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

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I was called to jury duty recently. As luck would have it, I was selected from a venire of about 80 fellow San Franciscans to be in in the first group of 12 to be screened to possibly become a juror. I sure was hoping to be excused. For the self-employed, jury duty puts a hole in the receivables for however long it lasts. The judge's questions were relatively standard: What kind of work do you do? Have you any problems with the legal system? Know anybody involved in the litigation? When she got to me, I told her I was an employment lawyer and I was concerned that I might be familiar with a potential witness. I explained that the leadoff witness appeared to be wearing a National Park Service uniform and that I routinely teach classes for federal supervisors in that agency, among others. She asked, "What do you teach?" I replied with my practiced elevator-ride shorthand summary, "I teach how to fire bad government employees." Her response was quick: "Professor, you have important work to be doing. You are excused." The whole room broke into applause. As I walked down the aisle toward the back door, people reached out to give me high fives. So, how's your day going? Anybody thank you for being in our business? If not, come to one of our seminars. We'll clap for you every day because if you're working in Federal employment law, you are working on the right side of history.

Bill

OPEN ENROLLMENT TRAINING

Employee Relations Week
Barbara Haga
October 22 – October 26, 2018
Washington, DC

Workplace Investigations Week
Deborah Hopkins, Katherine Atkinson
Meghan Droste
November 5 – November 9, 2018
Washington, DC

Managing Federal Employee Accountability
William Wiley, Deborah Hopkins
December 3 – December 7, 2018
New Orleans

Advanced Employee Relations
Barbara Haga
February 12 – February 14, 2019
San Diego

Developing and Defending Discipline
Instructors TBD
February 26 – February 28, 2019
Oklahoma City

MSPB Law Week
William Wiley, Deborah Hopkins
March 11 – March 15, 2019
Washington, DC

https://feltg.com/open-enrollment/

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Why Not an Administrative Jury? (Part 2)
By William Wiley

This is the second article of a three-part series.

In a **previous article**, we explained how the American jury system could be used to demonstrate the differences among three standards of legally required proof:

- Beyond a Reasonable Doubt: 12 out of 12 jurors must agree (used in criminal cases).
- Preponderant evidence: 7 out of 12 jurors must agree (used in misconduct removals).
- Substantial evidence: 4 out of 12 jurors must agree; maybe even just 3 (used in performance removals).

Then, we teased that perhaps this concept could be used to build an alternative dispute system, a system to replace the tedious grievance/appeals/complaint/mediation processes now provided to employees by law or regulation. There are no normal people in the world who think that these processes are perfect, or that they make for a great way to deal with disputes in the federal workplace. You know how I know that? Because that's how I define normal. If you think the existing systems are wonderful, you are not normal.

So how could this jury-evidence analogy work to be the basis for a fair expeditious system to resolve employee-initiated disputes? We are so glad that you asked. Here are the details of an Administrative Jury procedure:

1. Workplace disputes arise when management takes or fails to take an action that an employee thinks is wrong. An "action," for example, can be discipline, a reassignment, or a failure to promote; just about anything that can now be the subject of a discrimination complaint, grievance, or appeal.

2. Currently, when an employee decides to dispute a management action, he is given access to one of several regulatory-defined redress systems. Those systems usually involve many steps of review, take a long time to play out, and cost taxpayers and the employee basket-loads of money.

3. As an alternative to these procedures, management could offer employees who want to dispute an action the option of invoking resolution of the complaint by an Administrative Jury. This would be an option for management. Administrative Juries can occur only through mutual consent.

4. If the employee selects the option of an Administrative Jury, the agency would then convene the jury by selecting 12 agency employees who have previously volunteered and trained to serve in the jury pool. The jurors would be selected at random, except that none could come from the employee's work unit.

- "But, Bill, won't that cost a lot of money? Some of those coworkers might come from far away and the agency would have to pay all that per diem."
- Whoever asked this question clearly has no idea what it costs the agency to go through the traditional processes.
- Travel and per diem expenses for jury members is a drop in the financial bucket compared to the costs of traditional litigation.

5. The jury convenes in a conference room at 9:00 AM. Each side, management and the employee, gets 90 minutes to speak to the jury.

6. The party speaking first is the party that has the burden of proof in the dispute:

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- Discipline - Management goes first.
- Discrimination Complaint - The employee goes first.

7. Each side can have two Presenters; e.g.

- In a discrimination complaint, the two Presenters for the employee might be the employee and his attorney. Or, perhaps two witnesses who observed the discriminatory event and who can tell their story to the jury.
- In a removal action, the agency might choose to have the proposing and deciding officials as Presenters. Or, a human resources specialist and a witness.
- The parties can have more than two Presenters by mutual consent.

