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

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Consider, for a moment, that you live in a land with a bunch of other proto-humans. If you have a coconut, and your neighbor wants it, he comes over, beats you up, and takes it. All the coconuts go to the biggest and meanest. Then, one day you and one of your neighbors decide that things could be better. The two of you agree that you will not beat each other up. Ah, ha! There's our first law. And then you decide you need someone to enforce this new law to make sure that no one breaks it.

You and your neighbor, and all the other neighbors who like this law, chip in a few coconut pieces (taxes) to hire Big Grunt to enforce the law. We love Grunt. Now everybody (citizens) in the newly formed community (country) get to keep most of their coconuts, while the biggest meanest folks either abide by the law or they answer to Grunt. And that, my friends, is how we got a government (Grunt). Here at FELTG, unlike some people, we are not against a *Big Government*. We are not necessarily advocates of a *Small Government*. However, we are HUGE fans of *Enough Government*.

We want Grunt to be big enough to enforce the laws, but not so big as to insist on all of our coconuts in payment. And, that's where FELTG fits into this proto-country. We're here to teach Grunt (you readers) how the laws work so that they can be enforced efficiently and with accountability. Come to our seminars. Learn what you need to know to earn your fair share of the coconuts.

Bill

COMING UP IN WASHINGTON, DC

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

Watch Your Words: Drafting Defensible Charges in Misconduct Cases
June 14

Selecting a Defensible Penalty for Misconduct: An In-Depth Look at the Douglas Factors
June 28

Understanding MD-715: An Effective Approach to Barrier Analysis
July 12

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Room for Improvement at MSPB

By William Wiley

As many of you readers know, MSPB has been under a heavy workload for many years, with decisions sometimes taking too many months (and even years) to get out. We've written in this space before as to how the Board could streamline its final Opinions and Orders. Today we take a look at a typical administrative judge's Initial Decision, one that could benefit from some trimming and focus.

First, you might want to read the initial decision: *Avila v. Agriculture*, MSPB No. SF-0752-17-0488-I-1 (February 26, 2018). If you do, you'll find that it took the judge 24 substantive pages to do what we've done below in two. You'll find some paragraphs in the decision to be over two pages long, with all kinds of extraneous information thrown in; e.g., the color of the trellises on which the marijuana plants were growing, the cost of the overflights, and the suggestion that a "criminal disruption" had been contemplated. Most distractingly, you'll have to get to page nine before the judge bothers to tell you what the charge is.

Lengthy decisions like this take a lot of time to write and review on appeal. By cutting to the chase, the Board's judges could save time, get these things issued more expediently, and still provide the appellant fair treatment. As importantly, it helps us all capture the big issues without being distracted. For example, in the original decision, you'll see a lot of grand citations to grand principles of law, and a reasonable conclusion. However, what you'll find missing is an analysis of the gravamen of the appellant's argument: should she be held responsible for marijuana in her home if it was not her marijuana? Focused writing might have surfaced that issue for resolution.

So, here's our FELTG Initial Decision, if we were in charge of how these things are written:

> On May 12, 2017, the Forest Service removed Catherine A. Avila (appellant) from her position as Forestry Technician, GS-462-9 based on a single charge of "Conduct Unbecoming a Federal Employee." The specification on which this charge was based describes the uncontested fact that marijuana was being grown on her property. This appeal followed her removal. As explained below, I AFFIRM the removal.
>
> ANALYSIS AND FINDINGS
>
> Significant among the appellant's duties was the requirement to work independently enforcing federal laws and regulations relative to the forest in which she worked. On April 29, 2015, Forest Supervisor Carlson issued a written reminder to the appellant and others that the possession of marijuana is illegal under federal law, and that law applies to all Forest Service employees regardless of contrary state laws. Subsequently, on July 19, 2016, Special Agent Mayo observed about a dozen marijuana plants in the backyard of the appellant's home. In August 2016, Carlson again reminded employees that Forest Service employees cannot grow marijuana at home even if the employee's spouse has a medical marijuana prescription. Subsequently, on September 27, 2017, Special Agent Mayo again observed about a dozen marijuana plants growing in the appellant's backyard.
>
> Following the second observation, an agency investigator questioned the appellant. In this interview, the appellant admitted:

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- She jointly owned the home in which she lived with her husband.
- She knew that marijuana was being grown there.
- People came to her home to purchase marijuana.
- Her husband processed the marijuana in their home and transported it in their shared car.
- The money from the sale of the marijuana was kept in the home.

