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

FELTG Newsletter | Vol. XIII, Issue 4 | April 21, 2021

On the Road Again

Many of you have been asking when FELTG plans to return to the physical classroom, and today I finally have an answer for you. Our plan is to begin hosting open enrollment classes in person (with safety protocols) starting with Workplace Investigations Week in Denver August 2-6, followed by Absence, Leave Abuse & Medical Issues Week in Washington, DC August 9-13, and Federal Workplace Challenges: Managing Performance, Conduct, Reasonable Accommodation, and Behavioral Health Issues in Hawaii August 25-27. We also have events planned for September; check out the complete list of open enrollment classes here. And register soon, because we're limiting class sizes amid COVID restrictions.

More good news: Most of our instructors have been vaccinated, or are in the process of doing so, and are ready to travel to provide onsite training to your agencies. And for those of you still not ready or able to get back out there on the road, we've got plenty of virtual training on the upcoming schedule (including classes on performance feedback, nondiscriminatory hiring, and EEOC-ordered compliance training).

This month, we fondly remember a FELTG founder who left this world too soon, and discuss microaggressions, the return of OPM, and more.

Take care,

Deborah J. Hopkins, FELTG President

UPCOMING FELTG VIRTUAL TRAINING

Emerging Issues in Federal Employment Law
April 27-30

Advanced Employee Relations
May 4-6

FLRA Law Week
May 10-14

UnCivil Servant: Holding Employees Accountable for Performance and Conduct
May 19-20

EEO Counselor and Investigator Refresher Training
May 25-26

The Performance Equation: Providing Feedback that Makes a Difference
May 27

EEO Challenges, COVID19, and a Return to Workplace Normalcy
June 2

Nondiscriminatory Hiring in the Federal Workplace
June 9

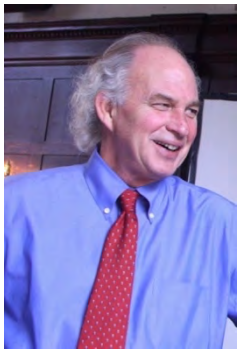
The Supervisor's Role in Diversity, Inclusion and EEO Compliance
June 16-17

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.

In Memory of Ernie Hadley

With deep sadness, we note the recent death of Ernie Hadley. Ernie was a founder and the first President of FELTG, and was a beloved instructor. He served the Federal employment law community for more than 30 years as a strong advocate for employee rights, and authored more than a dozen foundational legal texts in the field. Those of us fortunate to know him appreciated his quick wit, broad intellect, and compassionate heart. Ernie will be greatly missed.

Below, we share an article Ernie originally wrote and published in this newsletter in 2013. As you'll see, with microaggressions now a major training point in the Diversity, Equity, Inclusion and Accessibility (DEIA) arena, Ernie was years ahead of the curve.



Are You a Microaggressor?
By Ernie Hadley

Originally published in 2013

Several years ago, we took a family trip to Costa Rica. It was a great trip. We hiked, saw some extraordinary birds, walked on suspension bridges through the canopy of the cloud forest, visited a coffee plantation and, with my son Luke and daughter Mairead, I went zip-lining. (Not entirely sure I could be talked into the latter again.)

Part of the success of the trip was, no doubt, Costa Rica itself, but some was probably due to the fact that we knew with my daughter Jasmine leaving for college in the fall, this was likely to be last the vacation for the whole family in quite a while.

We reentered the U.S, in Miami as I recall, and approached the Customs and Border Protection checkpoint passports in hand. The officer, a young man probably in his early 30s, dutifully looked at each of our passports and, in turn, each of us. He asked each of the kids a few questions: What's your birthday? What's your home address? He stamped the passports and handed them back to me.

He then told the rest of the family that they could go but asked me to stay behind a few minutes. My wife asked if she could stay, as well, and with his assent, we sent the kids off to find our luggage.

"I didn't want to embarrass your son in front of everybody," he said, "but I can't help but notice that he looks different from the rest of you." Well, you don't really need to have the deductive powers of Sherlock Holmes to figure this one out. Luke stretches out to all of 5'2" and I doubt he'd eclipsed 5' at that point. He has brown skin, very dark brown eyes and black hair.

You've probably guessed from the photo that sometimes accompanies these articles, that he doesn't look like me at all — so much the better for him — or like my wife or his two sisters. There was never any great debate over telling Luke he was adopted.

At the time, I wasn't sure how to react. Part of me was relieved that he didn't ask in front of Luke and his sisters. Part of me was offended because I believed the only reason for asking the question was the color of Luke's skin.

To be honest, I don't think our daughters, both of whom are biological, look particularly alike. Jasmine has brown hair and her mother's height, which is to say not much, and my features. Mairead has blonde hair, my height and her mother's features. Obviously, the answer to the question had no bearing on our reentry into the country as our passports had already been stamped and returned to us.

The reason I write about this is that I recently learned there's now a term for events like this — they're called "microaggressions." As with

all things these days, there's even a website. Microaggressions are the subtle and often subconscious ways that we use stereotypes.

