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

FELTG Newsletter Vol. XII, Issue 4 April 15, 2020

Five Weeks In: Measuring Desk Distances, Cyber Spying, and More

Much of America remains in crisis mode as COVID-19 wreaks havoc on people's health and the economy. For those fortunate enough to have kept jobs, it's a new reality, whether you are still going to a half-empty building, out in the field, or working from home.

We've heard stories of supervisors who, rather than allow telework-capable employees to work from home, have literally measured distances between desks to ensure that coworkers were spaced 6 feet apart. "Spy software" sales have spiked, as companies seek to capture teleworking employees' keystrokes and monitor website activity.

One of my personal pet peeves is the social media posts made by people "not-working" from home, who are treating this period in history like an extended snow day. Maybe they are trying to keep things light, but that behavior gives hard-working teleworkers a bad name. The truth is, most teleworkers will get the job done, and well. Why apply a mistrust of teleworking employees to all, rather than just handling the poor performers or the time-wasters as they arise? So today, we at FELTG want to thank all the hardworking federal employees, who are tirelessly performing the country's work, regardless of their work location. We appreciate all you do.

This month's newsletter covers a couple tricky cases, disciplining an employee for coming to work sick, virtual depositions, and much more.

Read and enjoy,

Deborah J. Hopkins, FELTG President

UPCOMING FELTG VIRTUAL TRAINING

Emerging Issues in Federal Employment Law

Tuesday, April 21: Performance, Conduct and Legal Updates

- *Accountability for Conduct: Taking Defensible Actions*
- *Unacceptable Performance: Streamlining the Procedures*
- *Federal Employment Law Update: Recent Developments at the EEOC, FLRA and MSPB*

Wednesday, April 22: Managing and Advising During the COVID-19 Pandemic and Beyond

- *Handling Current Leave Challenges in the Federal Workplace*
- *Managing a Mobile Workforce: Tools for Accountability*
- *Strategies for Stress: Effectively Coping in a COVID-10 World*

Thursday, April 23: Managing and Advising During the COVID-19 Pandemic and Beyond

- *Preventing and Correcting Discrimination: A Focus on Race, Color and National Origin*
- *Conducting Effective Harassment Investigations*
- *Reasonable Accommodation in the Federal Workplace: Challenges and Solutions for 2020*

UnCivil Servant: Holding Federal Employees Accountable for Performance and Conduct, April 29-30

Conducting Effective Harassment Investigations, May 18-20

Defending Against Discrimination Complaints: The Supervisor's Role in EEO*, May 27-28*

Unintentional Outcomes of Two Recent Court Decisions
By William Wiley

If you paid attention in civics class in the 10th grade, you probably remember a fundamental aspect of our country's great legal system:

- The legislative branch (Congress) decides what the rules should be in our society and then passes laws to implement those rules.
- The judicial branch (the courts) then interpret those laws the way Congress wrote them, thereby clarifying any ambiguity in the laws.

Ideally, there is a better way. Once a governmental rule-maker creates a law, if there's any subsequent ambiguity, we would be able to just go back to that rule-maker and ask what was really meant. We do that all the time in day-to-day life. If you've enjoyed happy hour a bit too much and accidently leave a $1000 tip on a $50 bar tab, the nice restaurant staff will call you the next day and say, "Did you really mean to do leave a $1000 tip?" (Don't ask me how I know this.) In normal life, we clear up ambiguity by dealing with the source of the ambiguity.

Unfortunately, we can't do that in government. The Congress that passed the unclear law probably no longer exists by the time the ambiguity arises. Therefore, we use the judicial branch to interpret the laws, based almost exclusively on the words of the law itself. If those words result in awkward outcomes, so be it. The role of a judge is not to make law, but to interpret it. The courts sometimes look to the intent of Congress when the laws were drafted, but those intentions are an educated guess at best. It's the black-letter law that matters most.

A couple of decisions that produced arguably unintended outcomes, coincidentally decided the week after April Fool's Day, recently landed in the field of federal civil service law:

Babb v. Wilkie, No. 18-882, U.S., April 6, 2020 – Federal law demands that personnel actions within the government be untainted by discriminatory motives, e.g., race, sex, age, etc. Courts have interpreted this prohibition to mean that the agency's personnel action (for example, a termination) will be set aside, and the petitioning employee made whole (e.g. reinstated with back pay) if "but-for" the discriminatory characteristic, the agency would not have taken the personnel action. The *but-for* aspect of this requirement gives a level of defense to an agency when it would have removed the individual, even if its decision somehow involved one of the protected civil rights categories.

Yes, when the agency fired me, it was aware that I am a male. However, even though it considered my sex in making its removal decision, it still would have fired me because what I did was so seriously harmful. In other words, for me to be successful in my discrimination complaint challenging the removal, I have to prove that had I not been a male, the agency would NOT have fired me, e.g., but-for my sex. If I simply prove that my sex was a consideration, that's not enough to get reinstated.