Throughout the interview, the appellant asserted that the marijuana was not hers, but her husband's. At hearing, the appellant attempted to recant part of her statement, asserting that she did not know whether there was marijuana was on her property or how her husband transported it. I find the appellant's hearing testimony to be wholly unpersuasive and improbable. *Hillen v. Army*, 35 MSPR 453 (1997). Therefore, I SUSTAIN the charge.

PENALTY

The appellant is known throughout the community as an employee of the Forest Service. Possession of marijuana at her home affects her status and reflects negatively on the agency. Her work requires her to work independently enforcing federal laws and regulations. The fact that she continued in her illegal activities after being warned twice demonstrates exceedingly poor judgment. She has been previously reprimanded and suspended. Her actions reflect that she does not have an appropriate sense of how federal law applies to her. Therefore, I conclude that the agency's selection of the penalty of removal is reasonable.

AFFIRMATIVE DEFENSES

The appellant claims sex discrimination in that she was not offered the opportunity to enter into a Last Chance agreement as were three male coworkers. However, such differential treatment is justified in that none of the male coworkers had previously been disciplined. Separately, although the comparator male employees had been involved in marijuana-related offenses, none had engaged in the more serious aspects of the charge in this case of cultivation, distribution, and sale of marijuana from their homes. As the appellant has presented no other evidence of sex discrimination, I find she was not the subject of sex discrimination.

The appellant also claims age discrimination. However, as she has offered no evidence of such mistreatment, I find she has not proven that she was the subject of age discrimination.

The removal is AFFIRMED.

The very earliest Board decisions were very short; some just a page. Over the years, MSPB and its judges have added more and more legal and factual verbiage to decisions, without any commensurate benefit. If MSPB wants to be around another 40 years, perhaps it should consider going back to the writing style of the good old days. Wiley@FELTG.com

Final Agency WHAT?
By Deborah Hopkins

Remember in grade school, learning about homonyms? In case you don't remember, homonyms are words which sound alike or are spelled alike, but have different meanings. Think *to, too, and two*; or *they're, their and*

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there. It's not always a fatal error to use the wrong word, but it can make you look pretty silly.

Lots of terms that sound alike, but have different meanings, get used in our federal employment law world – and while people may be tempted to use these terms interchangeably, sometimes it's a mistake to do so. Today, let's clear up any potential confusion over these common EEO terms:

- Final Agency Decision
- Final Agency Order
- Final Agency Determination
- Final Agency Action

First up is the **Final Agency Decision** (FAD), which refers to a written decision on a complaint of discrimination that is made by the agency's EEO Office, without a hearing before an Administrative Judge. The agency will issue findings based on the claims raised, and if discrimination is found, will issue a remedy. This may include agency decisions to dismiss claims, or agency decisions on the merits. A FAD is appealable, by the complainant, to the EEOC. Agencies are not permitted to appeal their own FADs (though some would like to!).

If complainant requests a FAD, fails to request a hearing, or files an untimely hearing request, the agency must issue Final Agency Decision within 60 days. 29 CFR § 1614.110(b).

On to the rest. EEOC Management Directive 110 clarifies these terms for us:

A **Final Agency Order** refers to a decision by an agency to implement or not implement an Administrative Judge's decision, which is appealable to the Commission. That's right, an agency can choose not to implement all – or any part – of an AJ's decision if it disagrees with the finding, the amount of damages, or any other remedy therein. If the agency's final order does not fully implement the AJ's decision, the agency must simultaneously appeal to the Commission with its reasons explained.

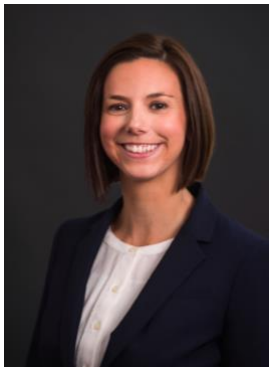
A **Final Agency Determination** refers to an agency's determination about whether there was a breach of a settlement agreement that is appealable to the Commission. For example, the agency may make a determination the complainant breached the settlement if, as part of the settlement the employee agreed to withdraw all pending EEO Complaints but then did not do so.