Now, I don't think that the agent who asked the question had any bad motive; certainly, not one that he conveyed. But it goes to the heart of a notion that we've tried very hard to convey to our kids. "Family isn't about how you got here. The mere fact that you're here makes you part of the family."

Fast forward to just a few months ago. Luke was in Ireland studying at the Burren College of Art and I went to visit him. We were, as of course one must do in Ireland, sitting in a pub, sipping on a Guinness and listening to music. An older man, aptly named Declan and about three sheets to the wind, asked if he could sit at our table. No problem. After looking at Luke for a while, he asked "What's a young guy like you doing with an old guy like him?"

"He's my dad," Luke said.

"Then your mom must be the one who's Hispanic."

"No," Luke said. "She's not."

"Oh, then he's not your real dad."

Luke then explained to Declan that, yes, he knew there were two people out there that's he's biologically related to but I was his dad and there was no real about it, just his dad plain and simple. Declan eventually wandered off into the night, no doubt confused by Luke's insistence that he did not have a "real" set of parents and, presumably, a "fake" set but just a mom and dad like many other folks.

The Microaggression's blog gives several other examples:

> H&R Block employee when my best friend (who's black) and I went to get our taxes done together: "Employed?"
> Me: "Yes."
> H&R: "Any children?"
> Me: "No."
> H&R, turns to my friend: "Okay, and you. Employed?"
> Him: "Yes."
> H&R: "Any children?"
> Him: "No."
> H&R: "Are you sure?"
> Him: "Um…"
> H&R: "Just checking."
> Him: "Yes, I'm sure."
>
> I was at the bar with several new coworkers when I was approached by a white guy who told me I was beautiful and asked what my nationality was. I told him I was African-American and he asked, "But what are you mixed with? Who is white? Your mom or your dad?" This made me feel angry and sad. It's a shame that some people think black people must be mixed or biracial to be attractive.
>
> Me: Hey, should I go to a steakhouse or to a sushi place for dinner with my family?
>
> Friend: I think you should go to the steakhouse because you guys know how to make sushi, right?
>
> Often when I have dinner at people's houses, they ask me if I would prefer chopsticks, regardless of the meal!
>
> I'm fine with gay people as long as they aren't gay around me.
>
> The gay couple who moved in next door are not as comically flamboyant as the gay people on TV. It's like they're not even trying.

I'm sure you can think of plenty of other examples, just as I'm sure that I've engaged in some microaggressions of my own.

Some of you may recall that I wrote recently about an EEOC African American

Workgroup Report that concluded, among other things, that "[u]nconscious biases and perceptions about African Americans still play a significant role in employment decisions in the federal sector." And, of course, that doesn't apply to just African Americans. That just happened to be the focus of the workgroup.

It is the cutting edge of our field. Blatant discrimination still exists but, more often, it is being replaced by far more subtle forms of discrimination; forms that are harder to identify and, as a result, harder to correct.

So, let's leave you with something a little more upbeat. For Luke's sixth birthday, we had all the boys in his class over for a party. Most of you can probably imagine what a herd of six-year-old boys can do to a house in a very short period of time, but that's neither here nor there. They we're all sitting around the table eating cake and Luke made mention of something we call Adoption Day. It's the day Luke's adoption was finalized here in the United States and we celebrate it as a family holiday. It's a low-key kind of celebration, usually marked by going out to dinner. Anyway, one of Luke's friends looked at him wide-eyed and said, "Luke. You never told me you were adopted."

These behaviors don't come to us naturally. We learn them. And that gives me hope. Info@FELTG.com

Join FELTG on June 23 for **Honoring Diversity: Ensuring Equity and Inclusion for LGBTQ Individuals**, a two-hour virtual training event covering the law, new EOs, gender stereotyping, transgender protections, unconscious bias, microaggressions and more.

The Golden Doodle Who Wouldn't Nuzzle: A Service Dog, or Not?
By Deborah Hopkins

While preparing the materials for an upcoming training session Ricky Rowe and I are presenting at FELTG's annual Emerging Issues in Federal Employment Law virtual forum, I came across a case that I thought prudent to share – especially because, as return to work orders are issued in the coming months, agencies are likely to see an uptick in requests for service animals and emotional support animals in the workplace.

In a recent case at the Department of Veterans Affairs, the complainant suffered from PTSD, depression, anxiety, and panic attacks. Because of her medical conditions, she requested an accommodation to bring her trained service dog, a golden doodle, to work. She informed the agency that her dog was scent-trained to recognize chemical shifts in her body when she was escalating into anxiety or panic attacks. The dog was trained to alert and calm her before she reached the panic stage. The complainant explained to agency management that her dog might bark in the process of alerting her to her escalating symptoms, as that was the dog's alert mechanism.

The agency approved accommodation for a 30-day trial. During a meeting shortly thereafter, the dog repeatedly barked and was disruptive for more than 30 minutes. Because of the disruption, management began considering removing the interim accommodation, but did not take action.

The dog became even more disruptive in a subsequent meeting. According to agency management, the dog appeared impossible to handle. During the meeting, it continually barked, and jumped on the complainant multiple times, and she was unable to calm it down.