In *Babb v. Wilkie*, the Supreme Court carved out an exception to this principle. As the law that provides for protection from age discrimination reads a bit differently from the civil rights laws that prohibit discrimination based on race, religion, sex, etc., the Court held that if the employee proves that age was a factor in the decision to take the personnel action, the employee has proven that the agency engaged in prohibited discrimination, and is thereby entitled to a remedy. Importantly, though, unless the employee also can prove the but-for aspect, the remedy does NOT include reversal of the termination along with reinstatement and back pay. What exactly would be a proper remedy when age is a factor - but not determinative of the

decision to remove - was left unresolved by the Court.

Bottom Line: If the complainant can prove that one of the civil rights protected categories was a factor in the agency's termination, but cannot prove that but-for his race, sex, religion, etc. he would not have been fired, he loses. However, if the employee proves that his age was a factor, he deserves a remedy, but not necessarily reinstatement unless he can meet the but-for standard.

So whaddya think? Did Congress actually intend this distinction, that complainants mistreated because of their age should receive a remedy when other individuals mistreated because of their race or sex do not receive a remedy? No, we don't think so either.

***Kammunkun v. DoD*,** No. 2019-1374, Fed. Cir., April 6, 2020 – As most every civil service law practitioner is aware, an employee who is fired often can challenge that removal in a variety of forums. For example, an employee who believes that a removal was reprisal for whistleblowing can file a complaint with the U.S. Office of Special Counsel (OSC). On the other hand, if the employee believes that pre-removal due process procedural rights were violated by the agency, the employee can file an appeal with a different agency, the U.S. Merit Systems Protection Board (MSPB). Bargaining unit employees who happen to hold positions covered by a collective bargaining agreement (union-management contract) have a third option. They can file a grievance under the CBA's negotiated grievance procedure, with the right to receive a decision on the contested removal from an arbitrator.

In an attempt to attain administrative efficiency, Congress enacted 5 USC § 7121 (g)(3) to restrict a fired whistleblowing employee from pursuing redress through multiple forums -- a complaint with OSC, an appeal with MSPB, and a grievance through arbitration, all involving the same issue. The law says that the offended whistleblower "may elect not more than one" of the three available forums. Such limitations on avenues of redress are common. Individuals usually get just one bite at the apple, as they say.

In *Kammunkun v. DoD*, MSPB's administrative judge dismissed the employee's appeal. The Board's regulation relied on by the AJ references the statute when declaring that the election of forum is made when the employee selects a remedy initially and cannot be changed later, 5 CFR 1209.2(d)(1). As Kammunkun had previously filed with OSC claiming whistleblower reprisal, she was not allowed to pursue a separate MSPB appeal on the merits of her removal. That outcome seems to make sense relative to the goal of adjudicatory efficiency. One bite, one forum.

When the Federal Circuit reviewed the law on which the regulation is based, it found the statute codified in that portion of Title V relative to labor relations. That's because, in part, the intent of Congress was to prevent the individual from taking the same whistleblower reprisal claim to both the Board and to an arbitrator. Employees can pursue a grievance to arbitration only if they are in a collective bargaining unit. Therefore, codification in the labor relations section of the law makes sense, because only in that section is arbitration a relevant remedy.

The word "employee" has a very specific labor relations statutory definition, see 5 USC § 7103(a)(2). Many individuals who work for the federal government who think of themselves as federal employees are not "employees" for the purposes of labor relations. For example, by law, supervisors and managers are not allowed to participate in union affairs and are, therefore, excluded from the definition of an "employee" who would have collective bargaining rights. Makes sense because management officials should not be allowed to exert influence in internal union business where there often is

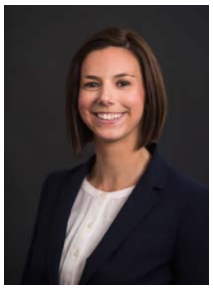
an inherent conflict between the goals of the union and the goals of management.

Unfortunately, when applying this narrow definition of "employee" to the Board's regulation intended to limit the number of forums in which a whistleblower can challenge a removal, the evidence reveals that the appellant in this case is, in fact, a supervisor. Therefore, she is excluded from the coverage of the regulation because she is not a labor-relations-defined "employee" and thereby not precluded from filing with both OSC and MSPB.

Bottom Line: An individual who is fired from a position excluded from the labor-relations definition of "employee," such as a supervisor, can file a whistleblower reprisal complaint with OSC and also file a merits appeal with MSPB. However, an individual who is fired from a position that satisfies the labor-relations definition of "employee" has to make a choice and cannot file in both forums.

So whaddya think? Did Congress actually intend this distinction, that supervisors should have greater redress rights than non-supervisors when claiming that a removal is motivated by the desire to reprise against a whistleblower? No, we don't think so either. Wiley@FELTG.com

The Value of Forgiveness (of Student Loans)
By Meghan Droste



If you graduated well before 2007, or are among the lucky few who graduated since then without any student loan debt, Public Service Loan Forgiveness (PSLF) might not mean much to you.

If you're a Millennial (those far more likely to have graduated from an undergraduate or graduate program with at least some debt), you are probably very familiar with the PSLF program and may be counting the payments until you can take advantage of it.