A **Final Agency Action** refers to an agency's last and, unsurprisingly, final action on a complaint of employment discrimination. The final agency action may be in any of several forms:

- a final agency decision,
- a final agency order implementing an Administrative Judge's decision, or
- a final determination on a breach of settlement agreement claim.

Hope this helps curb some of the confusion around these similar, but non-interchangeable terms. Hopkins@FELTG.com

He Said, She Said – But What Did They Say?
By Meghan Droste



We all know people who are able to make a decision right away—they can pick what to order after a quick glance at a menu, they can buy the first item they see, and they can plan a vacation on the fly. I am sure those people are lovely people; they are certainly lucky in my perspective. But they are not me. I will spend hours researching online before I buy something. For an upcoming trip, I bought two guide books and a country-specific etiquette book, and I am working my way

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through them before making any plans. I need a lot of information before I can make a decision.

The EEOC is at least somewhat like-minded. Agencies are required to "develop an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint." *See* 29 C.F.R. § 1614.108(b). This means that there must be enough information from which a reasonable factfinder can determine whether the agency violated the law. *See* MD-110, Ch. 6, §IV(C). Investigations may take different forms, but generally an agency must interview the relevant witnesses and collect the necessary documents. The Commission's recent decision in *Mari R. v. U.S. Postal Service*, EEOC App. No. 0120160377 (March 29, 2018), is a good example of why this is important.

In the *Mari R.* case, the complainant alleged that her first-line supervisor sexually harassed her over a period of at least three months. The harassment included vulgar comments and sexual gestures. The complainant testified that the union president warned her in advance that the supervisor had a history of sexually inappropriate behavior towards female employees. She also testified that at least one other employee witnessed the supervisor's remarks to her, and two other employees told her that the supervisor had increased the workload of the last female employee who turned down his sexual advances. The supervisor denied the complainant's allegations.

In its final agency decision, the agency concluded that the complainant did not prove that the agency had subjected her to discrimination. On appeal, the Commission vacated the agency's decision and remanded the complaint for a supplemental investigation. The Commission noted that the investigator only interviewed the complainant, the responsible management officials, and other management witnesses. The investigator failed to interview any of the six witnesses the complainant identified. These employees either witnessed the supervisor's comments and gestures towards the complainant or were previous victims of the supervisor. There was no explanation for the decision not to interview the witnesses. The Commission found that the investigator's decision not to conduct these interviews "unfairly restricted [the complainant's] ability to prove that she was subjected to discrimination . . ." Without information from both sides, the Commission did not have enough information to determine whether the supervisor had actually acted as the complainant alleged.

Keep these lessons in mind as your agency investigates complaints, and make sure the factfinder has enough information to make an informed decision. Droste@FELTG.com

[Wiley Note: The quality of agency investigations, or lack thereof, is becoming a bigger and bigger issue on appeal. The first case to hit us between the eyes was *Whitmore v. Labor*, 680 F.3d 1353 (Fed. Cir. 2012). If you attend our *Workplace Investigations Week* seminar, you'll hear us talk about the mistake of using a biased investigator when investigating misconduct. More recently, in a 120-page initial decision, an MSPB administrative judge mitigated the removal of a highly-publicized employee (think *60 Minutes* public) based in large part on perceived investigator inadequacies. *Chen v. Commerce*, CH-0752-17-0028-I-1, (April 23, 2018)(ID). If you are drifting along old-school, thinking that just about anybody who is upright and convenient is capable of conducting a workplace investigation that will withstand EEOC, MSPB, or federal court scrutiny, you absolutely must read these two decisions.]

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Coming this summer:

REASONABLE ACCOMMODATION WEBINAR SERIES

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

July 19: Reasonable Accommodation for Disabilities: The Law, the Challenges, and Solutions for Agencies

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August 2: Telework and Flexible Work Schedules as Reasonable Accommodation

August 9: Understanding Religious Accommodation: How it's Different from Disability Accommodation

Here at FELTG, we are very fortunate to work with some of the best trainers in the business. The following guest article is written by one of them and is reprinted with the permission of the author.

Ten Ways to Provide Bad Training
By Michael Vandergriff

After training managers, supervisors, and employees for four decades, I think I may have seen it all. This may not be the top ten tactics for delivering bad training, but they are contenders.

