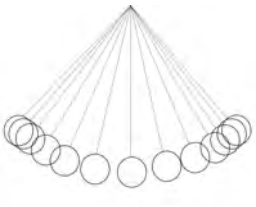
Federal Employment Law Training Group
Teaching the Law of the Federal Workplace

FELTG Newsletter Vol. XIII, Issue 2 February 10, 2021

The Pendulum is On the Move



We're exactly three weeks into a new administration, and to say that things have changed is an understatement. Regardless of where you fall on the political ideology spectrum, or how you feel about executive actions, the whiplash is real.

This edition of the newsletter highlights some of the significant changes that are occurring in the Federal government, as a result of a new president whose philosophy on just about everything, is diametrically opposed to the previous president's. There is always a bit of shock when a new President takes over, more so when the governing political party changes. The shock seems more pronounced this time around. Perhaps there is more change than usual, or perhaps the memories of previous transitions have faded.

Regardless, it's February and the new administration is charging ahead. Things are hopping at FELTG, especially as we incorporate the Biden Executive Orders into our training programs. See elsewhere in this newsletter for some of the upcoming highlights. Meanwhile, you'll find articles on whether saying "All Lives Matter" creates a hostile work environment, what led to an EEO Director's removal, and much more.

Take care,

Deb

Deborah J. Hopkins, FELTG President

UPCOMING FELTG VIRTUAL TRAINING

When Employees are Absent: Sick Leave, FMLA, and Paid Parental Leave
February 17 & 24

A Higher Standard: Disciplining Law Enforcement Officers for Misconduct
February 23

Conducting Effective Harassment Investigations
March 2 – 4

EEO Challenges, COVID-19, and a Return to Workplace Normalcy
March 10

UnCivil Servant: Next Level
March 11

EEOC Law Week
March 15 – 19

Strategic Planning for Federal, State, and Local Offices of Inspectors General
March 24

MSPB Law Week
March 29 – April 2

Honoring Diversity: Eliminating Microaggressions and Bias in the Federal Workplace
April 7

FELTG is an SBA-Certified Woman Owned Small Business that is dedicated to improving the quality and efficiency of the federal government's accountability systems, and promoting a diverse and inclusive civil service by providing high-quality and engaging training to the individuals who serve our country.

Does Saying 'All Lives Matter' Create a Hostile Work Environment?
By Deborah Hopkins

Last summer, at the height of the Black Lives Matters protests, the U.S. Office of Special Counsel (OSC) issued guidance on whether Federal employees were permitted to display Black Lives Matter paraphernalia in the workplace. According to OSC, the phrase "Black Lives Matter" (BLM) has become a motto for protesters and organizations "seeking to raise awareness of, and respond to, issues associated with racism in the United States." Because BLM is centered on issues, it is not considered political organization. Therefore, employees are not prohibited from wearing or displaying BLM merchandise in the workplace.

As with any movement, there are supporters and non-supporters of BLM. One of the catchphrases of opponents to BLM is "All Lives Matter." Much has been written about how and why this phrase is offensive to Black individuals, even when the perpetrator claims to have non-racist intentions.

So let's look at a hypothetical, coming to a workplace or Zoom meeting near you. Employee X comes to work wearing a BLM shirt. Employee Y, a co-worker, looks at the shirt and says to Employee X, "All Lives Matter." Employee X contacts an EEO counselor and claims hostile work environment harassment based on race.

Which leads me to the obvious question: Can a statement such as "All Lives Matter" create a hostile work environment?

I know this is a divisive topic. I know I'm taking a risk even writing about it. There are a lot of strong feelings about BLM and ALM. But this stuff is happening, right now, maybe in your agency, and you need to be prepared to deal with it – the legal way.

Harassment can be a difficult subject to handle. When you find yourself faced with what appears to be a hot-button subject such as this, take a deep breath or two, and remember to always come back to the framework: 1) What are the elements of a hostile work environment, and 2) Is there agency liability?