The complainant explained the dog's behavior was an alert to her oncoming anxiety attacks. She said that the dog was trained to stand in front of her, put her paws on her shoulders and nuzzle her to calm her down. Agency management's account of the events was that the dog was not nuzzling the complainant, but jumping on her and others in the workplace, and was uncontrollable.

As a result, the agency terminated the interim accommodation, stating that the dog was too disruptive and impossible to handle in the office. The agency invited the complainant to discuss alternative accommodations, including liberal use of leave when she was experiencing symptoms, but she maintained that other than having her service dog, there was no other useful accommodation.

The agency denied her request to keep the dog in the workplace, so she filed a complaint and the FAD found for the agency. On appeal, EEOC looked at the facts and said the agency was not obligated to allow the service dog in the workplace because the complainant "failed to provide evidence to adequately establish the need for the presence of her dog in order to assist her in performing [her] essential functions." EEOC also said they "cannot reasonably conclude that the Agency's decision to terminate its trial approval constitutes an unlawful failure to accommodate." *Kathie N. v. VA*, EEOC No. 2019003312 (Sep. 22, 2020).

So remember, if an employee wants to bring a service animal into the workplace, having a disability is not enough. The employee must establish the need for the specific use or presence of the service animal as accommodation, and that no other accommodation would be effective. For more on this, join us for the session ***Barking Up the Wrong Tree? Service and Therapy Animals in the Workspace***, part of Emerging Issues in Federal Employment Law, April 28. Hopkins@FELTG.com

The Good News: OPM is Back (I Think)!
By Ann Boehem

A mere two years ago, a move was afoot to abolish the Office of Personnel Management. You know, OPM – the entity created by the Civil Service Reform Act of 1978 that "serves as the chief human resources agency and personnel policy manager for the Federal Government."

At the time, I wrote an article suggesting that abolishing OPM might not be a bad thing. I reflected on a time, early in my career in the 1990s, where one could call OPM experts and get outstanding advice. And I reflected on how that greatly changed by the end of my career in 2018. OPM stopped being the go-to entity for Federal personnel advice, particularly in the area of hiring federal employees.

Not to bore those of you who read the article then, but my anecdote is worth mentioning again.

I could not fill an Employee Relations Specialist position. Two years of advertising the position resulted in no hires. I went to OPM's website to see if there was anything there that could help me. The website highlighted OPM's hiring reform concept. I was prepared to be the manager who could be creative and hire more effectively.

I wrote an email to the address on OPM's website. Instead of getting some legitimate guidance from OPM, the OPM contact forwarded my email to the Human Resources Director for my agency and indicated that I needed help. I was mortified. What OPM did not only failed to help me, but also embarrassed me with my agency, just for trying to think outside the box.

In 2019, the Trump Administration proposed moving OPM to the General Services

Administration and the Office of Management and Budget. Congress placed that action on hold and commissioned a study by the National Academy of Public Administration (NAPA) on the wisdom of this proposal. The findings of that study, issued in March, recommended against dismantling OPM. *Elevating Human Capital: Reframing the U.S. Office of Personnel Management's Leadership Imperative*, National Academy of Public Administration, March 2021 (NAPA Report).

The study also highlighted years of OPM failures, particularly failing to provide greater flexibilities to hire. It noted the constant turnover at OPM – from the position of Director on down through the ranks. And it stated emphatically that OPM needs to "focus on strategic human capital management and performance." NAPA Report at p.22.

The Supervisor's Role in Diversity, Inclusion and EEO Compliance

For many federal supervisors, the EEO process is mysterious and foreboding. The only thing more mystifying may be diversity and inclusion efforts. With this two-part virtual training class, FELTG aims to make it all less baffling.

This course serves another purpose: It's a great tool if you're looking for EEOC-ordered compliance training

Join us on Wednesday June 16 for Diversity, Inclusion and the EEO Process and June 17 for Understanding Theories of Discrimination. Register and get more information here.

FELTG's experienced instructors provide specific guidance for supervisors, and advisors will learn how best to work with supervisors throughout the process, to help your agency avoid costly mistakes.

Now for the good news. Even before the issuance of the NAPA Report, the current administration signaled support for the mission of OPM.

Just a few days after the Inauguration, on Jan. 25, the Biden Administration identified a new OPM leadership team. On Feb. 23, 2021, President Biden nominated Kiran Ahuja to be OPM Director. Her nomination is pending in the Senate. OPM has been without a Senate-confirmed Director since Dale Cabaniss left abruptly in March 2020, and leadership is important.

Most recently, on April 9, OPM indicated it is ready to improve its management of human capital. It launched the Federal Workforce Competency Initiative (it even has an acronym, FWCI, which we know is a big deal in the Federal government!) to Build Stronger Federal Workforce Capability.

The first phase of the FWCI will be a survey of Federal agency employees and supervisors. The purpose of the survey is to identify competencies and tasks relevant to Federal jobs. Hmmm. Sounds like a good start (and yes, I know, OPM has done stuff like this in the past to no avail. But I'm always hopeful).

Here are some more good signs. We know that OPM worked quickly to issue guidance to agencies on the implementation of Biden Executive Order 14003. I'm also hearing that OPM is happily taking phone calls and providing advice.