To provide bad training:

Do Not Parse Your Employees by Level or Function

Missile Shots and Garbage Disposals. In a class on Project Management in the '90s, a participant on the left said that my prescription was at the heart of the rescheduling of missile shots. Five minutes later, a participant on the right expressed his challenges around gathering his tools to repair in-sink garbage disposals.

Contract with a "Memorex" Trainer

Rookie Mistake. "Green" trainers lack breadth and depth of knowledge and experience. A linear delivery can be highly polished, smoothly delivered, and have all the impact of a senior presentation in a business school. Also, questions might be a problem.

Do Not Promote Your Training

How does it Play in Peoria? About 20 years ago, I was contracted to deliver a day of training for the City of Peoria. Arriving for the training, I introduced myself to the new Director of Training. He replied, "Who are you, and what training?" The prior occupant of the job had left hastily to take an opportunity in Chicago, leaving a non-class in his wake. No announcements. I asked the new training director what he knew about training and he replied that he knew nothing. Inviting him to take a seat, I delivered an overview of employee training and development. When I am asked about the smallest class I have ever addressed, I reply, "Half a day for zero participants."

Allow Critical Decisions to Be Made by the Powerful and Ignorant

Training Killer. It was the early 1980s and I had developed a reputation as a competent multi-topic presenter at the California State Training Center in Sacramento. The center was not in Sacramento, as such, but was

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across the Sacramento River, in Bryte. A lot of residents were elderly Russian immigrants whose yards were being overrun by prostitutes the Sac Police officers were chasing out of downtown. Also, the entry to the center was often blocked in the morning by someone sleeping it off. My "halo effect" was not fueled by competence as much as adrenaline. To borrow from NASA, failure was not an option. I was proud that, in my mid-twenties, I was invited to take the lead on the state's newest $80,000 program: *Planning Problem Solving, and Decision Making* (and "situation evaluation" – a section not in the title). The design was very intense with a heavy case focus, a lot of interaction, and a maximum number of ten students. I opened the door of the classroom to meet my first ten students and was greeted by thirty state analysts. Some doofus with the authority saw the class size and reasoned that adding twenty students was more cost-effective. Four days later, I crawled out without a failure (never acceptable) and, within a year, was living in New Mexico. California has not fared well in many ways since that time.

Build a Class Around Your Problem Employee

Get a Grip. Years ago, I delivered a conflict class to an organization hoping they could fix their problem employee by placing him in a class. Essentially, all the coworkers were there as window dressing; a behavior change of Arnold (one might call him "Ahhnold") was the goal. Arnold sat at the back table for the entire session and grimaced. Proud of his physique, he would exercise his forearms under the table with a wrist grip. A quick read of Arnold led me to deliver "straight up" training, ignoring the barely audible noise of the grip. The nonverbals indicated he needed a long-term relationship with someone in a helping role. He also needed to know that his cheap exerciser would soon deliver him to carpal tunnel damage and the inability to pick up a pencil.

Send a Soon-to-Retire Employee to Class

Shameful Sendoff. Over the years, I have interacted with seminar participants who have revealed they are within a month or two of retirement. I try my best to hide my reaction. With tuitions as high as $5,000, this allocation of training funds is wrong. To get a return on the investment, I would recommend that the trainee be at least three to four years away from retirement, unless it is skill training that is essential to completion of work.

Allow a Small Segment of Your Organization to Burn All Your Training Funds

No Goofy Training. A Director of Training, David, was under intense pressure to spend the years' training budget for a specific level to train one person. The generals' secretary wanted to get customer service training from a vendor that was famous for their outstanding customer service program. David labelled it "goofy" and held the line. He had an entire organization to serve.

Get a Trainer Who Can't Handle an Unhappy Participant

Unhappy Camper. I entered a classroom early and spoke with the Program Director, John, who told me we had a malcontent in the seminar, Dobie, who hated every presenter. Rookie presenters usually avoid the malcontent and work the other side of the room. I looked at Dobie's nameplate and was familiar with his organization. When he entered, I spoke briefly with him, asking him if he knew the people I had met while speaking at his national conference. He smiled, and we discussed our mutual contacts. In an opening example, I walked up to Dobie and gave a hypothetical in which Dobie and I had experienced a disagreement. At the first break, Dobie approached John and said, "This guy is pretty good." He simply needed a bit of attention…

