



Federal Employment Law Training Group

Teaching the Law of the Federal Workplace

FELTG Newsletter

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2022 is the Year of DEIA



Welcome to the new year, FELTG Nation. I am so thrilled to announce a brand-new feature on our website that enhances the site's accessibility. When you visit www.feltg.com, click on the accessibility icon (here, on left) on the bottom of the screen and

you'll have the opportunity to change font size, colors, justification, focus, and more. The site will remember your selections from now on, so happy scrolling as you check out all the training, resources, and news we are offering in 2022.

With the continued Federal government emphasis on Diversity, Equity, Inclusion, and Accessibility (DEIA), we have more than just a highly-accessible website for you this year. Classes on [avoiding EEO reprisal for vaccine exemption requests](#), [EEO counselor training](#) in the new normal, current challenges with [COVID-19 and EEO](#), and [eliminating workplace microaggressions](#), are just a sampling of our classes early in the new year. Our [Virtual Training](#) and [Webinar](#) pages have more.

This month, we present our annual state of the civil service, and tackle topics including performance management, leadership traits, how asymptomatic COVID-19 is NOT a disability, and more.

Take care,

Deborah J. Hopkins, FELTG President

UPCOMING FELTG VIRTUAL TRAINING

Navigating Federal Labor Relations in 2022
January 13

Calling All Counselors: Initial 32-Hour Plus EEO Refresher Training
January 24-27

Managing COVID-related EEO Challenges in the Federal Workplace
February 8

UnCivil Servant: Holding Employees Accountable for Performance and Conduct
February 9-10

Advanced Employee Relations
February 15-17

Workplace Investigations Week
February 28-March 4

Honoring Diversity: Eliminating Microaggressions and Bias in the Federal Workplace
March 9

Nondiscriminatory Hiring in the Federal Workplace: Advancing Diversity, Equity, Inclusion and Accessibility
March 16

MSPB Law Week
March 28-April 1

EEOC Law Week
April 4-8

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.

**The State of the Civil Service:
2022 Edition**

By Deborah J. Hopkins



It's now 2022, and over the past twelve months there have been significant changes in the Federal civil service – common any time there's a change in administration, but more so in this past year than any other year I can recall. As

I've done for the past several Januarys, I'd like to share some highlights and happenings (and, unfortunately, non-happenings) in the world of Federal employment law.

Vaccine Requirement

On September 9, President Biden issued Executive Order 14043, which required all Federal employees to be vaccinated against COVID-19, unless they qualified for a legal exemption. These exemptions only apply when employees have a medical condition or sincerely held religious belief that prohibits them from being vaccinated. Even then, exemptions will only be granted if doing so does not cause an undue hardship on agency operations. The deadline to be “fully vaccinated” was November 22.

In December, the administration issued guidance telling agencies to wait until the new year to take any disciplinary actions involving a loss of pay (suspensions, demotions, or removals) for employees who fail to be vaccinated and don't qualify for a legal exemption.

Now that it's 2022, agencies are free to move forward with the steps of progressive discipline as set forth in the [guidance](#).

This EO has gone largely unchallenged, whereas the vaccine requirement for Federal contractors, and those for employees outside the Federal government, have seen numerous Court challenges and injunctions.

Executive Orders

President Biden issued 77 Executive Orders in 2021, many within his first few days in office. Below are just a few that directly impact Federal employees.

- 13985: Advancing Racial Equity and Support for Underserved Communities Through the Federal Government
- 13988: Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation
- 14003: Protecting the Federal Workforce (this EO rescinded President Trump's three Federal workforce EOs from 2018, plus the EO on Schedule F designation)
- 14035: Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce
- 14043: Requiring Coronavirus Disease 2019 Vaccination for Federal Employees

MSPB

Last year, President Biden nominated three individuals to serve as members of the Merit Systems Protection Board.

In October, the nominees were voted out of committee, which means the next and final step is a vote from the Senate, where a simple majority could confirm the nominees.