8. The Presenters speak directly to the jury.

- There's no direct nor cross-examination.
- Presenters can provide documents to the jury members.
- The jurors can ask questions of the Presenters.

9. The parties are done by noon and excused. After lunch, the jurors discuss and decide the outcome of the dispute.

- For a discrimination complaint to be resolved in favor of the employee, seven or more jurors have to find discrimination.
- For discipline to be upheld, seven or more jurors have to vote to uphold the discipline
- For a performance removal to be upheld, four or more jurors have to find removal warranted.

10. The jurors reach a decision sometime that afternoon, the parties are informed before COB, and the next day, we are back to running a federal agency.

"But, Bill, there must be pros and cons to the Administrative Jury process. Why haven't you discussed those yet?" Because, dummy, we like to keep you coming back for more. Wiley@FELTG.com

Stay tuned to FELTG for the third installment in our Administrative Jury series.

The #MeToo Movement by the Numbers
By Meghan Droste

This year, I have logged thousands of miles traveling to various parts of the US and Japan to teach courses on several different topics. One area that I have covered in nearly every course is sexual harassment — what it is, when an employer is liable for it, and what agencies can do to address and prevent it. I am frequently asked if there has been a change in the number of reports of harassment or the number of cases alleging sexual harassment since the rise the #MeToo movement last October. Until now, I have had to answer the question with anecdotal evidence from my practice and stories of others in the field. It has generally felt that more people are willing and able to come forward now to report what has happened to them and to press employers to hold harassers accountable.

The EEOC recently released numbers that back up the general feeling that there are more reports of sexual harassment. As the Commission notes, in the past year "the country heard story after story of sexual harassment that just one year before might never have been told." In *What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment*, the Commission provides statistics from Fiscal Year 2018 that demonstrate just how much the legal landscape has changed.

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Although the report does not include numbers from the federal sector, we can see a noticeable change in the numbers of charges and lawsuits filed. The Commission observed a 12 percent increase in the number of sexual harassment charges filed in the private sector. There was also a 50 percent increase in the number of sexual harassment lawsuits the EEOC filed. Sexual harassment cases made up more than 60 percent of the cases the Commission filed in FY18. The Commission also recovered almost $70 million for victims of sexual harassment through litigation and administrative enforcement.

The public's interest in information regarding sexual harassment also increased during the past fiscal year. The Commission reported that the hits on the sexual harassment page of its website more than doubled. Requests for training by the EEOC also increased across the country [**Editor's Note: as has also happened at FELTG.]**

It is still too early to tell what the lasting impact of the #MeToo movement will be. It is encouraging, however, to see that in just the last 12 months, it has made a difference. You can read more about the FY18 numbers on the EEOC website. The EEOC has also issued press releases about several of the harassment suits it has filed this year, which you can read here and here. Droste@FELTG.com

The Danger of a Bad Investigation
By Deborah Hopkins

Have you ever conducted an administrative investigation? Depending on the allegations at issue, even if you haven't yet, you might one day find yourself in a Sherlock Holmes hat and cape, tasked with discovering the truth.

You have the best chance of doing so if your job title is any of the following:

- HR specialist
- Law enforcement officer
- Attorneys
- Contract investigator
- EEO specialist
- IG or professional responsibility staff
- Line manager

The characteristics of a legally sufficient investigation are that the investigation be prompt and objective; that all relevant witnesses be interviewed, particularly when credibility is at issue; that all relevant documents are reviewed; that the investigator follows up as information is collected; and that a fair analysis of the facts is given. *California Labor & Employment Law Review*, Vol. 28, No. 6, pp. 1-7.

Objectivity is really key here; if the investigator shows any bias, it undermines the entire investigation. One of the worst things that can happen to both an agency and an employee, is for an investigator to conduct a bad investigation. Whether it's a misconduct investigation, an EEO investigation, a reprisal investigation, or another type, the results can cost the agency anything from a minor sanction to a sizeable settlement to default judgment – and it can cost the employee years of waiting for a final answer.

One of the lead cases we discuss in our Workplace Investigations Week training (next held in Washington, DC, November 5-9) is *Whitmore v. Labor,* 680 F.3d 1353 (Fed. Cir. 2012). In this case, the employee was fired. The agency said it was for misconduct. Mr. Whitmore alleged it was in reprisal for his protected whistleblowing. The Department of Labor brought in an investigator who from the start showed extreme bias against the appellant. You should read the case for yourself (or come to our class) if you want the details, but among the highlights – er, lowlights – the investigator refused to interview any of the appellant's witnesses, and also sent an email to a DOL official saying he would help the agency "kick [the

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whistleblower's] ass this time." It was such a bad investigation the agency ended up settling the case for $820,000 rather than go to a rehearing. Ouch.

