strict liability. In these cases, the Court examined when an employer may be strictly liable for harassment by a supervisor, and when it may avoid liability by putting forward affirmative defenses. The takeaway from these cases is that an agency will be strictly liable for supervisory harassment if the supervisor takes a tangible employment action (*e.g.* firing or demoting the employee). If, however, the harassment stops short of a tangible employment action, the agency may avoid liability if it can show that it took prompt and effective corrective action as soon as it became aware of the harassment, or if the employee unreasonably failed to take advantage of a published reporting procedure.

All of this of course invites the question of what constitutes prompt and effective corrective action? What must an agency do to take advantage of this affirmative defense? The Commission recently addressed this in *Jenna P. v. Department of Veterans Affairs*, EEOC App. No. 0120150825 (March 9, 2018). As the Commission explains, the complainant's first line supervisor ("S1") sexually harassed her for several months. What began with comments about the complainant's appearance and clothing quickly escalated to S1 asking the complainant to have sex with him and another management official. S1 also exposed himself to the complainant several times and groped her on more than one occasion. After more than seven months of harassment, the complainant's fiancé, who was also an agency employee, reported the harassment to his supervisor. Immediately after the report, the complainant's second-line supervisor ("S2") placed S1 on administrative leave pending an investigation. Within two days of the report, S2 assumed direct supervision of all employees previously under S1, granted the complainant indefinite telework, and arranged for harassment training for all management officials. S2 also met with S1 and then later that day accepted S1's voluntary resignation.

As I started to read the Commission's decision my first thought was how the agency appeared to do the right thing. So often we see cases that make it to OFO because the agency fails to take the complaint seriously or takes corrective actions that only serve to punish the complainant rather than the harasser. In *Jenna P.*, the agency tried. Unfortunately, it didn't quite do everything it needed to do. The complainant filed a formal complaint regarding the harassment as well as a subsequent delay in her career ladder promotion. After the complainant withdrew her request for hearing, the agency issued a Final Agency Decision. In it, the agency concluded that it was not liable

for the harassment. The agency relied on the steps S2 took immediately after he learned of the harassment and S1's resignation, which prevented the agency from taking any further action against him. In reviewing the complainant's appeal, the Commission found that although the agency had taken several steps to address the harassment, it failed to make the complainant whole. As a result of the harassment, the complainant had used sick leave and annual leave; the agency had not restored the leave or provided the complainant with the appropriate back pay. The Commission concluded that because the agency had not made the complainant whole, it could not avail itself of the affirmative defense. The agency therefore was liable for the harm the months of sexual harassment caused, even though the harassment did not include a tangible employment action and the agency was not aware of it until the very end.

This case is a good reminder to all of us that agencies are "under an obligation to do 'whatever is necessary' to end harassment, to make a victim whole, and to prevent the misconduct from recurring." As we continue to discuss how we can prevent and stop harassment, we also need to focus on what we must do to undo the significant harm that so often follows.
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Here's How Not to Fix the Civil Service
By William Wiley

Consider this hypothetical. Wife gets home one night and says to Hubby, "Honey, the car is broken." Hubby, being something of a shade tree mechanic, jumps from his Barcalounger and heads for the garage. First, he replaces the car battery. Then, he tunes the engine. Finally, he replaces the fuel pump because he knows that this particular model of automobile often has fuel pump problems. Proudly, he tells Wife about all the good things that he has done to fix the car. And that's when Wife says, "But Honey, the problem is the rear axle is busted."

The approach that Hubby took, attempting to fix something before identifying what is wrong, is exactly what Congress is doing relative to improving our ability to hold employees accountable within the civil service. Our leaders have already extended the probationary period in DoD from one year to two and are considering a similar extension for the entire executive branch. Separately, the President recently signed a bill into law that applies only to the Department of Veterans Affairs (DVA) that reduces the evidence burden in misconduct removals from preponderance to substantial, shortens the notice and appeals periods so that removals move a bit more quickly through the system, and takes away the authority for judges and arbitrators to mitigate removals to some lesser penalty if a removal is seen as too severe. And finally, Congress has taken away most of the authority for an agency to offer an employee administrative leave in exchange for the employee quitting without the agency having to defend a removal through the litigation process.