Folks, this is a big deal. The Federal workforce is essential to this country. Agencies need support managing the workforce – from hiring to firing. OPM is supposed to help. And maybe, just maybe, help is on the way.

Think good thoughts, my friends. I'm looking forward to a renewed and improved OPM that can result in a better Federal government for all! That would be Good News! Boehm@FELTG.com

Being a Member of Protected Class Is Not a Free Pass to Harass Others
By Meghan Droste

It's hard to believe it's been more than a year since I've been able to teach a class in person. I'm so grateful that we live in a time when technology makes it possible for us to continue teaching and learning in a virtual environment. Even in this past year of dramatic changes, there have been a few constants — my cat still demands treats regularly, the weather in New England remains unpredictable (I've received reports from friends that it is snowing there today, and yes, it's mid-April as I write this), and many people still have questions and concerns about holding an employee accountable when there is the possibility the employee might file an EEO complaint.

I get the hesitation. Who wants to invite a complaint, and the time and effort it requires to respond to one, if there is a way to avoid it? That's an understandable concern. But as a recent Commission decision reminds us, *not* holding an employee accountable can lead to consequences as well. In *Zora T. v. Department of Justice*, EEOC App. No. 0120171654 (Mar. 23, 2021), the complainant alleged that a coworker harassed her repeatedly based on her sex. The harassment included following the complainant in what multiple employees perceived as a stalking manner, physically blocking the complainant from leaving a room, repeatedly invading the complainant's personal space, and grabbing the complainant from behind and lifting her off the floor in a "bear hug." The agency verbally reprimanded the coworker and proposed a five-day suspension that it mitigated to one day. Despite this, the harassment continued. The complainant's supervisor testified that management was afraid to discipline the coworker because she served as the LGBT Program Manager.

The case was before the Commission on an appeal from the administrative judge's grant of summary judgment in the agency's favor. The Commission noted that summary judgment was not appropriate in part because there was a dispute of fact as to whether the agency took appropriate corrective action against the coworker. From the facts presented in the decision on the appeal, it seems clear that the agency's actions were not sufficient to avoid liability, if for no other reason than that the harassment continued. While management may have been concerned that the coworker would have filed a complaint of sex discrimination if they took more severe disciplinary action, that concern does not change the agency's obligations to the complainant. Regardless of whether the harasser might subsequently file a complaint, an agency still has an obligation to take prompt and effective corrective action when it learns of harassment.

Sometimes, despite your best efforts, employees will file EEO complaints. That's their right and there is nothing inherently wrong with that. What is wrong is failing to act simply because you are concerned that a harasser will file a complaint if you hold her accountable. Droste@FELTG.com

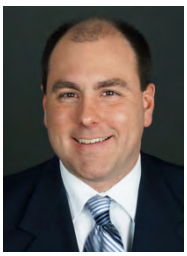
D E I A
Diversity | Equity | Inclusion | Accessibility

Nondiscriminatory Hiring in the Federal Workplace

This half-day virtual training, which takes place on June 9, will explain how to ensure your hiring practices are nondiscriminatory and align with merit system principles. Taught by Attorney at Law and FELTG Instructor Meghan Droste, this course will cover interview questions that cause problems, selection panel roles and responsibilities, and much more.

If you plan to hire an employee this year, this course is a must. Register here.

What Is Diversity, Equity, Inclusion, Accessibility (DEIA)?
By Michael Rhoads



The Biden administration has set a striking tone when it comes to Diversity and Inclusion. OPM has always taken a lead role in defining Diversity and Inclusion, which it has now expanded to include two other related concepts, Equity and Accessibility. OPM defined its role in its March 8 memorandum, "Moving forward, OPM will play a critical leadership role in the Administration's governmentwide efforts to advance diversity, equity, inclusion and accessibility (DEIA) and we encourage all agencies to continue DEIA activities which include training and educating your workforce." But what does that mean for you and your agency?

Let's start by looking at what each term means:

Diversity – This is a well-established field in federal agencies. I found a comprehensive definition of diversity in OPM's Guidance for Agency-Specific Diversity and Inclusion Strategic Plans. It states, "workforce diversity is a collection of individual attributes that together help agencies pursue organizational objectives efficiently and effectively. These include, but are not limited to, characteristics such as national origin, language, race, color, disability, ethnicity, gender, age, religion, sexual orientation, gender identity, socioeconomic status, veteran status, and family structures. The concept also encompasses differences among people concerning where they are from and where they have lived and their differences of thought and life experiences." Diversity in the Federal workforce is established, but because people aren't perfect, it needs attention and follow up to ensure standards are maintained.

Equity – A renewed focus on equity began on day one of the Biden Administration. On Jan. 20, 2021, President Biden issued Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, which states, "the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality."

The EO goes on to further clarify: "The term 'equity' means the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality."

OPM further clarified action items for agencies regarding equity in its March 8 letter. "Consistent with these aims, each agency must assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups."