Unwelcome Conduct
In a hostile work environment case, the first step of the analysis is to identify the conduct that is unwelcome in the workplace. Unwelcome conduct might be words, jokes, name-calling, use of epithets or slurs, threats, email forwards, touching or physical assaults. Conduct is also broad enough to include objects or pictures worn or posted in the workplace.

The primary focus in these cases is on whether the conduct was unwelcome to the victim, not on what the speaker's intent was – though malicious intent can go to severity.

The question: Could a coworker uttering the phrase "All Lives Matter," or wearing a shirt or posting a sign in their office with that slogan on it, be considered unwelcome conduct?

____ Yes

____ No

Based on Protected EEO Category
The next element to consider is whether the conduct was based on a protected EEO category: race, color, national origin, religion, gender, disability, age, genetic information, or reprisal.

The question: Is the statement "All Lives Matter" related to an EEO category?

____ Yes

____ No

If so, which category or categories?

_____

Severe or Pervasive
When determining whether the conduct creates a hostile, intimidating, or abusive work environment, the severity and/or pervasiveness of the conduct must be considered. Some of the items to think through include:

- Is the complainant offended by the conduct?
- Would a reasonable person be offended by the conduct?
- The frequency and duration of conduct
- The egregiousness of the conduct
- The vulnerability of the victim, considering factors such as age and mental capacity
- The makeup of workforce -- is the victim the only employee in the EEO category?
- The social context
- Whether the conduct is physically threatening or humiliating
- Whether the conduct unreasonably interferes with an employee's work performance
- Relative positions of perpetrator and victim

The question: Is one utterance of "All Lives Matter" from one co-worker to another, severe or pervasive enough to alter the terms, conditions, or privileges of employment?

____ Yes

____ No

Does this change if the person making the statement is a supervisor?

____ Yes

____ No

Note: While most EEO case law says that a one-time instance of offensive conduct does not generally rise to the level of a hostile work environment, there are a number of cases where once was enough. Here are a few to get you started: *Lashawna C. v. Department of Labor*, EEOC Appeal No. 0720160020 (Feb. 10, 2017); *Frank v. USPS*, 2013 EEOC Appeal No. 120110223 (Jan. 31, 2013).

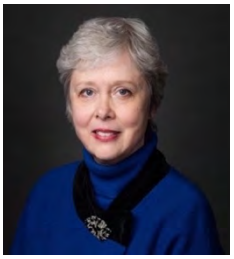
> ***Ask FELTG***
>
> *Do you have a question about federal employment law? A hypothetical scenario for which you need guidance? Ask FELTG.*

Agency Liability
The hypothetical above didn't say anything about the agency's response to the incident, so we don't have enough information to discuss liability. That's another article altogether. But I can tell you, these kinds of incidents have occurred and are likely to occur, and the agency has a responsibility to protect its employees from harassing conduct. If you see or hear anything like this, it's critical to intervene immediately.

I don't have a definitive answer about whether this one statement would create a hostile work environment. As of this morning, there isn't an EEOC decision involving the term "All Lives Matter." I have to think that's because of timing. Perhaps those cases are making their way through the EEO process now because ALM wasn't a thing until fairly recently. There are, however, a few cases where "Black Lives Matter" comes up as a search term. If you're interested, here are a few citations: *Emerson P. v. USDA*, EEOC No. 2019001823 (Mar. 20, 2019); *Sherman H. v. Reclamation*, EEOC No. 2019002422 (May 7, 2019); *Jaqueline L. v. DLA*, EEOC No. 2019001449 (June 23, 2020).

If you're free March 2-4, join FELTG for the virtual training class Conducting Effective Harassment Investigations, where we'll give you lots more on this topic and more, in three half-day segments. Hopkins@FELTG.com

Director of EE Oh No!
When HR Practitioners Fail to Perform
By Barbara Haga



A case caught my eye earlier this week. I was reading through another newsletter focused on the Federal workplace and saw this headline: *Air Force EEO Director Removed Following Investigation*. Of course, I had to read that article. Discipline among HR practitioners doesn't come up all that often, and certainly doesn't make the news.