Yet, I see no evidence that our leaders have taken the time to check the rear axle before making these changes. Personally, I've run into few situations in which a longer probationary period would make a significant difference in our ability to hold individuals accountable. Shortening the notice and appeal periods mostly disadvantages the slower employee who can't get his act together to defend himself. Otherwise, that's not of much help, either. We still have to defend the agency's removal no matter how fast or slow the employee is in filing an appeal.

What our leaders should be doing is looking at situations in which agencies have a problem holding employees accountable, identifying the bumps in the road, then passing legislation to smooth out those bumps, to whatever degree Congress wants them smoothed. Since the folks on The Hill seem to be too busy right now to do this sort of background work, here at FELTG we'll show them how it's done, in case they ever get a little spare time. While Congress may prefer the "Fire, Ready, Aim!" approach, we're big believers in "Ready, Aim, Fire!" when it comes to changing the civil service.

Here's a somewhat typical case with a mid-level of complexity that might give us some ideas as to what is wrong with the civil service accountability system. The agency fired the employee based on three charges:

A. Failure to perform duties, 11 specifications.
B. Failure to perform supervisory duties, 5 specifications.
C. Failure to perform duties in a timely manner, 1 specification.

As a removal is an adverse action appealable to the US Merit Systems Protection Board, the employee appealed and received a decision from an MSPB administrative judge. The judge held:

A. Failure to perform duties, 11 specifications.
    - Judge: Sustained 1, dismissed 10 specifications.
B. Failure to perform supervisory duties, 5 specifications.
    - Judge: Sustained 0, dismissed all 5 specifications and thereby the charge.
C. Failure to perform duties in a timely manner, 1 specification.
    - Judge: Sustained the 1 specification.

Given that the judge sustained only 2 of the original 3 charges, and only 2 of the original 17 specifications, he found removal to be too severe and mitigated the termination to a demotion.

On subsequent appeal to the three Presidentially-appointed Board members, the Board agreed with the judge: two out of three charges affirmed, and mitigation of the removal to a demotion.

On subsequent appeal to the Federal Circuit Court of Appeals, the court affirmed only one of the two charges sustained by the Board. Therefore, it remanded the case to the Board to reconsider an appropriate penalty. There, the case will rest indefinitely because the Board now lacks enough members to issue decisions due to two unfilled member vacancies. *Mott v. DVA*, No. 2017-1222 (January 26, 2018).

Let's dissect the decisions made in this case and see if we can pick up any hints as to what's wrong with the civil service accountability system.

1. The length of time involved here and the expense to the government and the employee to get a resolution of this matter is horrendous. The employee was fired in November 2013. As of today, the eventual resolution of the case remains undecided for over four years, with it likely being a total of FIVE YEARS before a reconstituted Board is able to issue a final decision. Geez, Louise. It takes only three years to get through law school. In the early 16th century, Magellan circumnavigated the globe in three and a half years. World War II ended with fewer than four years of United States involvement. Who could possibly argue that in comparison, it makes sense to take longer to resolve a civil service dispute?