Inclusion – Also a well-established concept in Federal agencies. Inclusion takes Diversity a step further, and is a call to action within the business culture of an agency. OPM's Guidance for Agency-Specific Diversity and Inclusion Strategic Plans states, "a culture that connects each employee to the organization; encourages collaboration, flexibility, and fairness; and leverages diversity throughout the organization so that all individuals are able to participate and contribute to their full potential." It further states OPM's ultimate

goal for workplace inclusion, "Cultivate a culture that encourages collaboration, flexibility, and fairness to enable individuals to contribute to their full potential and further retention." Like diversity, inclusion is a work in progress.

Accessibility – Accessibility is traditionally thought of as Section 508 compliance, but the current administration is taking a broader look at who in society has access to and benefits from Federal programs, and is looking to provide broader access to communities and populations that have been underserved.

EO 13985 Section 2(b), "Underserved communities" refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life …"

The EO also gives explicit guidance on the next steps agencies can take. Section 8: "The head of each agency shall evaluate opportunities, consistent with applicable law, to increase coordination, communication, and engagement with community-based organizations and civil rights organizations."

Be the Change You Want to See

Nothing changes if nothing changes. Let's begin the process of change by speaking to one another in an honest search for understanding. Education and training are the best way to alleviate misunderstanding. FELTG is focused on providing training that will promote Diversity, Equity, Inclusion and Accessibility.

Look for our DEIA logo in our course descriptions to update your SES, supervisors, attorneys, HR team, unions, and staff on the latest information, and get ideas on how to implement DEIA topics at your agency. Together we can make the Federal workforce the model employer it is meant to be, and lead the workforce towards a more diverse, equitable, inclusive and accessible future for all.

Our upcoming DEIA classes include:

- Nondiscriminatory Hiring in the Federal Workplace, June 9, 12:30 – 4:00 pm eastern
- The Supervisor's Role in Diversity, Inclusion and EEO Compliance, June 16-17, 12:30 – 4:00 pm eastern
- Honoring Diversity: Ensuring Equity and Inclusion for LGBTQ Individuals, June 23, 1:00 – 3:00 pm eastern
- Webinar Series – Reasonable Accommodation in the Federal Workplace – July 15 – August 12, 1 PM eastern, 5, 1-hour Sessions each Thursday.

Stay safe, and remember, we're all in this together. rhoads@feltg.com

Need Labor Relations Training?

With one Executive Order, President Biden created a dramatic shift in the world of federal labor relations, rescinding numerous Trump Executive Orders, including those regarding official time, bargaining topics, negotiation timeframes, and much more. Let FELTG's upcoming training navigate you through this 180-degree change in federal LR.

FLRA Law Week – May 10-14

This five-day virtual training program (choose one session or all five) provides in-depth guidance on a wide range of LR issues.

Also, consider these upcoming 60-minute webinars:

Mandatory Permissive Bargaining: What Does That Really Mean – April 22 *That's this Thursday, register now.*

What's the Difference Between a Formal Discussion and a Weingarten Meeting – July 1

Director of EE Oh No: When HR Practitioners Fail to Perform Part III
By Barbara Haga

This third column will focus on how discipline might fit with the situation described first in the February column.

Just a quick recap: An IG investigation resulting from an OSC complaint found that the head of the EO Office at an Air Force Base had "… 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."

As a result of the OSC action, the Air Force reassigned the EO Officer to another office with no involvement and influence over EEO filings and issued a Letter of Counseling.

Let's look at performance errors handled through conduct procedures.

Performance Errors and Conduct

As noted last month, there is nothing mentioned in any of the documents posted on the OSC website that indicated the EO Officer gave this bad advice for some nefarious reason or received any benefit from doing so. I read the report to say that the person believed that her actions were proper. She was wrong. These are terrible errors. When there are performance errors, we might think of performance procedures as the proper remedy. However, sometimes a performance approach doesn't make sense. The risk of allowing the person to continue to perform the work after discovery of such errors in my mind is unacceptable.

Performance errors don't have to be intentional to be actionable under conduct procedures. Negligence and failure to follow procedures are types of charges that might be used when performance errors are so serious that the agency would find a performance opportunity period intolerable. I wrote a series of columns on this topic in September, October, and November 2017.

752 Cases and Performance Errors

The cases I discussed in the prior columns dealt with actions that, for the most part, threatened people's safety and well-being. All resulted in removals. One was a paramedic who failed to check the drug box to make sure it was properly filled and secured before departing for the day. Unfortunately, later that day, she needed a drug that should have been usable but wasn't there. Providence intervened because another truck had responded to the call and their drug box was intact so the drug could be administered to the patient. In this case the paramedic had prior discipline for failure to follow procedures. *Publicover v. Navy*, DC-0752-15- 0003-I-1 (2016) (ID).

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

A second case involved a VA technician who did not properly sterilize instruments even after being recently counseled about proper procedures. The problem here should be obvious to all – the danger of infection through use of dirty instruments. The instruments that were not properly sterilized made it all the way into an operating room before they were discovered. The VA had to discard $1,000 worth of supplies that had been exposed to the dirty instruments, and there was a delay in being able to perform the surgery.

The Board decision includes an interesting discussion of remorse and potential for rehabilitation in this type of circumstance. Mr. Williams was very sorry, but that didn't convince the Board to allow the AJ's

mitigation to stand. *Williams v. VA*, 94 FMSR 5623 (1994), *affirmed without opinion* Fed. Cir. October 18, 1995.