For those who have never heard of it, the PSLF program forgives the student loan balances of employees of government agencies and certain non-profits and not-for-profit organizations after they make 120 qualifying payments while working for a qualified employer (i.e. pay their loans for at least 10 years while in a public service position). The loan balance is forgiven rather than discharged, a very important distinction. For those who do not qualify for the PSLF program and have their loans discharged after 25 years of reduced payments based on income, the balance of the loan is considered taxable income. For those who receive loan forgiveness under the PSLF program, the balance simply goes away as a thank you for your public service. This might not seem like a huge difference, but having a discharged balance of more than $100,000 treated as income will make for a very noticeable tax liability.

Why am I explaining all of this to you? I promise, it's not just so you have a better understanding of what those of us with student loan debt (thanks, law school) are facing. It's so you understand the value of having the documentation to back up eligibility for the PSLF program (hint: it is extremely valuable). And why does that

matter? Well, it helps explain why I find the Commission's decision in *Lazaro G. v. Department of Commerce*, EEOC App. No. 0120181501 (Feb. 21, 2020), so interesting. The back and forth between the agency, the complainant, and the Commission leading up to the Commission's recent decision is a bit convoluted, but for our purposes can be distilled to the following: The complainant alleged that the agency discriminated against him when it did not select him as a patent examiner.

In its Final Agency Decision, the agency found in the complainant's favor. As part of the damages he sought, the complainant requested employment certifications for the period of retroactive employment or reimbursement for the amount that would have been forgiven after 10 years of federal service.

The agency argued the complainant was not entitled to recover costs related to his loans for various reasons, including that he "did not prove any pecuniary losses related to the student-loan program was caused by the Agency's discriminatory actions."

In its decision, the Commission ordered the agency to determine whether the complainant would have received employment certifications for the PSLF had it selected him for a position in September 2012. If he would have, the Commission also ordered the agency to retroactively provide all of those certifications — in other words, truly placing him in the position he would have been in but for the agency's discriminatory non-selection. If he would not have received the certifications, the Commission ordered the agency to determine whether the complainant had established that he is entitled to monetary compensation related to the PSLF program.

This might not seem like much if you don't a large amount of student loan debt. However, I cannot stress enough how valuable more than six years of certifications can be to someone seeking forgiveness under the PSLF. Keep this in mind when making damages determinations or engaging in settlement discussions in cases involving retroactive instatement or reinstatement. Droste@FELTG.com

Supervising Federal Employees: Managing Accountability and Defending Your Actions

Those of you who supervise federal employees know it can be a frustrating calling, especially when you face so many new and challenging issues amid complex and changing laws.

Help is here: Register for one, several or the rest of the courses in FELTG's annual supervisory webinar series.

No other training provides the depth and breadth of guidance federal supervisors need to manage the agency workforce effectively and efficiently. It doesn't matter that you missed the first few webinars. You can jump into the series at any time. Here are the rest of the webinars in the series:

May 12: Disciplining Employees for Misconduct, Part I

May 26: Disciplining Employees for Misconduct, Part II

June 9: Tackling Leave Issues I

June 23: Tackling Leave Issues II

July 7: Combatting Against Hostile Work Environment Harassment Claims

July 21: Intentional EEO Discrimination

August 4: Disability Accommodation in 60 Minutes

August 18: EEO Reprisal: Handle It, Don't Fear It

September 1: Supervising in a Unionized Environment

This series fulfills OPM's mandatory training requirements for new supervisors.

Disciplining an Employee Who Shows Up at Work Sick in Today's World
By Barbara Haga

I'm going to take a break from writing about performance standards to deal with an issue that is relevant to things happening right now.

Telework is a wonderful thing for many people, and many agencies have work that can be performed remotely. That's not the case across the board. I sometimes think OPM loses sight of this when the guidance keeps talking about telework, telework with children in the house, and adjusting schedules for telework. There are numerous jobs where telework is not an option. Law enforcement officers, medical staff who provide direct patient care, intelligence specialists, and many others still need to be at work. Their work is essential to maintaining law and order, the health and well-being of patients, and our nation's security.

Obviously, these agencies must implement procedures and provide protective equipment to try to protect workers from exposure from patients and other people that they deal with while completing their duties, including their coworkers. But what if those procedures are ignored by the employees they were intended to protect?

An Enforceable Rule

Could there be anyone who doesn't know that if you are sick you should stay home? It's repeated everywhere. I would imagine that most agencies have put out guidance to that effect. If your notice referenced OPM's issuances, those refer to the CDC's guidance. You don't have to click too far on the CDC website to know to stay home. At the top of the page, there are two buttons, one of which is "what to do if you are sick." Click there and it brings up a page that gives steps to follow if you think you are sick. The first is: Stay home except to get medical care. It's in public service announcements on television. The daily briefings from the White House talk about following precautions.