2. The employee was removed in November 2013. Without holding a hearing, the judge ordered her restored to a lower-grade by his initial decision in April 2016. When I was Chief Counsel to the Chairman at MSPB, judges had to issue decisions within 120 days, including any time it took to hold a hearing. Why did this no-hearing case sit with the judge for over TWO YEARS? I've reviewed tens of thousands of judge's decisions in my career, and I can find nothing in this one that explains the excessive length of the delay.
3. Of the 11 specifications brought under Charge A, 7 required the employee to meet a performance standard of at least 85% utilization. The agency's evidence shows that she actually performed at the 91% utilization level. Congress recently changed the law so that DVA needs only substantial proof level to prove a charge, not the higher-level of a preponderance of the evidence. In this case, the proof is at the ZERO level. It does no good to lower a standard if the agency cannot produce ANY evidence at all.
4. The other three Charge A specifications that were not sustained by the judge were based on a similar finding, that the agency produced ZERO evidence to support the specifications. Folks, this is not a careful balancing of "some evidence goes this way and other evidence goes that way." If it were, DVA would benefit from the lower burden of substantial evidence. However, when there is NO PROOF to support a specification, a lower substantial-evidence burden is irrelevant.
5. Regarding the five specifications the agency put forward to support Charge B, two of them did not make it beyond a telephonic status conference. That's how badly they were framed; they were so non-specific that they violated due process. Woof. DVA sends some of its best and brightest practitioners to our FELTG training programs where we teach that specificity in charges is absolutely essential. What happened here? Are you guys letting non-FELTG-certified practitioners draft proposed removals? Law changes aren't going to help that.
6. Two other Charge B specifications failed because even though the misconduct was described in the proposal notice, no witness testified to support the incident, nor did agency counsel argue the specifications in closing brief. That's ZERO evidence if you're counting. If you have been certified by FELTG to practice MSPB law, you might remember our "colorful bubbles" diagram. We use colorful bubbles to demonstrate graphically that the agency probably will lose if its arguments and evidence change as the action moves through the redress process. Here, the evidence and arguments changed between the proposal/decision notices and the case before the judge. This is a classic mistake not likely to be made by FELTG-certified practitioners.
7. In another Charge B specification, the agency alleged that the employee had a poor relationship with a subordinate. Again, the judge found that the agency presented ZERO evidence to support this claim.
8. The employee was fired from a GS-7 position. The judge ordered her restored (on an interim basis, pending the eventual outcome of her appeal) to a lower graded position, something less than a GS-7. Yet today, a web search shows someone with the appellant's name at her original work location holding a GS-9 position. So, we are continuing to fight about …?
9. There are three steps in our civil service redress and accountability system if a removal is involved:

I. Judge's decision
II. Board's decision
III. Court's decision

In this case, the employee was successful at Step I. Two years ago, the judge ordered her restored to employment, albeit at a lower grade level than the level from which she was fired. However, the employee believed the mitigated demotion also to be unwarranted, so she (not DVA) pressed forward to Step II the Board, and Step III the Court (and now back to the Board), attempting to have the demotion reduced to some lesser penalty or set aside altogether. Of course, that is her right to challenge a penalty she believes to be too severe. But consider the taxpayer cost of this continued litigation.

10. The judge in this case is highly respected. By my reckoning, he is the most senior judge at MSPB today. He's been a Board administrative judge for more than 30 years. Yet, the court found that he had made a freshman's mistake when deciding the case (considering evidence outside of the record, aka "extra-record" evidence). If we have a civil service accountability oversight system so complex that even this judge might make a critical error, something indeed is wrong with the program.

These ten items alone give us focus regarding changes that need to be made, and changes that have little value. For example, most of the statutory changes being considered on The Hill today that would expand the DVA new procedures to the rest of the executive branch will do us little good. Lowering the burden of proof from preponderance to substantial is useless if an agency presents no evidence at all to support a charge. Shortening the notice period and the appeal timelines does not help if the employee manages to file an appeal anyway. Extending the probationary period from one to two years is irrelevant to firing a longer-term career employee as was the case here.

The only worthwhile change currently in place at DVA and potentially in play for the rest of the agencies is the abolishment of the Board's authority to reduce a penalty. Without mitigation authority in this case, once we have a single specification being upheld (with the court's decision, we are now down to 1 out of 17 specifications), we are done. This removal would have been upheld by the judge (who affirmed 2 of 17 specifications), and there would be no court remand because there would be no need for MSPB to reconsider the penalty given that a specification failed due to judge error. That is a HUGE benefit to the agency.

If you believe that an agency should be able to fire a 15-year civil servant with no prior discipline because she failed to comply with a single supervisory instruction, you should be dancing in the streets. If you believe that our civil servants deserve a higher degree of protection, you are in for a big disappointment once the DVA procedures are enacted for your agency. The world, she is changing.