The article was about the director of EEO at Hill Air Force Base (AFB), which is located near Ogden, Utah. It was written by an attorney who had represented one of the whistleblowers involved in the case.

The EEO director was removed after an Office of Special Counsel (OSC) investigation into whistleblower allegations regarding how EEO complaints were handled at the base, according to the article. The Special Counsel and the Air Force looked into the claims and determined that, among other things, the director "… actively discouraged employees from filing EEO complaints, improperly modified and rejected EEO complaints and allegations, provided false and misleading information about the EEO process, and failed to identify conflicts of interest by management during the EEO mediation process." There were also findings related to improper actions by military attorneys at the base.

The article was focused on the fact that the whistleblowers were successful in getting the issue in front of the OSC and agency officials, who took action to fix the process. Certainly, that's an outcome we would hope for. Yet, I had to know more.

If you've never used the OSC site to read about their investigations before, be aware that there is a lot of information there. Under Press Releases you will find notices when the OSC has made a finding on a particular matter, when they are announcing details about case processing, or making an interpretation that they want to make available to the public. You will find Hatch Act interpretations and notices about cases like the one that is the subject of this column there. Under Public Files you can read case documents, which is where we begin to look at the Hill AFB case.

The initial report of investigation prepared by the Air Force, after the case was referred to them by OSC, includes background information relevant to this discussion. That initial referral took place in September 2018. The Air Force response of 139 pages is dated Dec. 9, 2019. The letter from OSC to the President advising that the whistleblowers' allegations were substantiated was dated Dec. 22, 2020.

The EEO office was responsible for the implementation of federal laws and USAF policy to eliminate unlawful discrimination and sexual harassment for the 21,000 military and civilian employees at Hill AFB.

The EO director was the head of an office that included 5 EEO specialists and an EEO superintendent. (The director is not identified by name, but in some of the statements is referred to as "she," so I will do the same.)

The director had previously been an active-duty military equal opportunity specialist from 1994 to December 2007 when she retired from active duty. She had worked as a civilian EEO specialist from 2008 until August 2016, when she took over as the EO director. She had served as the ADR program manager prior to becoming the EO director. From the information I could glean from the report, this position would be the equivalent of a GS-13.

Air Force Findings
The allegations the Air Force investigated are listed below. I have very briefly summarized the findings:

1 - Whether the EO director actively discouraged employees from filing EEO complaints.

Substantiated. One of the whistleblowers was in the informal step regarding a sexual harassment complaint. The EO director advised the employee could not file because some incidents were outside of the 45-day window, even though there were continuing violations, and that her case wouldn't go anywhere. The EO director said to the employee that because there were no witnesses, the claim "wouldn't carry any weight."

2 - Whether the EO director inappropriately modified or rejected EEO complaints and/or allegations.

Substantiated. The EO director negligently performed both the EEO counseling and the acceptance/dismissal functions for one of the whistleblower's complaints in violation of regulations regarding timeliness and dealing with patterns of behavior in sexual harassment and hostile work environment claims. In addition, there were incidents where records were not complete about why issues were dismissed in certain cases.

3 - Whether the EO director gave employees false and/or misleading information about the EEO process.

Substantiated. The EO director improperly advised employees that a) complaints could not be amended when they could have, and b) an employee in a sexual harassment complaint did not have an option to remain anonymous in the informal stage. The director also advised a contractor that he/she could not file a complaint without doing due diligence to determine if the contractor would be considered an employee.

4 - Whether the EO director failed to identify conflicts of interest by management during the EEO mediation process.

The EO director did allow management officials to be involved in settlements in cases they were involved in, but the investigation found that no law, rule or regulation was violated.

The agency was directed to look at whether the EO director engaged in gross mismanagement. The Air Force did not find evidence of mismanagement.

The Remedy

This is scary stuff. The person entrusted with management of the system that allows employees to bring issues of illegal discrimination forward is making serious mistakes that deprive employees of their rights. The 2019 Air Force report indicated that the subject of the investigation would be referred to appropriate officials for consideration of any appropriate disciplinary action. The letter to the President explained what action was taken. The Air Force committed to revising training requirements for EEO personnel, to issue new policies regarding conflicts of interest, and they referred the issues related to the two military attorneys to the Judge Advocate General Corps.