As of this writing, that vote has not been scheduled and we have no indication when, or if, a vote will occur.

The last time there was a quorum at the MSPB was Jan. 7, 2017. The backlog of Petitions for Review has now reached over 3,600. If and when the nominees get

ASK FELTG

Do you have a question about Federal employment law? A hypothetical scenario for which you need guidance? Read [Ask FELTG](#) to find the answer or to ask you own question.

confirmed they will have a LOT on the agenda besides the backlog, including:

- Assessing cases under new performance requirements, as a result of the March 2021 Federal Circuit decision *Santos v. NASA*
- Challenges to Administrative Judge authority, as a result of *Lucia v. SEC*
- Interpretations on the newish VA accountability law
 - This includes the burden of proof in misconduct cases, as a result of the August 2021 Federal Circuit decision *Rodriguez v. VA*
- Untangling the timeline in cases involving several Executive Orders and OPM regulations that were issued first under the Trump administration and then rescinded under the Biden administration

We can only hope these confirmations will occur soon. If so, we should start getting MSPB decisions in time for [MSPB Law Week](#), March 28 - April 1. Register soon and save your seat.

EEOC

The Equal Employment Opportunity Commission has been very busy over the past twelve months, in the Federal sector and beyond. In addition to taking on an integral role in President Biden's Diversity, Equity, Inclusion and Accessibility (DEIA) agenda, the Commission has also regularly provided updated guidance related to the COVID-19 pandemic and related EEO issues.

More recently, the EEOC cautioned employers against illegal reprisal related to vaccine exemption requests. We're tackling that in the January 19 webinar [Stop the Spread of COVID-related Retaliation in the Federal Workplace](#).



For more, join us for [EEO Counselor training](#) later this month or [EEOC Law Week](#) in April. And be sure to check out Dan Gephart's recent [interview](#) with EEOC Chair Charlotte Burrows about what agencies can expect in the world of EEO in 2022.

FLRA

The MSPB isn't the only agency dealing with a backlog. The Federal Labor Relations Authority has several hundred Unfair Labor Practice cases pending review. In addition, two nominees for Authority members are still awaiting Senate confirmation. Sound familiar? Of course, the significant difference between these confirmations and the MSPB confirmations is that there are currently Authority members in acting positions, so there's a quorum and decisions can still be issued.

In addition to quickly overturning President Trump's union-related EOs, the Biden Administration has also taken several steps to increase the visibility of, and employee participation in, Federal unions. OPM issued management directives in October 2021 that instructed Federal agencies to highlight collective bargaining rights for Federal employees.

Plus, there have been numerous precedent-altering decisions over the past year that may be impacted after the anticipated change from a Republican majority to a Democratic majority. On top of that, we're still waiting for the Senate to confirm the first permanent FLRA General Counsel in more than four years.

Join us for [FLRA Law Week](#) May 10-14, where the entire world of Federal Labor

relations will be discussed in depth. By then, a lot of these issues should be much clearer.

OPM Regulations

Last week, OPM issued [proposed new rules](#) on 5 CFR Parts 315, 432 and 752, as a result of Executive Order 14003. Comments are open for the public until February 3.

OPM also proposed regulations for 5 CFR part 724, the *Elijah E. Cummings Federal Employee Anti-Discrimination Act of 2020*, and [comments on these regs](#) are due by February 4.

Next week, FELTG's News Flash will share the takeaways from these proposed regulations.

Closing Thoughts

2022 looks to be quite interesting with a continued pandemic, anticipated returns to the workplace, and expanded telework for hundreds of thousands of employees. As always, we'll keep you up to date when ever anything noteworthy occurs. Hopkins@FELTG.com

UnCivil Servant Training is Back!

Mark your calendars now. FELTG will be presenting its flagship program [UnCivil Servant: Holding Employees Accountable for Performance and Conduct](#) on February 9-10 from 12:30-4 pm ET each day.