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Don't Prepare for the Upcoming Training

Totally Unprepared. I delivered three years of training on Team Facilitation and Team Tools to a huge organization under intense pressure. Unprecedented, I had two Friday cancellations for classes to begin the following Monday, *within two months!* I gained more insight into this location when USA Today printed a two-page story about the mayhem at this facility. After that, I travelled to a "flagship" location on the west coast to train. Arriving early, I walked into the training room. No tables. No chairs. No flipcharts. No materials. Wondering if I was in the wrong place, I walked back into the hallway to see that someone had placed a sticky flipchart page adjacent to the door. In a very pale pastel, it announced, "Team Faccion." In contrast, I trained later at a sister facility in New Orleans. In my four decades of training, I have rarely experienced a facility as prepared on all fronts. The training coordinator was boo-coo. The Boy Scout motto? Be prepared.

Use a Middleman to Acquire a Trainer

Not Worth a Dime. Middlemen take a cut. Sometimes they take an arm and a leg. A prominent training vendor carves out 90% for overhead, leaving 10% for the trainer. I am relaxed about the opportunity for newcomers finding a path to break in. The question is, are you open to hiring a ten-percenter who owns a fresh diploma with wet ink? The non-value-added aspect of the overhead is a topic for another day. Also, piercing the veil to determine that your training dollars are well spent is problematic. The only path may be more work for you as you seriously evaluate the presenter being offered. It is important for you, though, to avoid being fleeced. Some training-vendor emperors have no clothes. Info@FELTG.com

Tips from the Other Side: Developing a Record on Joint Employment

By Meghan Droste

As the regular readers of this column know, I generally represent employees, both in the federal and private sector. In my time I have also represented federal agencies, so I have seen how resources can be stretched thin at times. Agencies often have too many cases and simply not enough time to handle them. Faced with these circumstances, I can understand the temptation to dismiss complaints as early as possible.

As a complainant's counsel, it seems that when there is a joint employer issue, agencies automatically dismiss the case as soon as they receive the formal complaint. This means, of course, that I have to file an appeal. When briefing the issue, there is very little to discuss because the agency has not created any record. This makes it more difficult for me to support my position that the agency is a joint employer, but it makes it nearly impossible for the agency defend its position that it is not.

The question of whether the agency is a joint employer turns on an analysis of several factors that come from *Ma & Zheng v. Department of Health & Human Services*, EEOC App. No. 01962389 (May 29, 1998). This is a very fact-specific inquiry, focused on factors such as who assigns work to the complainant, who approves leave requests, and who selected and/or removed the complainant from the position. Too often, agencies look only to the language of the contract between the agency and contracting company—which inevitably states that there will not be an employee-employer relationship with the agency and the contractors—to support the position that the complainant was not an employee. Agencies reach this conclusion without any investigation into the other factors. The Commission then inevitably concludes that the record is insufficient and remands the complaint to the agency for

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investigation. A search of Commission decisions reveals several appeals with this exact outcome. *See, e.g.*, *Alan F. v. Dep't of Agric.*, EEOC App. No. 0120161089 (March 5, 2018); *Complainant v. Army*, EEOC App. No. 0120150809 (June 12, 2015); *Complainant v. Dep't of State*, EEOC App. No. 0120131112 (October 17, 2014); *Tolbert v. Dep't of Defense*, EEOC App. NO. 0120113572 (January 24, 2013).

I recommend that agencies carefully consider whether to dismiss a complaint for failure to state a claim in potential joint employer cases. While it may seem like a time saver, it will likely end up taking up unnecessary resources in an appeal the agency will not win.

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.

COMING TO ATLANTA

Developing & Defending Discipline: An Accountability Seminar
September 26-28

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!

Successful Management of Employees with PTSD in the Workplace
By Shana Palmieri

With 8 million adults experiencing Post-Traumatic Stress Disorder (PTSD) in a given year, 7-8% of adults have PTSD at some point in their lifetime, and rates as high as 20% in a given year for veterans, chances are you have employees with PTSD - or at a minimum, employees who are suffering from symptoms of PTSD.

First, what is PTSD?

Post-Traumatic Stress Disorder is classified as an anxiety disorder which changes the body's reaction to stress, affecting stress hormones and specific parts of the brain. PTSD can develop in individuals that have experienced a life-threatening event (such as combat), a natural disaster, sexual assault, a car accident, or even witnessing a life-threatening event.