In the discrimination world, EEOC has seen a number of bad investigations. Recently, in a complaint of disability and reprisal discrimination, the EEO investigator doing the investigation did not interview any of the witnesses identified by the complainant, which the Commission noted unfairly restricted the complainant's ability to prove discrimination (ya think?). The Commission also said it would not have been unduly burdensome for the investigator to talk to those six witnesses (again, ya think?). There was no investigation into the complainant's statement that he was not allowed to take annual leave in lieu of sick leave for his disability-related issues. This, said the Commission, was articulation of a denial of a reasonable accommodation that the investigator should have addressed, but did not. This case got remanded to the agency for a supplemental investigation. Julius P. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120162827 (Mar. 6, 2018).

The complainant's first contact with an EEO counselor was on March 2, 2015, and the new investigator is presumably only talking to his witnesses and investigating the denial of reasonable accommodation allegations now, coming up on four years after the fact. It's unfortunate to all parties involved that years later, this matter in Julius P. is still not resolved, and all because of a bad investigation. Need more? Come to the classes. We're here to help. Hopkins@FELTG.com

Don't miss our next webinar on Thursday, October 25. Meghan Droste will present *Think Before You Ask: Medical Exams & Inquiries and Medical Documentation Requests in the Federal Government*.

A Gritty Approach to Avoiding First Impression Hiring Mistakes

By Dan Gephart

Author J.K. Rowling wrote in one of those boy wizard books: "First impressions can work wonders." Well, they didn't work wonders for J.K. Her first Harry Potter book was rejected by 12 different publishers before it found a home and became an industry all its own.

First impressions aren't to be emphatically embraced, but tempered with caution.

Exhibit A: Gritty.

The Philadelphia Flyers of the National Hockey League introduced Gritty as their new mascot on a recent Monday morning. What stands out on the seven-foot-tall mound of unkempt orange fur is the set of googly eyes that never blink. Media called Gritty a big orange blob, a creep, terrifying nightmare fuel, a cross between Elmo and Grimace gone wrong, the Babadook of professional sports, and the most frightening mascot ever invented. There was widely held agreement that he had a major substance abuse problem.

Gritty was the laughingstock of social media. Within a few hours of his introduction, he was photoshopped into images from every horror movie imaginable. People shared videos showing their young children screaming at the sight of Gritty's monstrosity.

As morning moved into afternoon, it became clear: The Flyers had made a miscalculation of epic proportions. Gritty was the New Coke of mascots. The Flyers haven't won a Stanley Cup since Jimmy Hoffa disappeared. Maybe Gritty needed to vanish, too.

But then the unexpected happened. People started to embrace Gritty. Perhaps, the mascot's human side came out when he slipped on the ice during his first night on the

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job. Or maybe people felt bad about the abuse he was taking. Maybe people liked the resiliency Gritty showed as he got pummeled all over the Internet. Whatever it was, fans (most, not all) got over their shocking first impressions.

First impressions are formed within milliseconds and based heavily on our biases – both conscious and unconscious. I sometimes get mistrustful when someone offers me a limp handshake or fails to look me in the eyes when greeting me. I have to regularly remind myself: There are many reasons why someone may not have a firm handshake or may look down at the ground when we meet. It could be ability-related, or there could be cultural or religious reasons.

All hiring managers are trained at some point to avoid the "Just Like Me Complex." Whether we admit it or not, we are biased in favor of people like us, whether it's our race, gender, political beliefs, education, or personality. You are all aware of the study that found that resumes bearing African American or Hispanic names received half as many callbacks as those with more traditional white names.

First impressions lead to untold poor hiring decisions every day. Let the job candidate worry about that first impression. You need to make a decision that isn't based on that initial gut feeling. Here are some ways to avoid the first impression trap:

1. Self-identify your conscious and unconscious biases and be aware of the role they play when making personnel decisions. (That a bias is unconscious is not a legitimate excuse.)
2. Focus on the objective, job-related qualification standards of the position for which you're hiring.
3. Ask the same questions of all candidates. (While you're at it, make sure to leave out any questions that border on illegality.)
4. Take careful notes during each interview. The notes will help you make the best decisions. They will also help you protect you if there is a future discrimination claim.