What happens if an employee ignores that guidance and comes to work showing signs of a respiratory illness? Maybe he thinks this is all overblown and not a big deal (and from the news it seems that there are people who believe that). Maybe she thinks that she is critical to doing what your agency does and it's worth the risk. Maybe he doesn't have any sick leave and can't afford being without pay. What do you do?

Sending Employees Home

The CDC answered what employers should do if employees showed up with symptoms. OPM referred to that information in their guidance on 3/7/202 in section F of the Fact Sheet. The CDC says, "Employees who appear to have symptoms (i.e., fever, cough, or shortness of breath) upon arrival at work or who become sick during the day should immediately be separated from other employees, customers, and visitors and sent home." By the way, the EEOC said that was OK, too. The EEOC pandemic guidance was updated on March 21.

To get the person out, you can try to talk them into taking their own leave. If all else fails, you send them home on admin leave. If your agency chooses to follow up with an enforced leave action, that's an option. Enforced leave, of course, requires that the agency provide the employee the notice-response opportunity required by the principles of due process found in 5 CFR 752. But what if management wants to take further action because the employee failed to follow the procedures in place and/or because of the risk to the organization that failing to do so caused?

Could the Employee be Disciplined?

I am not aware of anything that would stop an agency from taking action in these

circumstances. I recently reviewed about 50 MSPB cases that included the term "communicable." There was nothing relevant to this type of case. We have a novel issue to go with the novel virus.

Case and Program Consultation

FELTG's team of specialists has decades of experience. They can help you tackle your most challenging workplace issues. If you have a difficult case or situation and think FELTG can help you, email us at info@feltg.com or call 844-283-3584.

How would it work? If you've been to FELTG training, you've seen the elements of discipline list. The steps are 1) Establish a valid rule, 2) Inform the employee of the rule, 3) Prove the employee broke the rule, 4) Select a defensible penalty, and 5) Provide due process.

Steps 1 and 2. We looked at the "enforceable" rule earlier. Your agency probably put out guidance. It may have said "Stay home if you are sick." If it didn't specifically say it, that guidance may have incorporated the OPM information which referred to the CDC guidance. It's in the media. Remember that you can rely on some very basic common sense requirements like "you can't stab anyone at work" even if you never set a policy about that.

Step 3. Could an employee credibly argue that she did not know that she should not come to work if she had symptoms of a respiratory illness? I think that would be a stretch. That would be particularly so if it involved people in the health care business, even including tangential jobs such as firefighters who are also EMTs, or housekeeping staff in a hospital.

Step 4. Select a defensible penalty. Under *Douglas*, you would talk about the nature and seriousness of the misconduct.

Here are some examples:

> "You reported to roll call for your shift in the Fire Station exhibiting symptoms of infection, risking spreading the virus to all of the Firefighters and supervisors on your shift. This includes 18 first responders, who are essential to fighting fires and providing emergency lifesaving to the facility and mutual aid to the surrounding community. Your misconduct could have led to this Station not being able to respond to fires and other emergencies, requiring more distant Stations to respond which would increase response times."

> "You reported to your office exhibiting symptoms of infection, risking spread of the virus to the five other IT Specialists on this shift who maintain the computer equipment that supports the Remotely Piloted Aircraft (RPA's) unit on base. If this equipment is not properly maintained by the IT staff, it could potentially mean that RPA's would not be available to support intelligence missions. If our base could not respond, other bases who are also dealing with the virus's impact on their own manning would have to cover our missions."

I think FELTG readers know what to do with Step 5.

The Charge

The charge should be something akin to "Failure to Follow Instructions." More to follow next month! Haga@FELTG.com

Join Barbara Haga for the 90-minute live training *Handling Current Leave Challenges in the Federal Workplace* on April 22. It is part of FELTG's three-day virtual training program **Emerging Issues in Federal Employment Law** held April 21-23.

How Do You Address Performance Failures During Emergency Telework?
By Deborah Hopkins

Today as you read this, over a million federal employees are teleworking because of the COVID-19 emergency. Under OPM regulations, during an emergency an agency may assign any work considered necessary without regard to the employee's grade or title, including assignments that an employee is given while teleworking.

We've seen this happen in recent weeks as agencies have issued evacuation orders and sent employees home on telework, even if the employees haven't previously been cleared to work from home. In fact, a number of federal employees are currently at home, getting paid with nothing to do because they don't have a computer and, therefore, have no way to telework – but they're stuck at home because it's not safe to come to work in virus-stricken areas. If one thing is sure, it's an unprecedented time in the federal government, the country, and the world.

So, back to that OPM stuff. An agency can assign work the employee doesn't normally do, but only if the agency knows the employee has the necessary knowledge and skills to perform the assigned work. Let's use me as an example. I'm an attorney. Maybe while I'm working from home you assign me to attend virtual training classes, or to proofread some documents. That's just fine. But you can't assign me to do peer review on a scientist's research, because I have no clue how to do that.

The assignment of alternative performance requirements raises an important question, though: How can an agency hold an employee accountable for performance while they are on emergency telework, if the performance failure is not covered by a critical element in the employee's performance plan?