Speaking of changing, check this out. The court's *Mott* decision has dropped a little bomb in our business of civil service law. Here are the well-established principles at issue:

- Bad employees can be fired for either unacceptable performance or misconduct.
- If fired for misconduct, the agency's burden of proof is "preponderance." 5 CFR 1201.56(b)(1)(ii). The procedures are found at 5 USC Chapter 75.
- If fired for poor performance, the agency's burden of proof is "substantial." 5 CFR 1201.56(b)(1)(i). The procedures are found at 5 USC Chapter 43.

- An agency is free to take a performance-based removal using the procedures found at 5 USC Chapter 75. When doing so, it is bound to the "preponderance" burden of proof. *Lovshin v. Navy*, 767 F.2d 826 (Fed. Cir. 1985).

In this case, DVA chose to take the *Lovshin* approach with the employee, invoking 5 USC Chapter 75 procedures to fire the employee for bad performance. The judge and the Board adjudicated the decision as a Chapter 75 removal. However, here's a direct quote from the Federal Circuit's decision:

> *The VA bears the burden of proving its charge in an action based on unacceptable performance by substantial evidence. See 5 CFR 1201.56(b)(1)(i) (2015).*

Oh, lordy. Where did this rule come from? Is the court trying to tell us that we need only substantial evidence if we use Chapter 75 for a performance removal? They've certainly never said that before. Or, is this law so confusing that the United States Court of Appeals for the Federal Circuit simply misread the facts of the case and applied the wrong statute? And their fact-checkers did not catch it before issuing the decision? Neither answer is a good answer, no matter which one is correct. They both tell us the accountability oversight procedures for the civil service need some serious tweaking to make them more usable while still being fair to the employee.

We've said it before here at FELTG, and we'll say it again. What Congress needs to do is get together the smartest, most experienced people it can find who know the federal workforce. Lock them in a room, stock the place with Red Bull and pizza, and don't let them see the light of day until they come up with a comprehensive, soup-to-nuts, reform plan for the civil service. Require this group to base their recommendations on facts, not speculation. Reconsider the philosophy of just how much protection federal workers really need balanced against the needs of agency management to run the place. Check to make certain that it is the back axel that needs repair, and don't mess around with anything else. Do this and America will be a greater country for the effort. 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
May 8-10

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

Reassignment as the Accommodation of Last Resort
By Deborah Hopkins

Elsewhere in this newsletter, I discussed some of the questions that come up about management-directed reassignment for business-related reasons. We also often get questions about reassignment as reasonable accommodation (RA) for disabilities, so let's tackle that topic here.

Question: Is reassignment an entitlement?

Answer: Yes, if all other accommodation options have been exhausted. Reassignment is designated as a type of reasonable accommodation under the Americans with

Disabilities Act. Under 29 CFR 1630.2, reassignment is a legal obligation if the agency cannot make minor job modifications or otherwise find an accommodation that will allow the employee with a disability to perform the essential functions of her position without causing an undue hardship on agency operations. Reassignment is referred to as the accommodation of last resort, a final opportunity for the individual to retain employment.

Question: What counts as reassignment for RA purposes?

Answer: Reassignment is a non-competitive, permanent transfer of the employee to a vacant, funded job at the same grade level in the agency. The individual must be qualified for that position, both in terms of "on paper" (education, work experience, etc.) and as a practical matter (able to perform the essential functions of the job with or without accommodation). 29 CFR 1630, Appendix. There is no obligation that the agency search for a higher-graded position for reassignment, *see Foley v. Transportation*, EEOC No. 0120090235 (February 6, 2009), or that the agency should create a position for the employee, see *Mengine v. Runyon,* 114 F.3d 415 (3d Cir. 1997).

Question: Does the employee get to choose which position he prefers?