The EO director was removed from her position and reassigned to another office with no involvement and influence over EEO filings and issued a Letter of Counseling. I'm still scratching my head over this one. More next time. Haga@FELTG.com

The Good News
Focused on Mission and the American People: An Effective Federal Workforce
By Ann Boehm

Let's be honest. The past administration did not hold any particular fondness for Federal employees. We can start with the whole "Drain the Swamp" thing.

Being referred to as swamp dwellers does not do much for employee morale.

The Biden Administration is trying to rebuild the morale. President Biden recognizes and values civil servants. He's been busy in the first few weeks of his administration making that clear.

Executive Order 14003, issued just two days after the inauguration, rescinded Executive Orders 13836 (limitations on collective bargaining); 13837 (limitations on official time); 13839 (accountability for employee performance and misconduct); and 13957 (creation of at-will Schedule F employees).

Unions and federal employee advocates are cheering the administration's efforts, and so am I. But having gone through this kind of transition several times during my own career, I am also a bit afraid of the pendulum swinging too far in favor of employee unions and in favor of protecting the bad employees.

An important part of employee morale is ensuring that agencies deal effectively with Federal labor organizations, and also with discipline problems and poor performers. Your friends here at FELTG have spent more than 20 years helping agencies do just that.

The system Congress created in the Civil Service Reform Act back in 1978 remains in place. Federal employees have many rights. But they don't have the right to be bad employees.

I think it's important to recognize what President Biden already has said about the Federal workforce. Executive Order 14003 begins with this statement: "Career civil servants are the backbone of the Federal workforce, providing the expertise and experience necessary for the critical functioning of the Federal Government. It is the policy of the United States to protect, empower, and rebuild the career Federal workforce. It is also policy of the United States to encourage union organizing and collective bargaining." E.O. 14003, § 1 (Jan. 22, 2021).

Beats swamp-dweller, right?

Also, in a taped message for all career staff, President Biden made these statements:

- "We're a team ... One team for one America."

- "You are civil servants for all Americans."

- "[T]ogether we will lead with core values … values that help us make good decisions, stay focused on what's most important, and keep ourselves accountable, hold ourselves accountable to the American people and to our conscience."

- "Humility, trust, collegiality, diversity, competence: these are the values that most of you look to. These are the values that form our vision for our work ahead."

Pretty powerful stuff. If you haven't watched the President's video, I highly recommend that you do. And make sure your employees watch it too.

In this administration, unions are more empowered. Employees are more empowered. And yes, managers are also empowered (and protected – be very thankful that Schedule F is gone). What's critically important in this more positive

environment is for *every* Federal employee to make sure that the American people come first.

How do agencies ensure that this happens? I recommend that agency managers, labor-relations specialists, and labor relations attorneys reach out to their bargaining unit representatives. Communicate effectively. Talk about the rescinded Executive Orders. Work together to ensure the President's goals are achieved, keeping in mind that the goal for all is to stay mission focused and help the public.

Also continue to take appropriate action to handle those performance and misconduct problems that impact negatively on the morale of the many outstanding civil servants. Even the President's speech noted that "most" of the career civil servants embrace the values he highlighted. Those who don't should be handled as Congress envisioned in 1978, through the discipline or performance routes.

It's good to be a Federal employee. It always has been. Now you have the support of the administration. You can focus on your mission. You can take care of the American people. And that's good news! Boehm@FELTG.com

A Higher Standard: Disciplining Law Enforcement Officers

- How do conduct standards for LEOs differ from other employees?
- What kind of conduct could cause an LEO to have a security clearance revoked?
- When can an agency invoke the crime provision?
- What proof does an agency need if the employee appeals her removal?

If you have questions like these, FELTG's Ann Boehm has the answers. Join her for the half-day virtual training A Higher Standard: Disciplining Law Enforcement Officers on February 23.