Since the Civil Service Reform Act was implemented in 1979, the law and regulations have set out clear requirements on how federal employees should be held accountable for poor performance. And if you look at 5 CFR 432, you'll see that an agency can't take a performance-based action unless the employee performs unacceptably in a critical element, after being given an opportunity to demonstrate acceptable performance.

So what's an agency to do if it assigns a performance-related task to an employee who is on emergency telework for COVID-19, and the employee doesn't complete the task, or performs the task poorly? In other words, using me as your hypothetical employee, what can you do if I don't attend the virtual training or don't review the documents, if I don't have a critical element related to either of those things?

Does the agency have to accept poor, or even no, work performance? I think not.

The agency can't hold an employee accountable under the performance procedures if the assignment doesn't fit into a critical element, so the agency is now left with the option to take a 5 CFR 752 action, also known as an adverse action, against the employee. This rarely-used option has been permissible under the law for 40 years.

That said, there are a few drawbacks to handling a "performance" problem as an adverse action:

- The burden of proof is higher (preponderance of the evidence) to take a misconduct-based action, than it is to take a performance-based action (substantial evidence). The exception is the employees covered under the new VA law, where the burden of proof is substantial for misconduct and performance actions.

- If the failure to perform doesn't cause significant harm, the agency may need

to issue multiple disciplinary actions via progressive discipline, before it can remove the employee for the failures.

- The agency would be required to justify its penalty in any discipline it issued beyond a reprimand.

So here's what this situation would look like, if I'm your hypothetical employee:

You: Deb, I'm registering you to attend the three-day FELTG virtual training April 21-23, so you can earn your CLE credits and learn about legal updates while you're teleworking. You need to attend all sessions.

Deb: Is properly registered for the sessions but doesn't attend because she is binge-watching Veep.

You: [It's April 24] Deb, here's your reprimand for failure to follow supervisory instructions. Now, I need you to review this document, edit it, and have it returned to me by 3:00 p.m. on April 28.

Deb: [It's April 29] Sorry, I didn't get a chance to review that document yet. I've been busy on other things.

You: Deb, here's your proposed 3-day suspension (or reprimand in lieu of suspension, if you prefer) for failure to follow supervisory instructions.

Does this make sense? The law doesn't require an agency to pay an employee to sit at home and do nothing during a pandemic, if there's work the agency can assign the employee. But if the work doesn't relate to a critical element, the agency must use the misconduct procedures to hold the employee accountable. Interesting times, aren't they? Hopkins@FELTG.com

New Date for a FELTG Favorite

Absence, Leave Abuse & Medical Issues Week will be held July 27-31 in Washington, DC. Learn more.

The Good News: Fed Circuit Case Clarifies Board Review of VA Penalty Decisions
By Ann Boehm

Since the enactment of the *Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017* (the Act), 38 USC § 714, questions have remained about its application. We've always known that Congress intended to improve the performance of the VA by making it easier to remove employees for misconduct and performance through shortened notice periods and a lower burden of proof (substantial evidence) for misconduct cases. But we were not really sure how the Act applied to the agency's penalty selection.

The Act says, "[I]f the decision of the Secretary is supported by substantial evidence, the administrative judge shall not mitigate the penalty prescribed by the Secretary." 38 USC § 714(d)(2)(B). "Shall not mitigate the penalty" sounds like – well – shall not mitigate the penalty. With no Board quorum since the Act's passage, we have not had any case law to substantiate that interpretation.

Now, we have guidance from the Federal Circuit in *Sayers v. DVA*, Case No. 18-295 (Fed. Cir. Mar. 31, 2020). In this case, the VA argued that section 714 "limits the Board's review to only the facts underlying an adverse action." *Id.*, slip op. at 7. The Court disagreed and ruled the Board has to review the penalty, because removing, suspending, or demoting – *i.e.*, the penalty – is necessarily a part of the decision and the Board is reviewing the Secretary's decision.

Huh? Yep, clear as mud.

What the Federal Circuit really is saying in this case is that "not mitigating" a penalty is

different from Board review of whether a penalty is supported by substantial evidence and reasonable. In pages and pages of legalese, it's my belief that what the Federal Circuit is really saying in *Sayers* is this -- the VA does not have license to fire anyone it wants to based upon any kind of misconduct. The punishment has to fit the misconduct, and if it does not, the Board can reverse the VA's decision.

What's Happening at the FLRA?

Join FELTG Instructor Joseph Schimansky for the 60-minute webinar *Significant Cases and Developments at the FLRA* on May 6 from 1-2 pm ET. Register Now.

Here's some key language from the decision that explains the Court's thinking: "[t]he government's reading — allowing the agency to remove an employee for the tiniest incident of misconduct so long as the agency could present substantial evidence that the trifling misconduct occurred — could 'gut due process protections' in a way Congress did not intend." *Id.*, slip op. at 10. Congress made it easier to remove VA employees, but did not and could not eliminate their basic due process rights, including the right to appeal to the Board.

So now we know. But before I leave you, I want to tell you a few more interesting things about this case.