It is important to note that not all individuals that experience a life-threatening event will develop PTSD. In fact, 70% of adults in the U.S. have experienced some type of traumatic experience in their lifetime; that is 223.4 million of us! Of that 70%, only 20% will go on to develop PTSD, or approximately 44.7 million people in the U.S. At any given time, around 8% of people in the U.S. have PTSD. That translates to 24.4 million people, roughly the population of Texas.

Individuals that develop PTSD as a result of experiencing life-threating events develop specific symptoms, to include the following:

- Intrusive thoughts, nightmares, flashbacks, emotional distress to traumatic reminders, physical reactivity to traumatic reminders
- Avoidance of trauma-related stimuli

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- Exaggerated self-blame, social isolation, difficulty connecting with others
- Irritability, difficulty sleeping, fatigue, heightened startle reaction, difficulty concentrating, hypervigilance

What does PTSD in the Workplace Look Like?

PTSD is much more than an individual reacting to loud noises that sound like gun shots or bombs going off. The interactions that trigger PTSD symptoms can be subtle and difficult to understand for individuals who have not had the experience themselves. It could be something as simple as someone putting their hand on a colleague's shoulder. What may be a non-threating gesture to one person, may trigger a strong emotional and physical reaction in another individual as a result of past experiences. A supervisor that has a "strong tone" may come across aggressive or trigger an employee with a history of verbal and physical abuse.

It is important for supervisors, managers and human resources staff to listen and openly communicate with employees to ensure a work environment that creates a place where the employee feels safe and has the opportunity to be successful in their position.

Is PTSD Real?

There is an unfortunate common misperception that PTSD is not a real disorder. Research has demonstrated both through changes in the brain and changes in stress hormones that in fact, people with the diagnosis of PTSD have significant brain and hormone changes compared with individuals that do not have PTSD. These changes are directly related to the symptoms individuals with PTSD experience. So yes, PTSD is very real and so are the symptoms individuals are experiencing as a result. An individual with PTSD has a disability and is legally entitled to the reasonable accommodation process.

How can Employers Create Opportunities for Success for Employees with PTSD?

- Ensure all supervisors, managers and human resources staff are educated on the symptoms of PTSD and the potential impact on the workplace.
- Learn to recognize the warning signs that an employee is struggling and provide support and guidance to help them access treatment options.
- Encourage and support employees in accessing EAP and appropriate mental health services.
- Implement programs through HR or EAP that promote mental wellness and stress reduction.
- Engage in the interactive process to determine what workplace accommodations need to be made for an individual with PTSD.

For more on this, attend FELTG's seminar Federal Workplace Challenges: Behavioral Health Conditions, Threats of Violence, and Coworker Conflicts July 17-19 in Washington, DC. Info@FELTG.com

Bullied by the Union – What Can You Do?
By Deborah Hopkins

Questions, we get wonderful questions from our wonderful class participants. This one combines the very contemporary issue of workplace bullying with the old-as-the-hills concept of union official robust debate:

> Dear FELTG,
>
> Where can I find information about addressing union reps' rude, unprofessional, and hostile behavior in emails, in-person, and on the phone when performing day-to-day representation duties? I am aware of the robust debate exception to misconduct, but this behavior is not during

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> negotiations, creates a hostile work environment and any non-union employee would be disciplined. As an employee, I should not have to tolerate this, and it interferes with my work. Agency LR staff says the union has the right to act the way it does. I want the union to show me respect like I show them. I want their behavior to stop and the agency to stop allowing it. Please advise.
>
> Thank you, Bullied by Union

Dear Bullied,

You may not like the FELTG answer, but based on the hypothetical you've described, your LR staff is correct. *Robust debate* is the term we use to describe the rough speech and raised voices that union representatives are allowed to exhibit when performing representational duties – not just during negotiations. This "uninhibited, robust, and wide-open debate," is protected activity and may include profanity and shouting, according to the U.S. Supreme Court. *National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974).

Congress intended to permit union-related debate, even if it rose to the level of "unrestrained" or "uncivil." Language used during union-related discussions may be "intemperate, abusive and insulting." *Old Dominion Branch, NALC v. Austin,* 418 U.S. 264 (1974).