Don't Abuse the Abuse of Process Dismissal
By Meghan Droste

Happy February, FELTG readers! Although a certain rodent recently predicted six more weeks of winter, I know I have already turned my thoughts to spring and the warm weather it will hopefully bring. I don't need a groundhog to tell me that it will still be many months before I will be able to teach any in-person classes, but I'm also looking forward to getting back into the swing of teaching with the virtual programs we have coming up this spring.

One of the topics that comes up in many classes I teach is when an agency can or should dismiss a formal EEO complaint. When we discuss the various reasons listed in 29 C.F.R. § 1614.107(a), I often get questions about 107(a)(9), which allows agencies to dismiss complaints when they are "part of a clear pattern of misuse of the EEO process." The Commission gives agencies some guidance directly in the regulation: There must be "(i) Evidence of multiple complaint filings; and (ii) Allegations that are similar or identical, lack specificity or involve matters previously resolved; or (iii) Evidence of circumventing other administrative processes, retaliating against the agency's in-house administrative process or overburdening the EEO complaint system." *See id.* So how many complaints are enough to meet the standard? And how similar do the complaints need to be?

The Commission recently looked at this issue in *Jeffery J. v. Department of the Navy*, EEOC App. No. 2020004860 (Dec. 2, 2020). The complainant filed his formal complaint alleging a discriminatory non-selection on June 21, 2020. The same day, the agency issued a FAD dismissing the complaint as an abuse of the EEO process. The reason? The agency said the complainant had filed eight

other complaints against the same installation over the past 10 years.

The Commission reversed the FAD, finding that filing numerous EEO complaints was not enough on its own to meet the standard for abuse of process. Instead, the agency needed to "show evidence that somehow in filing numerous complaints a complainant specifically intended to misuse the EEO process."

Diversity Training is Back – and More Important than Ever

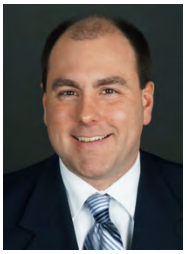
Join Meghan Droste for Honoring Diversity: Eliminating Microaggressions and Bias in the Federal Workplace on April 7, 1-3 pm ET. Register now.

The Commission pointed to two prior decisions to distinguish the issue. In *Wiatr v. Department of Defense*, the Commission found no abuse of process when the complainant filed more than 40 complaints in order to end alleged discrimination, while it found there was an abuse of process in *Abell v. Department of Interior*, in which the complainant filed 40 non-selection complaints with no intention to accept a position.

The Commission also rejected the agency's argument that the complaint was an abuse of process because the complainant's complaints had been similar, none had been successful, and he allegedly had a "personal grudge" against an agency official. It found that the agency had no evidence that this complaint was abusive, rather than just one in a series of complaints.

I'm sure that some of you can think of a complainant who is a repeat customer (although 40 times is probably an outlier!). You might find yourself getting frustrated, but don't let that frustration color the process. Complainants who have filed more than one complaint have just as much of a right to engage in the EEO process as someone coming to your office for the first time. Droste@FELTG.com

As Forecast, Flurry of Executive Orders Accumulate for Federal Workplace
By Michael Rhoads



Winter has made its presence known this year. Here in the Northeast, my friends and family have had the pleasure of receiving more snow in one storm than we have in the past two years combined. President Biden has also made his presence known with a flurry of Executive Orders.

The Executive Order has been the tool for the past few presidents to achieve political goals without having to go to Congress for approval. At the beginning of any new administration, changes via Executive Order can be expected.

Last month, I took a stab at forecasting how some of the Trump Administration's Executive Orders would fare in the Biden Administration, so here's and update on how some of those predictions played out.

Labor Relations
As predicted, EOs 13836, 13837, & 13839 – the Trump Administration's orders affecting Labor Relations – were rescinded. However, agencies are taking a cautious approach to implementing the Biden Administration's EO and are waiting for further instruction before proceeding. FELTG will have courses throughout the year to help you navigate any labor relations changes, but our FLRA Law Week, May 10 – May 14 will give you the most comprehensive review.