In *Hunter v. Navy*, DC-0752-11-0325-I-1, (2011) (ID), a police officer was removed for failure to follow procedures related to responding to a call. He was not dispatched to respond to the scene and the situation was not an emergency (high probability of death or serious injury) under their procedures. Hunter responded using lights and sirens, which was also against established procedures. In the process, his vehicle was involved in an accident and totaled.

Negligence and Similar Charges

Negligence is a subset of poor performance. Negligence in performance of official duties is a failure to exercise the degree of care required under the particular circumstances, which a person of ordinary prudence in the same situation and with equal experience would not omit. Board decisions tell us that where an act of carelessness or negligence results, or could result, in serious injury, a more severe penalty may be warranted.

Similarly, charges of failure to follow established procedures or careless workmanship could also result in severe penalties. Many actions that Federal employees perform from law enforcement work to medical treatment have horrible consequences if not performed correctly. But what about jobs that have legal responsibilities?

What happens when an employee fails to follow a law that applies to her assignment? What if the person has the proper training but still fails to uphold the provisions of that law? What would happen if a contracting officer failed to follow contract law in awarding a contract? What if an NLRB employee failed to enforce labor law in a case involving a private sector company or an FLRA employee failed to enforce 5 USC 71 in a Federal agency case? What if a budget officer violated appropriations law in approving use of funds? Assuming we could prove that the law was violated, I think that most of us would come to the conclusion that there would be serious consequences.

According to the OSC press release, this Air Force EO Officer was found to have "… improperly and unlawfully handled complaints involving sexual harassment and discrimination."

Does such a finding warrant disciplinary action? I believe an argument could be made that it does. When I first read an article about this case, I thought I was reading about an actual removal not a reassignment. I certainly didn't expect to read about issuance of a letter of counseling. What purpose did that serve? If the person was no longer in the position and had no involvement in EEO work, how could she repeat the infraction?

There are cases where an HR official has been disciplined when that individual failed to carry out responsibilities properly. There are several OSC cases where HR officials violated veterans' preference and were disciplined. A GSA GS-15 HR director was removed for fabricating three discontinued service retirements *Hathaway v GSA*, DA-0752-92-0689-I-1, (1993). The answer this time, however, was different. *C'est la vie.* Haga@FELTG.com

Opening Up the Damns About Supervisor Rules and Return to Physical Workplace
By Dan Gephart

I was moderating one of the recent webinars in our Supervisory Webinar Series (there are still a lot of great sessions left and you can still register) when FELTG President Deborah Hopkins was discussing the Five Elements of Discipline, specifically establishing legal and valid rules.

"Legally, a supervisor can establish a rule that you can't say *damn* in the workplace," Deb explained.

It's a good thing I was on mute. If not, attendees would've heard me say "Damn right!," thereby disrupting the presentation, while also breaking the example rule that Deb had just described. Why the overreaction? That "no damn" rule is the first one I would decree as a supervisor. It's not that I'm prudish. I don't curse much myself, but it's not an issue for me if others do, as long as it's not excessive.

During college, I spent many hours working in the warehouse of a freight shipping company. I don't want to name the specific company, other than it's named after a color and it rhymes with "hello."

I was promoted from loading the trucks to something called Swak Clerk. I and another young man would scan the boxes before they made their way down the conveyor belt, into a loader's pile and onto a truck. I was eager to meet the performance standards set for me. Yet, I found it difficult because every few minutes, I'd hear someone scream my name in a very urgent manner.

I'd stop scanning and holler: "What?" This would eventually lead to someone else saying: "What?" After further back-and-forth yelling over loud warehouse noises, I'd realize that nobody called my name. A truck loader had only screamed "Damn!"

These continuous interruptions made it hard to keep up with the performance standards. Things were much worse for my fellow Swak Clerk, who dealt with the exact same problem. His name was Buck.

You can understand why I'd embrace the "no damn" rule. But these kinds of rules have been absent over the last dozen or so months. During that time, employees have worn sweatpants, worked in bed, eaten whenever and wherever they wanted, yelled at their kids, and walked their new dogs during the workday. They've done a lot of things they're not going to be able to do once they return to the physical workplace. Readjusting to unique workplace rules is going to be a little challenging.

The concept of supervisor's rules is such a basic principle, there isn't a foundational case that specifically addresses whether small rules set by supervisors are OK.

There were a few cases where supervisor's rules were questioned, but those cases were adjudicated for completely different reasons. (Safe must be locked at all times when not in use - *Chavez v. DVA*, 120 MSPR 285 (2013)) (Leave office lights on during work hours - *Mogil v. Dep't of Veterans Affairs*, No. 2018-1673 (Fed. Cir. May 1, 2019)) (Men must wear neutral pants but women may wear pants of any color - *Shedd v. FAA*, EEOC No. 0120073132 (2007)).

The general authority to run the workplace the way a supervisor sees fit comes from 5 USC 301-302:

> The head of an Executive department or military department may prescribe regulations for the government of his department, *the conduct of its employees*, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. [Emphasis added.]