Over the course of two half-days, you'll learn simple step-by-step guidance for taking swift, appropriate, and legally defensible performance and conduct actions.

We hope you never have to fire an employee. However, it's important that you have the tools to effectively address poor performance and misconduct, should the need arise.

[Register](#) for both days and receive a copy of the *UnCivil Servant* textbook.

Writing Performance Narratives: It's Time to Do Better By Barbara Haga



For agencies that use a calendar year rating cycle, supervisors are in the throes of trying to put together performance narratives now. For some supervisors, this is the worst part of their responsibilities. Why is that?

Sometimes, supervisors don't fully understand the mechanics of the systems. They don't understand what the rating levels your agency selected mean and the standards and elements they have written don't work very well, so trying to measure against them is terribly difficult. Sometimes they don't want to tell the employee something he or she doesn't want to hear – whether that is that the performance is poor or that the performance isn't at the top, but supervisors are expecting resistance from the individual being rated, or worse yet a rating grievance.

Sometimes, supervisors have been given a limit on who can be rated at what levels, even though that, of course, violates 5 CFR 430.208(c), and they are trying to make things come out right by upper management's rules. Sometimes, supervisors don't want to distinguish among employees. It's easier to say that everyone is at a particular level and avoid the heat.

Problems with writing narratives are not generally a problem with the supervisor's writing ability, although this argument has been advanced for years, particularly with pay for performance systems. One comment raised against pay for performance systems was that with pay adjustments tied to ratings, then those who ended up with supervisors who were good at painting the picture of high-level performance would benefit financially throughout their careers, even though others whose performance was just

as worthy would lag in their pay rates because reviewing boards wouldn't judge the less well-written narratives as highly.

I don't think it is an issue of writing ability. It certainly isn't a literary contest. I think the problem is often that the supervisor has identified the level they want to "give," and they are having trouble coming up with the examples to justify it. The horse and cart are out of order. The manager should first be looking at what was accomplished and then determine the rating level.

Level 5 Narratives

The place where this problem is easiest to see is with narratives written for Level 5 ratings. The problem isn't the writing, it's the content.

Here's an example of a narrative written for a Level 5 rating of a GS-12 supervisor. The standard was a garden variety supervisory standard. See if you are convinced by what is written here that the supervisor was performing at Level 5. I have eliminated names of organizations and programs and also have added some notes throughout:

Employee established SOP manual. *Volunteered and served on a Committee.* [BH note: This was an employee welfare committee that was not relevant to the supervisory role.] Ensured all customers were in receipt of accurate documentation and understood the expectation of any documentation received from Branch. Re-enforced branch policies on how to perform all duties and tasks. Employee coordinated matters concerning internal and external customers of the agency and the office. In addition, coordinated with outside entities directly impacting the agency and office pertaining to the processing of certain actions. *Branch increased closure output for CY 2020.* [BH note: Much more information was needed here.] Employee ensured all

production levels remained sufficient to accomplish the mission. Moreover, employee established standard letters for the staff to use when interacting with customers. Re-enforced importance of accuracy of information to the staff when executing office functions to best represent the branch. *Employee continues to be a great asset to the leadership team.* [BH note: This platitude doesn't add anything in terms of documenting exceptional performance.]

So, what's wrong? This description outlines what should be normal day-to-day supervisory duties. Ensuring that employees coordinate, that production levels are maintained, giving guidance to employees about proper execution of their duties – that should be what we expect supervisors to do. There's no explanation of how this is exceptional. Here are some matters the supervisor's supervisor should have addressed:

Developing SOPs: Why was this of particular importance? Were the employees engaged in this? If so, how employees participated or, if not, what the supervisor brought to this task that was exceptional? Did having the SOP's lead to benefits during the cycle or could the supervisor anticipate future benefits?

How was communication with customers enhanced? Why were the standard letters noteworthy? How did workforce participate or what did the supervisor do in personally developing them that was noteworthy?