Schedule F
My initial read on Schedule F was it might survive, even if only in part. However, Schedule F was rescinded by the Biden Administration via Executive Order. According to Erich Wagner, no agency was able to re-classify employees into Schedule F, but agencies will have to assess whether or not political appointees may have "burrowed in" to civil service positions.

In addition to the Executive action, a bi-partisan bill has also been proposed in Congress which would prohibit any future actions implementing anything similar to Schedule F. The Preventing a Patronage System Act seeks "to impose limits on excepting competitive service positions from the competitive service, and for other purposes." The bill also seeks to keep any positions from being moved out of schedules A – E as they were defined on Sept. 30, 2020.

To learn more about the most recent Executive Orders and how to implement them, join Deb Hopkins and Ann Boehm on Thursday, Feb. 25 at 2:30 pm ET for Changing Course: Understanding the Biden Executive Order on Labor Relations, Performance, Discipline, and Schedule F.
As always, stay safe, and remember, we're all in the together. Rhoads@feltg.com

3 Steps to Complying with the Biden EOs

Did you miss the recent Changing Course: Understanding the Biden Executive Order on Labor Relations, Discipline, and Schedule F? No worries. FELTG will be offering an encore presentation of this 90-minute webinar on Thursday, Feb. 25 at 2:30 pm ET.

This far-reaching EO has a significant impact on labor relations official time, topics of bargaining, clear record settlement agreements, disciplinary and performance actions, and much more. You can't afford to miss this webinar.

Consider it your first step toward ensuring agency compliance with these Executive Orders. Also, join us for the 90-minute webinar Sex Discrimination, Gender Identity, and LGBTQ Protections: A Priority in the Federal Workplace Under Executive Order 13988 on February 17. Then don't miss the two-hour virtual training Honoring Diversity: Eliminating Microaggressions and Bias in the Federal Workplace on April 7.

Pop Goes the Mountweazel: Find the Roadblocks to Swift, Effective Action

By Dan Gephart

Mountweazel. I just love this word. I discovered it last week as I was reading *Liar's Dictionary*, a new novel by Eley Williams. Neither a steep scalable landmass nor a rat-sized mammal, a mountweazel is a bogus entry inserted into a dictionary, encyclopedia or other reference work as a trap to catch future copyright infringers.

About midway through Williams' novel, the protagonist Mallory is charged with finding the mountweazels left behind when the fictional reference book was first published more than a century ago. All of the fake words must be found before the publisher posts the reference book online. The problem is Mallory knows not where the mountweazels are nor even how many there are. (OK, I get it, a John LeCarre spy thriller this most certainly is not.)

Picture Mallory sludging through thousands of dictionary entries to find the fake words. It gives me a headache just thinking about it, and I love words. When overused, used incorrectly, or improperly communicated (all were the case in the novel), mountweazels make it harder to accomplish the mission, which in Mallory's case was digitizing an accurate reference book.

So here's my question: What mountweazels are keeping your agency from meeting its mission? Not fake words, but unnecessary or improperly communicated procedures. When it comes to discipline and performance, to paraphrase a certain insurance commercial, we've seen a mountweazel or two. (Bum ba dum bum bum bum bum.)

Back in 2017, FELTG Past President Bill Wiley was tired of hearing from supervisors

who took useless actions like Letters of Admonishments and Letters of Caution to address wayward employees. Supervisors would take these actions because they were easy and, they assumed, if the same situation arose again, they could say they've taken prior disciplinary action. But guess what? These actions are *not* discipline as defined by case law. The action was a temporary Band-aid that did nothing to address the root of the issue, and, more often than not, the suspect behavior would continue unabated. Even worse, these empty actions are actually grievable, putting the supervisor and the agency on the defensive.

So Bill created the "yellow donut." If you've taken part in FELTG's *UnCivil Servant* training over the last couple of years, then you've seen the graphic. It's the yellow donut that looks more like a three-tiered bullseye. (Seriously, are you going to pay attention to a donut or a bullseye?) The outer edge is the illegal stuff that you should never do, and you most likely don't. (Please tell me you don't.) The inner red part is the good stuff that FELTG teaches, which is the legal minimum, things you must do.