If you're a fellow "Dan" or "Buck," hard of hearing, or someone who hates mild profanity and you're looking for more guidance, you should read *Pinegar v. FEC*, 2007 MSPB 140.

In that case, a GS-12 attorney with a discipline-free record was removed based on two charges: Disruptive Behavior (two specifications) and Making Inappropriate Remarks (seven specifications, including referring to his supervisor's writing as "crap," making unseemly accusations, and using a sarcastic or intemperate tone).

The agency had issued "four express warnings" and the employee still did not correct his behavior, so the agency proposed removal, which the MSPB upheld.

For more guidance on rules and everything else involving accountability, register now for UnCivil Servant: Holding Employees Accountable for Performance and Conduct held over two half-days on May 19 and 20. [If you have new supervisors, this course fulfills OPM's mandatory training requirements for new supervisors. Also, registrants for both days will receive a copy of the textbook *UnCivil Servant: Holding Federal Employees Accountable for Performance and Conduct*, 5th Ed., by William Wiley and Deborah Hopkins.]

Basically, if your rule makes sense and it doesn't run afoul of any law, you're good. But in the coming months, as your employees reacclimate themselves to their old workspaces, you might want to ease up a little on any rules that are more onerous than useful. Gephart@FELTG.com

Tips From the Other Side: Employee Responsibility and Religious Accommodation Requests
By Meghan Droste

Welcome to the latest installment of our discussion of religious accommodations. So far, we have looked at various obligations agencies have when processing requests for accommodations, namely what an agency needs to prove in order to successfully defend against a failure to accommodate claim, and when agencies should not ask for more information or question the need for an accommodation. This month, we're going to take a look at part of what an employee needs to show in order to prove an entitlement to an accommodation.

When requesting an accommodation, an employee must point to a religious practice or belief that conflicts with a work requirement (think back to our February discussion of *EEOC v. Consol Energy, Inc.* and Mr. Butcher's belief that using a hand scanner would violate his religious faith regarding the Mark of the Beast). One key component to this is the employee providing enough information to show that a religious practice is actually part of the employee's belief — in other words, that not being able to engage in the practice would violate the employee's sincerely held religious beliefs.

As the Commission has explained, an agency is not required to provide accommodations for a voluntary activity that is connected with religion. For example, in *Nesbitt v. U.S. Postal Service*, EEOC App. No. 01996248 (Sept. 19, 2000), the complainant sought changes to his schedule

Dealing With Employee Mental Health Challenges During and After COVID-19 Pandemic

The COVID-19 pandemic has exacerbated the ongoing behavioral and mental health crisis in this country. After a year of isolation, new work processes, heightened responsibilities, and political minefields, employees with a mental health diagnosis will be returning to the physical workspace. This virtual training program on July 21 will provide highly practical guidance and straightforward advice from Shana Palmieri, a licensed clinical social worker. Find out more here.

to accommodate attending church services on Sundays, a teaching service on Wednesdays, and choir practice on Thursdays. The Commission upheld the administrative judge's conclusion that the teaching service and choir practice "were more akin to 'extra-curricular' activities than fundamental tenets or obligations of faith." Therefore, the agency did not have an obligation to provide accommodations for those activities. As the Commission explained, for the purposes of accommodations, there is a distinction between "a church member's belief in the tenets of the religion" and participation in activities, like religious study or choir practice, that occur "as a desire of the participant."

This does not mean, however, that the only activity an agency must accommodate is attending services. In *Yau v. U.S. Postal Service*, EEOC App. No. 07A50063 (May 24, 2006), the complainant requested leave to attend a Buddhist conference. The agency denied the request, stating that it was an "optional religious activity," and, therefore, it did not have a duty to provide an accommodation for it. The Commission upheld the administrative judge's finding of religious discrimination. Although a conference might appear to be similar to other "optional" activities, the record demonstrated that the complainant considered attendance at the conference to be a mandatory part of his religious practice. As the Commission noted, the complainant testified "regarding the commencement of his multi-year training to become a Buddhist Temple Master and Service Man and noted that his attendance at the conference was required of participants in the training program and those who maintained a temple in their home, which complaint and his wife did."

What does all of this mean for agencies? As always, you should handle requests for accommodations on a case-by-case basis. While the employee needs to show that the activity in question is required and not optional, the agency should not jump to conclusions or make assumptions just because an activity is something other than attending services. Droste@FELTG.com

FELTG Forum 2021: Emerging Issues in Federal Employment Law

A brand-new Administration with starkly different priorities than the previous White House occupants. A massive effort to return to pre-pandemic normalcy. New case law emerging from the EEOC and FLRA. 2021 is a year of change and challenge.

The FELTG Virtual Institute's second annual Emerging Issues in Federal Employment Law event offers 15 *live* instructor led sessions with the latest legal and practical guidance. And it starts ***next week*** (April 27-30).