Did any of these initiatives have direct benefits that could be identified?

The narrative almost reads as if the last supervisor wasn't doing a particularly good job of fulfilling his or her supervisory responsibilities and now someone in the job is taking care of that, That doesn't necessarily mean that the new supervisor is performing at Level 5.

The lost opportunity in this narrative was the line *Branch increased closure output for CY 2020*. There should have been documentation of the specifics. Did the closure rate increase by 1% or 10%? The rater should have talked about why this occurred and how the supervisor's efforts led to that. The closure rate going up could have been a result of the workers' efforts, so we should see something about how the supervisor was instrumental in achieving the improvement. What did having more cases closed mean? Does that mean 1) customers got answers quicker, 2) getting answers delivered was cheaper, 3) the backlog was reduced, etc.? What obstacles did the supervisor's leadership overcome?

The Last Word

I've written about this topic for several months now, so this is the last installment. **[Editor's note:** Read Barbara's other stories on the topic [here](#), [here](#), and [here](#).] If you are a rater or an advisor to raters, perhaps your resolution this year should be to do better.

In the illustration I provided, the rater should have done better. But the reviewing level should have, too. The reviewer should have returned the rating and asked the supervisor to fill in the gaps I identified. It ultimately comes down to the management chain emphasizing what they find important. Haga@FELTG.com

Webinar: Navigating the FMLA

Barbara Haga will present [Deconstructing FMLA: Entitlement, Notice, and Medical Certification](#) on February 3.

Attendees will learn how to:

- Manage substitution of paid leave in place of unpaid FMLA leave.
- Determine what to do when medical documentation is insufficient.
- Identify covered serious health conditions.
- And more. [Register now](#).

C8 Traits Provide a Road Map to Real Leadership Success By Marcus Hill



Editor's note: Marcus Hill presents FELTG training on leadership, EEO, supervisory challenges, and more. We're excited to have Marcus contribute to the FELTG Newsletter. If you're

interested in having Marcus conduct training for your agency, contact info@FELTG.com.

January 2022 marks my one-year retirement anniversary. It inspired me to declutter the workplace belongings around the house I amassed over 37 years. Yes ... I know, who hoards that amount of stuff? Unfortunately, and fortunately, me. *Unfortunately* is obvious, but I say *fortunately* because sorting through the clutter presented an opportunity to reminisce and celebrate professional achievements one more time. I began my Federal career as, some would say, a *disadvantaged* South Georgian 17-year-old GS-2 cooperative education student but concluded it as a highly accomplished Senior Executive Service leader.

As I combed through the documents and memorabilia chronicling my career, one word continuously resonated with me -- leadership. In fact, one of the first items I ran across during my organizing efforts was a May 1983 newspaper article that featured an interview I gave as the graduating high school senior class president. In that article, I acknowledged the leadership experience I gained serving in that role and commented it would *come in handy* in the future. Little did I know the future would be one month later when I started my Federal civil service career. In addition, I thanked my parents, teachers, coaches, and classmates for contributing to the leader that I had become. I was impressed reading such humility at a young age. Yes, what I now refer to as C8 Leadership Traits were infused in me early on and significantly contributed to achieving

those many accomplishments visible throughout the clutter. So what are these C8 Leadership Traits that I attributed to enabling so many successes? I am glad you asked:

C1–Character: Leaders who demonstrate impeccable character attract like-valued followers. We know integrity, honest and ethical behavior are core qualities of reputable, trustworthy leaders. Leaders of great character also possess a mindset of serving those who follow or *work for them*. By shifting the traditional paradigm of subordinates working for their leaders, leaders forge bonds that result in subordinates giving their all to support them. A former colleague shared a quote that resonated with me at the time. He attributed it to a Civil War dictum for cavalry commanders: “Feed your horses, feed your men (troops) and then feed yourself.” Character orders this sequencing.