The largest tier in between the inner and outer is the yellow part. That's the mountweazels of donuts of unnecessary actions, keeping you and your agency from meeting the mission. These actions are perfectly legal, but not worth using. Each unnecessary action is a barrier to a swift, effective, and legally sufficient conduct or performance-based action. Keep your stumbling blocks to a minimum.

If you're vegan or on a New Year's Resolution Whole 30 kick, you might eschew the donut for FELTG Instructor Ann Boehm's approach. During her federal career, Ann has also seen far too many unnecessary actions taking place. Why, why, why Ann would ask. The reason, she has been told is: "That's what HR told us to do." Ann spelled this out in her Good News column in the January 2020 newsletter, when she introduced readers to The Office of Folklore, know more affectionately as OOF! That newsletter article included a checklist, which empowers supervisors to demonstrate to the folklorists there is a better and more direct way to handle the situation. (Print the story and cut out the checklist now. I'll wait.)

I hope you are part of the *UnCivil Servant: Holding Employees Accountable for Performance and Conduct* virtual training we are holding starting today. If not, then put a hold on these dates -- May 19-20. That's when we'll be holding the class again. Or you can bring that course directly to your agency (in person or virtually). Email me (Gephart@FELTG.com) and we can discuss.

If you've attended UnCivil Servant previously, join us for UnCivil Servant – Next Level on March 11, where you'll be able to put the tools you learned in the original class to the test with some challenging and realistic scenarios.

These courses were designed to help you determine the minimum steps to take effective and legally defensible performance and conduct actions. We're not doing this to make your job easier, although it will. The more unnecessary steps you take when addressing discipline and performance problems, the harder it gets, the longer it takes, the more likely you are to make a mistake – and the further you get away from mission. Gephart@FELTG.com

EEO and COVID-19

More Americans each day are receiving the vaccines for COVID-19. But while the vaccine is helping eradicate the virus, it's not doing a thing to dampen your EEO challenges. Join Katherine Atkinson on March 10 for EEO Challenges, COVID-19, and a Return to Workplace Normalcy, where she'll share the most updated guidance, and give you the framework to manage your most complex EEO issues.

Tips from the Other Side: Understanding the Religious Accommodation Process
By Meghan Droste

This month, we continue our look at religious accommodations. As I mentioned last month, while there are some similarities with accommodating disabilities, there are ways in which responding to a request for religious accommodations may differ. One way is what you can and can't ask in terms of determining whether an employee is entitled to an accommodation. While it is relatively common to need documentation to establish that someone has a disabling condition that impacts the ability to perform the essential functions of the position, things are a bit different when it comes to religious accommodations.

If an employee requests accommodation for a religious belief or practice, the request needs to include an assertion that the employee has a sincerely held religious belief or practice that is tied to the need for the accommodation. I often get questions in classes about what an agency can do to determine this. Can you ask for more info? Can you push back when the belief or practice seems "strange" to you? Let's look at one of my favorite cases to illustrate some of these issues …

EEOC v. Consol Energy, Inc., 860 F.3d 131 (4th Cir. 2017) comes to us from the private sector, but is a great example. The Commission sued on behalf of an employee, Mr. Butcher, at a mine in West Virginia. In 2012, the mine implemented a biometric hand-scanner to monitor employee attendance. Mr. Butcher objected, stating his belief that the hand-scanner represented the Mark of the Beast. He asked to be exempt from the requirement of using it. The company provided printed information from the manufacturer of the scanner stating that it did not place the Mark of the Beast on anyone. The manufacturer suggested that using one's left hand should alleviate any concerns because, in its interpretation of Scripture, the Mark of the Beast would only appear on one's right hand. Mr. Butcher objected and again asked to sign in and out in another manner because he believed using either hand would violate his understanding of his faith. The company refused to provide other accommodations and reminded him of its progressive discipline policy—within three times of refusing to use the scanner, Mr. Butcher would be fired. He chose to retire instead and then contacted the EEOC.