If you're unsure of any of these suggestions, well get yourself some training. As you know, we offer that training – and we do it quite well.

By the way, Gritty's week got much better after that rough start. There were appearances on Good Morning America and the Tonight Show with Jimmy Fallon. In a sports world overrun with forgettable sports mascots, Gritty appears here to stay.

May you see the true Gritty in your next hire.
Gephart@FELTG.com

FELTG Training is not Like Law School
By Deborah Hopkins

If you're like me, you don't have the fondest memories of law school. Sure, there were classes I enjoyed and professors who challenged me (in a good way), but there were a lot of things I didn't enjoy. I think I started my countdown to graduation before first-year orientation was complete. Among the worst memories are those times I was called on, required to stand up in front of 60 classmates, and grilled about the minute details of the assigned class reading as sweat rolled down my back and I internally prayed for a fire drill or power outage.

Those days are behind me. I still spend most of my time in a classroom, but I now have the privilege of being in the front of the room. I still have to answer questions and some of them are stumpers, but all in all I absolutely love teaching classes on employment law for FELTG and haven't once had a nightmare about anything that has happened during one of our programs.

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Participants often give feedback about our trainings and many times the feedback directly correlates to how FELTG training is nothing like law school. Here are a few of the recent areas that students have commented on.

FELTG doesn't use the Socratic method. That's right, we don't. All of our instructors know the horror of the being put on the spot, so we will never do that to you in any of our classes. We will ask questions and see if anyone would like to answer because we love in-class discussions, but we won't ever force you to stand up and talk about what you know – or reveal to the class that you don't know anything because it's your first week on the job. Rest assured that when you come to our classes, you don't have to say a word all week, if you don't want to.

FELTG's intent is to teach you, not screen you out for failure. We've all seen the bad movie that takes place in law school. On day one, the professor uses some version of this speech: "Look to your right and to your left. At the end of this semester, one of the two people next to you - or maybe it's you – won't pass this class and will be kicked out of law school." Well, at FELTG it is not our goal or desire to kick you out or to have you fail the class. Our goal is to teach you things – law and strategy – that you might not have known, in order to make your job easier and the government run more efficiently. And if you earn CLE or HRCI credits and happen to have fun while doing it, then we consider the class a success.

There is no homework or pre-reading required. Some participants of FELTG programs have been in the business a long time, while others come to training right after starting a career (or career change) in federal employment law or federal supervision. With that understanding, we never give you a reading list or pre-work for any of our seminars. You can show up on day one with zero knowledge, and you will be just as welcome as if you have 20 years of experience litigating before the MSPB or EEOC. One of the most common things our participants say is that they always learn something new from our classes.

We don't have forced group projects. We won't do that to you. There are times you have the option to have group discussions or mini-workshops, but if you prefer to work alone, that's no problem for us. (Exception: Our *MSPB and EEOC Hearing Practices Week* requires you to work with your litigation team to prepare and deliver a hearing in front of a judge, so you do have to work with others a bit during this class.)

All questions are welcome. There are no stupid questions, and our instructors will assure you that all questions – no matter how silly or basic you think they are – are welcome in our classes. After all, if you're thinking it, chances are that at least a handful of your other classmates have the same question. So ask away!

There are no final exams. FELTG offers an optional Federal Employment Law Practitioner Certification for a number of our classes but we NEVER require participation, and the testing mechanism takes the form of quizzes rather than exams. The longest quiz takes about 15 minutes to complete, so there's no reading period required.

We have fun. Yes, it's true; we have fun during class. We love what we do, and our instructors will make you laugh by telling jokes, or talking about details from wacky cases. The best part of our business is that we never have to make anything up. Any wild scenario you can imagine has happened in some agency, somewhere, over the last 40 years.

Don't take my word for it; come to a class and check out why FELTG training is different from any other training you've ever attended.

We're now taking registrations for 2019 classes (see a list of our upcoming seminars on the next page). We hope to see you soon. Hopkins@FELTG.com

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UPCOMING OPEN ENROLLMENT TRAINING SEMINARS

Workplace Investigations Week
(Washington, DC)
November 5-9

Managing Federal Employee Accountability
(New Orleans, LA)
December 3-7

Advanced Employee Relations
(San Diego, CA)
February 12-14, 2019

Developing and Defending Discipline: Holding Federal Employees Accountable
(Oklahoma City, OK)
February 26-28, 2019

MSPB Law Week
(Washington, DC)
March 11-15, 2019

Absence, Leave & Medical Issues Week
(Washington, DC)
March 25-29, 2019

EEOC Law Week
(Washington, DC)
April 1-5, 2019

Scheduling the Oral Response Meeting
By William Wiley

As we all know, once the supervisor serves the notice of proposed removal on the mischievous employee, the employee has the right to make an oral response and defend himself to the deciding official. About 10 years ago, we started recommending that the proposal notice tell the employee the scheduled date and time for him to make that response if he chose to exercise that option.