C2–Capacity: Effective leaders must possess the capacity for continuous learning. Albert Einstein said: “Once you stop learning, you start dying.” Research has shown that developing a healthy reading habit strengthens your mental capacity. Leaders must have the capacity to absorb and apply relevant learnings for the betterment of their organizations, colleagues, and themselves.

C3–Competence: Competence establishes credibility. Therefore, leaders must invest time and energy into honing their craft, being very proficient in those competencies relevant to leading and managing.

C4–Confidence: Confidence results from preparation. Leaders who are prepared when opportunities present achieve success. In mathematical terms, “Preparation + Opportunity = Success.” Successful leaders exude confidence.

C5–Courage: “There is no right way to do the wrong thing.” On occasions, leaders may find themselves in situations in which they may have to remind superiors of this. I experienced such a time. Doing so can be

emotional and career-impacting. However, leaders must have the courage to speak truth to power if warranted. Remember, leaders are constantly being watched and evaluated by their subordinates. According to my former deputy, a former United States Marine, I earned my blood stripes that day when I had to demonstrate such courage. Along with that badge of honor, I earned the ultimate respect of my colleagues. That was priceless.

C6 – Compassion: We are spiritual beings living a human existence. Each of us will experience days in the struggle, and a good dose of compassion may be our cure. Often, leaders can *make/break, convict, or pardon*. There is power in the pardon. It’s OK to be the *Velvet Hammer* on occasion.

C7 – Completion: Zig Ziglar stated, “It’s not where you start but where you finish that counts.” Be a leader that’s known for closing. Most are only openers. Results matter.

C8 – Commitment to excellence: Leaders should strive for excellence in every endeavor and inspire others to do the same. In the last organization I led, our mantra was “Excellence in All We Do, It’s Our Responsibility.” The best strategy for a leader to gain that commitment to achieve organizational goals is by including their workforce in strategic planning initiatives, not just the senior leaders.

Creating an inclusive planning culture that values differing perspectives yields great opportunities to accomplish strategic priorities. Committing to this approach resulted in my former organization, during my tenure, achieving more than 40 governmental and industry awards, including many individual recognitions for excellence.

I have successfully organized the clutter and purged items I no longer need to retain from my former career. By doing so, I believe I have only created additional space for more C8 Leadership Traits-based successes to come. Hill@FELTG.com

***The Good News:
Stop Using ‘Can’t Versus Won’t’ and
Everyone Will Be Happier (Trust Me)
By Ann Boehm***



Throughout almost 30 years of working in Federal personnel law, one of the mantras that bothers me the most is the one used by many personnel practitioners to decide whether an employment issue is performance or misconduct: “If the employee *can’t* do it, it’s performance. If the employee *won’t* do it, it’s misconduct.”

My reaction to this statement is remarkably consistent: “Huh?!”

Seriously, what does this mean? If you want to get very legalistic about it, this mantra is assigning intent to whether an employee should be placed on a performance improvement plan or disciplined. No intent (can’t) = performance. Intent (won’t) = misconduct. That just doesn’t make sense.

I see how a willful failure to perform – “won’t,” if you will – could be misconduct. But a willful failure to perform can also be performance. And if somebody can’t do what they are expected to do, does that excuse them from engaging in misconduct? I think not.

In 2014, I attended FELTG’s MSPB Law Week training. FELTG Grand Poobah Emeritus Bill Wiley explained that “can’t vs. won’t” doesn’t make any sense (agreed, agreed, agreed; applause, applause, applause). As Bill explained it, **the proper test for performance versus conduct simply requires examination of the critical elements in the performance work plan. If an employee is unacceptable on any one critical element in the plan, it’s performance. Otherwise, it’s misconduct.**

Hooray! Life changing! This makes so much sense!

We at FELTG continue to teach performance versus misconduct in this way. It’s totally logical. “Can’t versus won’t” is not. But sadly, “can’t versus won’t” just will not go away.