At trial, the company tried to defend its position by saying the Mr. Butcher's own pastor disagreed with his interpretation of whether the scanner would leave the Mark of the Beast. Counsel for the company began oral arguments before the appellate court by quoting from Scripture, in an apparent attempt to show that Mr. Butcher's position on the Mark of the Beast was wrong. None of this mattered though. As the lower court and then the Fourth Circuit concluded, it was Mr. Butcher's belief, and not the beliefs of his pastor, his employer, or the manufacturer of the scanner, that mattered. Mr. Butcher believed that using the scanner would be a violation of his sincerely held religious beliefs and the inquiry should have stopped there.

(Fun fact: The company was providing accommodations to employees who could not use the scanner for physical reasons at the same time that it denied Mr. Butcher's request.)

What does all of this mean? If you find yourself starting to question a person's religious beliefs, not because you think they don't actually believe them, but because you don't share the same beliefs, you're probably starting down the wrong path.
Droste@FELTG.com

Need Your EEO Refresher Hours?

Join Meghan Droste and Katherine Atkinson and pick up 8 hours of refresher credit. EEO Counselor and Investigator Refresher Training will be held May 25-26.

Is Whistleblowing Different Under a Biden Administration?
By Deborah Hopkins

We have a new President in the White House, there's something you may not have realized: he sees things differently than the last guy who occupied 1600 Pennsylvania Avenue. At FELTG we try not to wade into the merits of politics; our job is to take what the current administration says about employment law topics, and relay those to you within the existing framework of law and regulation, plus any relevant Executive Orders. That said, there are certain ways in which the politics of the party in control impact what we teach and how we teach it. Take whistleblowing, for example.

Federal employees who make protected disclosures about waste, fraud, or abuse in the government are considered whistleblowers, and the highest level of workplace protections of any employee group. Higher than veterans, people with disabilities, union officials, religious minorities, LGBTQ individuals, and more. The law says that whistleblowers may not be fired, disciplined, or otherwise mistreated because of their disclosures. If an agency takes an action against a whistleblower, it needs to provide clear and convincing evidence the action was not taken because the employee blew the whistle.

Under President Trump's administration, there was a focus on firing leakers who shared inside information with the public. Firing a leaker is perfectly legal, unless of course the leaker is a whistleblower – in which case it's against the law. So, over the last four years agencies concentrated on looking closely at the nature of the disclosure (the "leak") to determine whether it rose to the level of protected whistleblower activity, or whether it was simply misconduct. If it was a close call, many agencies took the side of management and adopted the stance the disclosure was not protected, and handled the employee accordingly.

Today, we still have to look at the nature of the conduct to determine if it is protected activity, but under President Biden the philosophy about whistleblowers has shifted. Instead of viewing whistleblowers as leakers, the President (when a candidate and then as President-elect) has spoken about the need for employees to disclose waste, fraud, and abuse in the government – heck, he even hired a high-profile whistleblower to be part of his transition team. So now, if there's a close call, perhaps we'll see agencies take the side of assuming the disclosure was protected.

This Republican/Democrat dynamic is unsurprising. Republican administrations tend to be more pro-management and Democratic administrations tend to be more pro-employee. Members of both parties have talked publicly, and emphatically, about the importance of protecting whistleblowers – but traditionally hairs have been split when looking at *what* was disclosed and whether it was protected activity.

What does this mean for whistleblowing in 2021? You might expect, as political appointees are confirmed or placed in your agency, for the tone about whistleblowing to change. Perhaps you will be encouraged to settle existing reprisal complaints. Perhaps whistleblowers will be urged to come forward with disclosures. Perhaps Congress will pass a new law with more protections.

And perhaps not. Regardless of who is in the White House, whistleblower reprisal is going to occur – though our goal at FELTG is to educate the powers-that-be so that reprisal eventually stops altogether. That might be your job too, and now is a good time to check in with what you know, and what you might not know, about whistleblower protections. As timing would have it, Bob Woods will be covering the most important details in just 60 minutes during the February 25 webinar Why, How and When to Avoid Whistleblower Reprisal. We hope you'll join us. It's too important to miss. Hopkins@FELTG.com.