- Sayers appealed to the Federal Circuit after the Administrative Judge sustained his removal. If an employee does not appeal an AJ decision to the Board, the AJ's decision becomes the Board's final order and can be appealed directly to the Federal Circuit. This is how an employee can get a quicker decision on an appeal in the absence of a Board quorum.

- Interestingly, the Federal Circuit really didn't have to decide the penalty issue in this case. The primary issue in *Sayers* was whether section 714 applies retroactively. The misconduct for which the VA fired Sayers occurred before the passage of the Act, and yet the VA applied section 714 to Sayers's case. The Federal Circuit said that was a no-no – section 714 cannot be applied retroactively.

  The court vacated and remanded the Administrative Judge's decision. End of story, right? Not exactly. The Federal Circuit still wrote a lengthy opinion on section 714's penalty language. It did not have to do that.

  Why did it do that? I think the answer to that question is buried in a footnote in the decision. The Federal Circuit decided a lot of things in this case that it did not have to because THERE IS NO MSPB. *Sayers*, slip op. at 5 n.3. It's a problem. So, they are trying to provide guidance in the absence of a functioning Board.

- Interestingly, this case has some really good language on why it's easier to remove an employee for performance than for misconduct. According to the court, the agency has a "unique view on how incompetence impacts the agency," thus performance is reviewed on a lower burden of proof with no penalty mitigation (except, paradoxically, under the Act, where the burden is the same and there is also no penalty mitigation). Folks, remember that language. The agency knows when an employee's poor performance is hurting the agency. We say it over and over here at FELTG – take care of poor performers, and trust managers when they say an employee's performance is harming the mission!

So there you have it. I hope you see some Good News in this decision. We have some clarity. We have some good language on performance. Stay safe out there! Boehm@FELTG.com

7 Tips for Coping With the Stress of a COVID-19 World
By Shana Palmieri

The Coronavirus pandemic has thrown the globe into a sudden, unexpected and intense trauma. As a result of the global pandemic, lives for people around the world have changed in an instant. Within the first three months of 2020, our societal structure and lives were dramatically altered, causing our entire population to shift course in ways the majority of people have never experienced.

If you are struggling as a result of these sudden, intense changes in your life, you should know it is an expected and normal reaction to an abnormal and challenging situation.

Some common reactions you may be experiencing as a result of the COVID-19 pandemic include:

- Disbelief
- Emotional numbness
- Sleep disturbance and/or nightmares
- Anger, moodiness and irritability
- Forgetfulness
- Denial
- Guilt
- Panic
- Emotional withdrawal/isolation
- Crying
- Grief
- Questioning typically held faith or religious beliefs

Implementing strategies to manage stress and anxiety during these challenging times will allow you to stabilize your mood, stress level and improve your overall health. Times of extreme stress are typically those times we call upon our closest friends and family for connection and support. The COVID-19 pandemic creates the added stressor of requiring us to physically distance ourselves away from our social supports and connections.

While physical distancing is currently critical to mitigate the spread of COVID-19, social connection continues to be key to reducing stress and anxiety. It is important to stay connected to key social supports through available technology to help cope with the current crisis. [**Editor's note**: Shana is one of several instructors participating in the **Emerging Issues in Federal Employment Law** virtual training event April 21-23. Her session *Strategies for Stress: Effective Coping in the COVID-19 World* will provide more guidance on how to manage change and stress for you and your employees. For more information or to register, click **here**.]

In addition to staying socially connected while maintaining physical distancing, here are a few additional tips to help manage stress and anxiety through the crisis:

TIP 1: Allow yourself the time and space to feel the emotions caused by this sudden change. It is important to give yourself permission to process emotions related to this current crisis. Repressing your feelings can, in the long run, create further anxiety, stress, and cause pressure to build.

TIP 2: Socially connect to positive supports and/or schedule a telehealth visit with a therapist. Connect with your friends, family and, if needed, a therapist to talk. Social supports can be helpful to create a community going through a shared difficult experience in unison. It can also be helpful to engage in social connections (while physically distancing) that include conversations or shared activities that are not related to the current crisis to maintain elements of your normal life. (Have dinner together over video chat, play a game over video chat, have a Netflix party.)

TIP 3: Develop a new routine. The majority of society experienced a sudden and dramatic change in their routine. Kids were

sent home from school, workers were furloughed or sent home to telework, all non-essential businesses were closed and the majority of the country has been mandated to stay at home. With the entire family now at home 24/7, it is important to develop a new routine and healthy boundaries in the household. Think about and implement a routine that will help you reduce stress.

TIP 4: Exercise. The gyms are closed and depending on where you live, getting out for exercise can be a challenge. However, exercise is key to reducing stress and anxiety. Consider running/walking outdoors if that is an option, or taking an online workout class.

TIP 5: Limit watching the news to a specific amount of time each day for updates. Constant news watching can increase anxiety and stress. Create a plan to get the needed news updates and information and limit the times spent watching the news. Please remember that Facebook and similar social media sites are not valid sources of the news. Get the facts from a valid source.