Answer: If there are multiple reassignment positions for which the employee is qualified, the agency should defer to the employee's choice of position. We know that the agency gets to choose the accommodation, as long as it's effective. *See Birdie C. v. VA*, EEOC No. 0120150115 (February 28, 2017). We know from the case law that if an employee identifies a vacant reassignment position, the agency is required to consider that, *see Bowers v. DSS*, EEOC No. 0720070012 (March 22, 2010). And when it comes down to two or more vacant positions to which the employee can be reassigned, I just don't think an agency should want to pick a fight with the EEOC about which job the employee gets.

Question: What if there's no position available at the employee's grade?

Answer: The 29 CFR 1630 Appendix addresses this by stating the agency "may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation."

Question: How many times does the agency have to look for a reassignment position?

Answer: Once is enough, if the search is thorough and reasonable. The key is that you have to be "reasonable." One good-faith job search should be enough. If the agency has knowledge that a position will soon become vacant, though, the agency should reassign the individual once the job is open. 29 CFR 1614, Appendix. Also, if the employee is aware of a position to which she can be reassigned, and she is qualified, her proposal should be considered.

Question: What if the employee refuses to accept a reassignment?

Answer: If the employee refuses to accept a reassignment, and no other reassignments are available, the employee has ended the agency's obligation in the RA process and may be removed for medical inability to perform or a similar non-disciplinary charge. *See Clemens v. Army*, EEOC No. 0320070044 (March 29, 2007).

Question: What if there are no reassignment positions available anywhere in the agency?

Answer: If no positions are available for which the employee is qualified, then the agency is free to remove the employee. *See Acosta v. VA*, EEOC No. 0320100028 (July 20, 2010).

Hope this answers some questions you may not have even known you had.
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Tips from the Other Side, Part 4
By Meghan Droste

I just returned from a three-day FELTG training program with a fantastic group of EEO counselors and officers at an agency in Atlanta. The course focused on various types of EEO writing, including acceptance and dismissal letters. During the class we had a great discussion about timeliness and when it is ok to dismiss a claim as untimely. Although all of my students seemed to be on top of the various intricacies of determining timeliness, one area in which I have seen confusion is the timeliness of claims regarding the denial of reasonable accommodations. Too often agencies improperly dismiss reasonable accommodation claims as untimely because they fail to consider the ongoing nature of a need for an accommodation.

In many federal courts, the denial of an accommodation is a discrete act—it happens on one specific day and the clock starts ticking as soon as the employer notifies the employee of the denial. The Commission takes a different approach. In its Compliance Manual, the Commission explains that "because an employer has an ongoing obligation to provide a reasonable accommodation, failure to provide such accommodation constitutes a violation each time the employee needs it." *See* EEOC Compliance Manual, Section 2, "Threshold Issues," EEOC Notice 915.003 (July 21, 2005). As a denial of an accommodation is a recurring violation, the Commission has repeatedly reversed dismissals of claims when agencies have treated the specific denials as discrete acts.

An employee does not need to request an accommodation every day or every time the accommodation is needed to establish a continuing violation. It is enough for the employee to allege an ongoing need for the accommodation that continues after the denial. For example, in *Hunter v. Social Security Administration*, the complainant requested the agency purchase a space heater as an accommodation after it removed her personal heater because it was not compliant with the agency's electrical requirements. *See* EEOC App. No. 0720070053 (February 16, 2012). The agency denied the request, but the complainant continued to need the heater to address the symptoms of multiple conditions. The agency then dismissed the failure to accommodate claim as untimely because the complainant contacted a counselor more than 45 days after the agency denied the request. The Commission reversed the agency's dismissal, finding that because the complainant expressed an ongoing need for the heater to the EEO counselor, there was sufficient information in the record to establish a potential continuing violation.

As I reminded my students this week, no one wants to have a case remanded. It doesn't look good for the agency, it can be a waste of resources, and it negatively impacts the complainant who has to wait even longer for a decision on the merits of her claim. When reviewing formal complaints and drafting acceptance letters, be sure to keep in mind the ongoing nature of requests for accommodation. If you want more on this join FELTG in Washington, DC May 8-10 for the class Writing for the Win: Legal Writing in Federal Sector EEO Cases. Droste@FELTG.com

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

Another Reason They Want to Take Away the Civil Service
By William Wiley

I hate this case.