Sessions include:

- What to Expect When You're Expecting a New Board

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- When Employees Go Insubordinate: Don't Mess With the Wrong Elements

- COVID-19 and EEO: What We've Learned and What We Still Need to Know

- Leave for the Federal Employee in 2021

- The Telework Tango: Communication and Feedback for a Remote Workplace

- Impact and Implementation Bargaining in the Federal Workplace

- Addressing Microaggressions and Bias in the Federal Workplace

- Barking Up the Wrong Tree? Service and Therapy Animals in the Federal Workplace

Plus case law updates, and much more. Save money by registering for the All Access pass. Find out more or register here. Not only do you get answers from FELTG's experienced instructors in real time, but you can earn CLE credits and EEO refresher training credits.

New ARPA Presumption Expands Federal Workers' Comp Coverage
By Frank Ferreri, Special Guest Author

The one constant that has emerged in the COVID-19 era is that things will change, and such has been the case with Federal workers' compensation coverage.

Early on in the pandemic, the Office of Workers' Compensation Programs made it easier for certain federal employees to establish that their exposure to coronavirus was work-related without going through traditional requirements on producing evidence.

With the American Rescue Plan Act of 2021 now in effect, Congress has followed OWCP's lead, and declared that a federal employee who is diagnosed with COVID-19 and carried out duties that required contact with patients, members of the public, or coworkers, or included a risk of exposure to the virus during a covered period of exposure prior to the diagnosis, is deemed to have an injury that is proximately caused by employment.

Under the law, employees who are "exclusively teleworking" don't enjoy the presumption of coverage, and it's up to the U.S. Department of Labor to specify what the "covered period of exposure" is.

In the meantime, OWCP has advised in guidance that federal employees should be aware that:

- Any COVID-19 claim filed under the Federal Employees Compensation Act that was accepted for COVID-19 prior to March 12, 2021, is not impacted because coverage for benefits has already been extended.
- Any COVID-19 claim filed under FECA that was denied or withdrawn prior to March 12, 2021, is eligible for review under the new eligibility requirements.
- Any COVID-19 claim filed under FECA on or after March 12, 2021, will be reviewed solely under the new eligibility requirements.

OWCP explained in the guidance that if employees previously filed a COVID-19 claim under FECA that OWCP denied based on a lack of exposure or lack of medical evidence establishing a causal relationship between the job and the infection, they can expect to hear from OWCP by around the end of April.

For employees who have never filed a COVID-19 claim under FECA but believe they have contracted COVID-19 from federal employment, it's necessary to file a CA-1 through the Employees' Compensation Operations and Management Portal.

Employees who previously filed a COVID-19 claim under FECA that was accepted can expect no change and need not take further action. Info@feltg.com

Encore!

Did you miss the webinar on the recent Federal Circuit case *Santos v. NASA,* which drastically changes the way agencies must handle performance-based removals by setting new requirements?

Join FELTG President Deborah Hopkins and FELTG Instructor Bob Woods for an encore presentation on May 11: ***Justifying your PIP? What the Recent Precedent-Breaking Fed Circuit Decision Means***.

Register now.

The Performance Equation Adds Up To Better-Prepared Supervisors
By Anthony Marchese, Ph.D.

Most organizations do a great job developing strategy and working with divisions and departments to cascade goals to employees. Yet, the vast majority of supervisors seek support to help employees translate their goals into actionable results.

In many instances, the ability of an employee to successfully meet her goals requires learning new information, developing new or enhancing existing expertise, and having a mechanism in place to track her progress.

Opportunities for professional development and career advancement remain a primary driver in choosing and staying with an employer. Employees seek a work environment that is committed to their growth. They also want an environment that helps them develop a measurable strategy to reach their desired destination.

According to recent Gallup studies, 50 percent of employees do not know what is expected of them on a day-to-day basis. More than 70 percent report not having mastered the necessary skills to successfully do their job. We can do a better job preparing our supervisors!

The Performance Equation© considers the multidimensional nature of human performance. Performance is driven by the role Meaning, Mindset, Mastery, Malleability, and Measurement play in helping:

- Assess one's current state
- Plot one's desired state.
- And develop a strategy with measurable goals to ensure that clarity, competency, and capacity exists to effectively execute job responsibilities.

Employees can execute their jobs when they have a clear awareness of expectations, and either have the necessary skills or are in the process of developing them. It's also critical that the capacity for continual learning is present to ensure ongoing relevancy.

Learn the Performance Equation© to:

- **Equip** leaders with tools to better understand what matters most to employees and how to align the mission and values of the so employees know how they fit into the "bigger picture."
- **Examine** the intimate relationship between one's mindset and behavior. Mindset drives how individuals respond to performance feedback, confront difficult situations, handle ambiguity, respond to failure, and take on new tasks.
- **Integrate** the latest research-based practices in adult learning, neuroscience, and human motivation theory to help supervisors understand how to assess current capabilities and what to do to help support growth.
- **Embrace** the fact that diverse teams are better teams. However, without an inclusive, non-threatening approach to understand, celebrate, discuss, develop, and leverage behavioral differences, teams are likely to encounter greater misunderstanding, poor collaboration, and be impaired due to crippling conflict.
- **Establish** a clear understanding of where one is currently in their career or skill development and introduce a path forward creating goals that are driven by experiences that are proven to be most impactful.

I'll be presenting the virtual training The Performance Equation: Providing Feedback That Makes a Difference on May 27 from 12:30-4 pm.

I hope to see you there. Info@FELTG.com