TIP 6: Eat nutritious meals. It is well-documented that unhealthy eating habits have a significant impact on poor mental health, including depression and anxiety. Eating nutritious meals will improve your mental health and keep your immune system functioning well.

TIP 7: Engage in healthy sleep habits. Sleep is critical to keep stress and anxiety levels low. Sleep has numerous benefits, including keeping a healthy immune system, reducing the risk of chronic disease and helping with weight loss. A good night's sleep should include 8 hours a night. Develop a positive sleep routine that is consistent.

The COVID-19 pandemic has presented our society with an unprecedented crisis in modern times. While we must physically distance ourselves, we must also continue to unite to support each other, our families and our communities to reduce the spread of the virus and mitigate the emotional toll of the crisis.

We all must do our part to stop the spread of COVID-19 and engage in self-care to keep ourselves and our communities physically and emotionally healthy during these challenging times. info@FELTG.com

**There are situations in which individuals experience serious complications from a stress reaction and have symptoms such as thoughts to harm themselves, aggression towards others, and paranoia/psychosis. If you experience any serious symptoms, please reach out immediately to a mental health professional for assistance. The suicide hotline can be reached at (800) 273-8255.*

Flatten the Curve on Virus-related Workplace Harassment

By Dan Gephart

As the grim realities of the COVID-19 pandemic began to spread across the country in mid-March, so did discrimination, harassment, and the unfair treatment of some Americans. Spurred on by references to coronavirus as the “Chinese Flu” and, even more disgustingly, “Kung Flu,” the unfair treatment took many forms with one commonality – those on the receiving end were thought to be Chinese.

The California-based Asian Pacific Policy & Planning Council received nearly 1,200 reports of harassment during a two-week period in mid-March. Most were reports of verbal harassment. In one case, a young woman was screamed at and spat upon on as she walked down a San Francisco street. It’s not limited to California. Across the country, numerous Asian Americans and Pacific Islanders have experienced everything from microaggressions and racial profiling to violence.

The biased treatment has taken on economic forms as well. While Americans bemoaned the lack of toilet paper, rolls upon rolls of the desired bathroom tissue sat on shelves in Korean and Chinese groceries across the country. Chinese restaurants saw a significant drop in customers even before restrictions on restaurants were put in place.

Recent reports optimistically suggest that social distancing efforts may be flattening the curve of the virus. But they do not suggest a flattening of this ignorance that leads to discriminatory actions. Bias may appear to be dormant now as the majority of employees work from home. However, you need to be aware that it could erupt anew when employees return to the physical workplace.

Employees are protected from harassment and disparate treatment based on national origin. National origin is a protected category and it's broadly defined. The law protects employees against discrimination based on an individual's place of origin, as well the origin of an individual's ancestors. It protects individuals who have the physical, cultural, or linguistic characteristics of a national origin group. The law protects those who are married to a person of a national origin group, have a name closely associated with a national origin group, or belong to an association that promotes the interest of a national origin group. In its 2016 guidance, the EEOC noted that a lot of national origin discrimination tends to be intersectional, which means the individual is discriminated against based on national origin and another protected basis, such as race or religion.

Another important point: Employees are also protected from discrimination based on *perceived* national origin, which seems to be the case with much of the virus-related harassment.

If employees create a hostile work environment for a coworker because of his/her/their national origin based on some uneducated reasoning attached to COVID-19, it's your responsibility to promptly investigate and correct those actions. You shouldn't take action just to meet your legal obligations. Taking action inspires the trust of your employees and generates their confidence that you will take all allegations seriously.

To show that you're serious, take corrective action that:

- Is designed to stop the harassment.
- Includes disciplinary measures that are proportional to the seriousness of the offense.
- Doesn't adversely affect the victim of harassment.
- Addresses harm, such as reinstatement, expungement of disciplinary records, restoration of leave and other appropriate remedies, including an apology from the harasser.

You'll learn more when you attend Preventing and Correcting Discrimination: A Focus on Race, Color, and National Origin on Thursday, April 23. The presentation by FELTG Instructor Ricky Rowe, the former National EEO Manager for the Department of Veterans Affairs, is one of nine live instructor-led events taking place during the FELTG Virtual Training Institute's three-day Emerging Issues in Federal Employment Law event, April 21-23.

While the country has always rallied to meet its great challenges, our sad historical tendency has also been to find a target to blame. This has led to numerous horrors, such as Japanese internment camps or the lingering discrimination against American Muslims. Don't let it happen in your workplace. Gephart@FELTG.com

Conducting Effective Harassment Investigations

This three-day virtual training event, held May 18-20, will give you the foundation for a successful and effective approach to conducting harassment investigations. Find our more or register here.

Tips from the Other Side: Practicing Employment Law Virtually
By Meghan Droste

Much has changed since our last FELTG newsletter. Many of us are staying at home now and with that, far more employees are teleworking than probably any other time before. All of this teleworking brings new questions, more challenges, and a lot of differences in how we all work. In light of all of these changes, I have compiled some tips and pointers to consider as you move your practice into the virtual world.