Not because of the outcome, necessarily. No, it's because of the path it took, a path open to every federal employee who believes his supervisor has mistreated him. As you read through the following, ask yourself: "If I was a policy maker, would I want the government's time and money spent this way?"

1. **January 2000,** the employee was demoted from the SES to a GS-15 for poor performance. Her supervisor had recommended the demotion and the agency's Performance Review Board (PRB) for SESers agreed. Remember January 2000? We were all celebrating the millennium and waiting for our computers to crash because we were told that they could not count that high. If you had given birth to a child that month, he'd be heading off to college this year, breaking your heart and your bank account, all at the same time. The Clinton years were almost over (or so we thought).
2. **February 2000**, the employee filed an EEO complaint alleging that the demotion was sex discrimination. Another SESer, a male, had also been recommended for demotion at the same time, but was not demoted because the PRB concluded that he was not informed of a critical element of his position.
3. **February 2007** (keep up here, folks; these dates can be withering), the agency concluded its internal investigation and issued a "final agency decision" upholding the demotion. Remember that kid you had back in 2000? He's in the second grade. After this, the employee appealed the agency's decision to EEOC.
4. **August 2013**, the employee's case went to a jury in a federal district court and your son or daughter has entered the Terrible Teens. It's not clear to me what happened between her filing with EEOC and her going to federal court, but one way or the other, she got there. The jury found the agency to be liable for sex discrimination, reasoning that its evidence that it would have demoted the employee even if she were a man was not persuasive. The jury awarded her $100,000 in damages plus a retroactive promotion back into the SES, with what I assume would be accompanied by back pay with interest and attorney's fees and costs.
5. **January 2018**, the district court judge denied the agency's motion to set aside the jury's verdict as a matter of law, thereby affirming the jury's finding of sex discrimination. That might be good information for your now-adult child as he or she heads off to the university, to give her a good reason get a degree in civil rights law.

According to the court, there were two grounds on which the jury appears to have disbelieved the agency's evidence:

- The employee had rebuttable argument for each performance deficiency the agency identified. The jury was free to believe either the employee or the agency.
- Remember that male member of the SES who was recommended for demotion at the same time as the employee, but who was not demoted because the PRB believed his argument that he was unaware which of his performance elements was critical rather than non-critical (a legally

significant distinction)? The jury was free not to believe him.

For what it's worth, there still are two remaining levels of review of this case in federal court: the DC Circuit Court of Appeals and the US Supreme Court. If the agency and DoJ choose to press this case forward, we may have even more decisions to consider.

Ignoring that possibility for a moment, just consider what you see above. Without taking any position on the righteousness or wrongness of the sex-discrimination outcome, is this really how we want our government to work? The fundamental issue here was the routine evaluation of this individual's performance. As an SESer, one would imagine that there's a relatively high degree of subjectivity in the performance of a senior manager at that level. Before the case got to a jury, think of all the government officials who were involved in making the decision that the demotion was warranted: at the employing agency, at EEOC, and at DoJ. Think of the different types of individuals involved in reaffirming the demotion: senior line managers, coworkers at the SES level (PRB), perhaps political appointees, attorneys, civil rights specialists. Were all those people wrong about this case?

Well, according to the jury, yes. *Banks v. Agriculture*, U.S. District Court, District of Columbia, 07-cv-01807 (APM) (February 22, 2018).

If the jury is correct, that this lady was mistreated because of her sex, I feel terrible for her. Not only is that simply unjust in our society, it also breaks federal laws in place since at least 1964. At the same time, I feel terrible for our civil service system, that decisions like this – right or wrong – have to go through 18 years of review to get even close to closure.

Congress is so fed up with drawn-out outcomes like this that some members are considering abolishing the civil service protections altogether. Maybe employment at-will should be the new way we try to run an efficient government. At the beginning of this article, we asked you to think of yourself as a policy maker for a moment. If you actually could make a policy to replace the one that allowed the above to happen, what would it be?

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