To help clarify this, here are a few examples of protected activity:

- When the supervisor refused to make an overtime decision, the union president said, "Fuck you. I don't give a fuck." The supervisor had the employee removed from the workplace. FLRA held that the supervisor committed a ULP. *FAA v. NATCC*, 64 FLRA 419 (2010)
- Calling management a "cheap son-of-a-bitch," *Groves Truck & Trailer,* 281 NLRB 1194 (1986)
- The statement, "Management is a bunch of assholes," *UPS,* 241 NLRB 389 (1979)
- Referring to an employee as an "Egotistical fucker and a fucking liar," *Union Carbide*, 331 NLRB 356 (2000)

Pretty robust, wouldn't you say?

There are some limits, though. A union rep may be disciplined for "robust debate," but only in two circumstances:

(1) If in doing so the union representative engages in flagrant misconduct, or
(2) The behavior exceeds the bounds of protected activity.

5 USC 7102.

Here are a couple of examples of activity that is not protected and that is cause for discipline:

1. A union officer interrupted an office birthday celebration and called the event a "blatant and ridiculous display of management's power."
    a. She later complained about the dress code, called a district manager "ridiculous," and shouted when talking about her supervisor.
    b. The agency suspended her for two days for inappropriate, disrespectful, and disruptive behavior.
    c. This was not robust debate because she was not acting in her union capacity.

AFGE, Local 1164 and SSA, 110 FLRR-1 128 (2010).

2. A union steward was suspended for two incidents of improper behavior:
    a. He spoke forcefully to an HR specialist with balled fists and

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referred to violence against her, making her feel "intimidated and threatened"

b. He called a supervisor "Uncle Tom" after the supervisor questioned his whereabouts.

He was not acting in his official capacity – and even if he were, robust debate does not include protection for racial slurs.

AFGE, Local 987 and U.S. Department of the Air Force, Warner Robins Air Logistics Center, Robins Air Force Base, Ga., 109 FLRR-1 79 (2009).

Factors to consider in determining whether language exceeds the bounds of protected status:

- Does the union have a legitimate concern?
- Was the workplace disrupted?
- Who provoked the incident, supervisor or union rep?
- Was the outburst spontaneous?
- How extensive (and loud) was the profanity?
- Who else overheard the exchange?

Defense Mapping Agency, 85 FLRR 1-1018 (1985).

There's a different standard for acceptable conduct among employees and union reps engaging in union activity. The bottom line is, if the rude and disrespectful behavior occurs during representational duties, unless it's racist or sexist, it's probably protected and you can't stop it from occurring. It's unfortunate you're dealing with such a tumultuous situation, but legally there is no recourse.

Good luck and keep your head down. Hopkins@FELTG.com

FELTG is Coming to Alaska

Join us in Anchorage July 23-27 for a class that covers the most important aspects of supervising – and advising – in the federal civil service.

Here's what we'll cover:

Monday - Uncivil Servant: Holding Employees Accountable for Performance and Conduct: Fundamentals of disciplinary actions and unacceptable performance actions; establishing rules of conduct; proving misconduct; selecting a defensible penalty; providing due process via agency discipline procedures; writing valid performance standards; implement a Performance Improvement Plan; removal for unacceptable performance in 31 days.

Tuesday - Managing Employee Leave Abuse: Types of leave and leave entitlements; overviews of Family and Medical Leave Act; Office of Workers Compensation Program absences; LWOP; AWOL; leave restriction; handling leave abuse; the magic of Medical Inability to Perform removals.

Wednesday - Supervising in a Unionized Environment: What every supervisor should know about federal labor unions; collective bargaining agreements; official time; LR meetings; an overview of the Federal Service Labor-Management Relations Statute; fundamental employee, union, and management rights; unfair labor practices; controlling official time; handling information requests.

Thursday - The Supervisor's Role in EEO: The role of EEO in the federal government; defining protected categories: race, color, national origin, religion, sex, age, disability and reprisal; theories of discrimination; defending against EEO complaints; Reasonable Accommodation; what to do if you're a Responding Management Official in a complaint; EEO witness tips.

Friday - Management and Communication Skills for Federal Supervisors: Communicating effectively with employees; managing a multigenerational workforce; handling difficult employees; managing a mobile workforce; mentorship; identifying your leadership skills; bullying v. harassment.

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