Recently, we received a question from a webinar participant who had worries about our FELTG approach:

Dear FELTG,

Our office is trying to decide whether or not to use your example from a recent FELTG Webinar (*Watch Your Words: Drafting, Defensible Charges in Misconduct Cases),* and rewrite the oral and written reply paragraph in our proposals to include a date for the oral reply. However, setting a date in advance seems to be somewhat concerning to us. For example, will the employee feel that the oral reply is a requirement or expectation of management and would we try to schedule the reply within the 10-day comment period (for CBA employees) or just outside those 10 days? In addition, is there a potential argument of ex parte communication if it appears the Proposing Official secured a meeting time with the Deciding Official? Does it call into question the extent to which they discussed the proposal?

And our ever-elucidating FELTG response:

If you're concerned that the employee might believe the scheduled date is an expectation, then word the notice strongly: "Although not a requirement nor expectation, should you choose to respond to the proposal notice, you may do so at 2:00 on Friday, July 13 in the main conference room, Building 101. Some employees exercise this option, others do not."

As for the date for the oral response, I usually set it on Day 10 or the next business day. I would not set it sooner because of the literal wording of your CBA. For non-CBA employees, I set it on Day Seven or the day after. No reason to set it later.

Absolutely no problem with ex parte between the proposing and deciding officials relative to setting the date. When I'm representing an agency, I usually make the appointment myself with the DO. Even if the PO made the appointment

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personally, discussions of such logistical matters have never been found to be prohibited ex parte communications. If there's ever a question as to whether they discussed the proposal, all we have to do is have the PO or DO swear on a stack of CFRs that they did not discuss anything other than scheduling the meeting. No problem at all.

The benefit of prescheduling the oral response is much greater than any risk. Agencies have lost cases because they did NOT pre-schedule and waited for the employee to make a contact to schedule. The typical problem is when set the meeting when it's convenient for us, but also we avoid any lost-message claims.

Hope this helps. Wiley@FELTG.com

Tips from the Other Side, Part 10
By Meghan Droste

The idea of how to substantiate a claim of harassment is never far from my mind as a complainant-side attorney. I have to consider from the very beginning what evidence a potential client has and what evidence we are likely to develop during the course of an investigation and litigation. One of the most important considerations is credibility because harassment claims almost always come down, at least on some level, to a comparison of the victim's statement to that of the alleged harasser. Who is a judge more likely to believe? If I do not believe a potential client, there is no chance I can convince a judge to believe that person.

Agencies should also be concerned about credibility determinations. One of the first things an agency should do after learning of a complaint of harassment is to investigate the allegation. The administrative investigation, which is different and separate from an investigation of a formal EEO complaint, is essential to determining what, if anything, happened and what the agency needs to do to address it. The investigation should also be the start of determining whether the complainant and the accused are credible. If the story of the alleged harasser doesn't make sense, that is a huge red flag that you ignore at your own peril. Too often it seems like agencies are willing to dismiss an allegation simply because there are no other witnesses, even in the face of clearly questionable testimony from an alleged harasser.

How do we determine credibility? It's not an exact science, even for veteran investigators and others who have significant training in evaluating testimony. The Commission has identified a few facts that agencies should consider. First, is the testimony believable? Does it make sense on its face? Second, how did the person act when giving his or her testimony? Does the witness display a demeanor that indicates that the testimony is true? Or is there something in the way the person responds to the questions that makes you question if he or she is lying? Third, does the witness have a motive to lie? The witness's role in the incident, and her connection to the victim or the harasser, may make it more likely that the witness is not telling the truth. Fourth, is there any evidence, either other testimony or documentation, that corroborates the story? And fifth, does the accused individual have a past record of similar behavior? As the Commission notes, none of these factors alone are determinative. The lack of physical evidence or witnesses does not mean that an event did not occur. The fact that the accused employee has engaged in similar behavior in the past does not prove that harassment occurred this time. The agency should consider all of these factors as a whole.

No one expects you to be the next Sherlock Holmes. But you should be mindful of the evidence before you when determining the agency's next steps.

Send questions or topics for future *Tips from the Other Side* column to Droste@FELTG.com.

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