First, before you follow any of my tech suggestions, please check with your agency to ensure that these options are approved and available to you. Security issues and other concerns vary from agency to agency, and your agency may already have technology in place that can be used to address some of these issues. For example, if your agency already uses Microsoft products exclusively, you may have access to Teams for meetings and calls, while another agency might rely on Google products and, therefore, have access to Google Meet. (If none of these terms are familiar to you, I strongly recommend checking with your manager and/or IT team to determine what resources you can tap during this time.)

With that disclaimer out of the way, here are some things you may want to consider to keep your cases moving. One thing that might not change for you much is how often you are on the phone. For those who regularly interact with witnesses, opposing counsel, and others in different locations, you may be used to doing much of your work by phone rather than in person. The challenge may be in how to do so if you do not have an agency-issued phone that you can use at home. I prefer not giving out my personal cell phone number for work calls so I created a free Google Voice account, which gives me access to a local number that I can use through my cell phone. It allows me to make and receive calls without having to give out my regular number. You might also want to consider using Zoom, Microsoft Teams, or Google Meet without the video option for calls.

And that brings us to the now ubiquitous video chats. It really does seem that everyone is doing them (including some preschool play groups – the one to two-year-old set is now getting in on the fun!). Video calls can seem overwhelming right now, but they can be very helpful for preparing witnesses for depositions or hearings, and for conducting depositions. It's not the same as being in the same room with the witnesses, but as the Commission has recognized, being able to see a witness can be crucial to gauging credibility. Of course, video meetings can come with some risks. (Type "zoombombing" into your search engine of choice if you don't know what I'm referring to.) You can minimize if not eliminate these risks by ensuring that you require each caller to use a password to enter the chat, require the host to initiate the call and individually approve attendees to enter the virtual room, and disable features like recording so that there are no recordings stored on cloud servers.

As state and local governments across the country extend their stay-at-home orders, we may have to address some of these issues in conducting hearings before the EEOC as well. Since 2006, the Commission has prohibited administrative judges from conducting hearings entirely by phone except when circumstances make in-person or video testimony impossible, or both parties request it. If you have a hearing scheduled in the next few months, I encourage you to explore options for video testimony that do not require participants to travel to locations with VTC equipment.

Finally, be sure to take confidentiality concerns into account when you are using phone or video calls to conduct interviews, depositions, and possibly hearings. I know it can be hard to find a private space when everyone is at home, so you may want to

invest in a white noise machine or a white noise app for your phone to make sure no one else can hear you as you talk.

Good luck out there and be sure to take some mental health breaks when you can to stay sane during these challenging times! Droste@FELTG.com

Re-shape the Way You Think About Performance Conversations
By Dr. Anthony J Marchese

There are few expressions within the nomenclature of the workplace more effective at generating a physiological reaction than "performance review" or "performance feedback." For supervisors and individual contributors alike, the mere mention of these words have a tendency to invoke a lot of feelings including: anxiety, frustration, confusion, apathy, resentment, gratitude, or even pleasure. How do you feel about performance feedback? How do your employees feel?

As a lover of all things leadership, my own research and experiences reveal that supervisors (and those whom they manage) have less than favorable things to say about the nature of how feedback is provided, and how often it is provided. They even question the overall usefulness of that which is provided. Interestingly, many non-governmental organizations have eliminated the annual performance review process entirely. Instead, they require managers to have ongoing performance-related conversations throughout the year.

Feedback is intended to recognize and reinforce positive behavior and to act as a catalyst to correct poor performance. The ability to provide feedback that generates the best from employees is not supernaturally imbued upon us during our first day as a supervisor. Most learn of its importance and what works/doesn't through trial and error. Many supervisors describe struggling with (and even dreading) feedback of any kind, as they may have a firm grasp of the performance management "process" but have little confidence in their skills to translate the process into positive employee performance. In other words, how do I as a supervisor communicate my expectations and provide ongoing support so that my employees have all they need to be successful?

Conversely, employees may complain to colleagues that they don't know what their supervisor wants or aren't sure what they think about their work. They feel frustrated after spending a lot of time on a task only to learn that it didn't meet expectations and must be redone. Like emotional intelligence, providing feedback effectively is a skill that can – and should – be developed. It is possible to reshape how both you and your employees feel about performance conversations. Here are two tips that can help:

Consider your own behavioral style and that of your employee(s) BEFORE providing feedback. Most of us speak one of four distinct languages that are evident by our normal behavior: Results/Outcomes, Analysis/Data, Energy/Creativity, and Relationships/Collaboration. Knowing this information can help you provide feedback that is better understood and useful to your employee.

Make constructive feedback impactful. Don't assume that your employee knows *how* to respond to constructive feedback, even if you think your observations and follow-up requests are clear. Changing behavior (or developing new expertise) is a process. Learn how the three F's (Focus, Feedback, Fix) can make all the difference!

For more information, join me for the webinar Providing Performance Feedback that Makes a Difference on Tuesday, April 28, 2020 from 1-2 pm ET. Click here to register for the webinar.