Even the MSPB has used the illogical “can’t versus won’t” analysis. In *Valles v. Dep’t of State*, MSPB LEXIS 25 (M.S.P.B. Jan. 6, 2020), the appellant challenged his removal. He argued that a fully successful performance rating undermined the agency’s proof of the misconduct charge “failure to follow instructions.”

Let’s just stop right there. The appellant received a *fully successful* performance rating. He was acceptable on all of his critical elements. If you use the FELTG approach, this could not be a performance case. It had to be misconduct.

The MSPB, however, did not use the very wise and logical FELTG approach. The administrative judge explained that a “failure to follow instructions” charge requires an agency to show that the employee “(1) was given proper instructions, and (2) failed to follow the instructions, *without regard to whether the failure was intentional or unintentional.*” *Id.* at *19 (emphasis added). Even though intent is not relevant to a failure to follow instructions charge, somehow the AJ was persuaded by the agency witnesses’ testimony that “performance involves an employee who ‘can’t do,’ while misconduct involves an employee who ‘won’t do.’” *Id.* at *25. (Sounds like an intent analysis to me.) Apparently, the appellant was a classic “won’t do.” That was good enough for the AJ to find the agency proved the failure to follow instructions charge.

Argghhhh!! This makes no sense!

The Federal Circuit reviewed the MSPB’s decision and affirmed the removal. *Valles v. Dep’t of State*, No. 2020-1686 (Fed. Cir. Oct. 29, 2021). Unfortunately, the court did not question the AJ’s “can’t versus won’t” analysis. However, it did not rely upon it either. The court pointed out that “[i]ssues of

misconduct and performance may overlap” and “following instructions can fall within this area of overlap.” *Id.*, slip op at 4.

The performance and conduct overlap is precisely why agencies struggle with whether to pursue a matter as performance or misconduct. An easy tool is needed to help with this decision-making process.

Guess what that easy tool is. NOT “can’t versus won’t.” Trust me. It’s the FELTG way. Failing a critical element means it is performance. Otherwise, it is likely misconduct.

It’s important to understand what else the court held with regard to this performance/misconduct overlap. The court determined that appellant’s fully successful performance evaluation was relevant and had to be considered in assessing the proof of the charged misconduct as well as the penalty (in the *Douglas* factor analysis).

Agencies need to consider the impact of a fully successful evaluation on a related misconduct case. That being said, the court noted “that the existence of a fully successful performance evaluation” does not bar “discipline for matters covered by the evaluation,” only “that the evaluation must be considered” in determining whether the discipline was appropriate. *Id.* at 5. Fortunately for the agency in *Valles*, the court found that even though the AJ erred in not considering the fully successful appraisal, the employee was so bad that removal was justified – no harmful error there. *Id.* at 5-6.

My friends, we at FELTG want to make the crazy Federal personnel world easier for you to navigate. Resolve in 2022 to stop relying on “can’t versus won’t” in deciding between a performance or misconduct action. Rely on a review of the performance plan’s critical elements. We don’t make this stuff up. We want to help. And that’s Good News. Boehm@FELTG.com

No, Asymptomatic COVID-19 is NOT a Disability **By Deborah J. Hopkins**

Last month, EEOC released updated [guidance](#) on whether COVID-19 meets the definition of “disability” under the law. Which raises the question, is a person who has contracted COVID-19 a qualified individual with a disability for the purposes of reasonable accommodation (RA) under the Americans with Disabilities Act (ADA) and related laws?

It depends.

COVID-19 itself is not automatically a medical condition that rises to the level of a disability because most cases are transitory and minor. According to the guidance:

A person infected with the virus causing COVID-19 who is asymptomatic or a person whose COVID-19 results in mild symptoms similar to those of the common cold or flu that resolve in a matter of weeks — with no other consequences — will not have an actual disability within the meaning of the ADA. However, depending on the specific facts involved in a particular employee’s medical condition, an individual with COVID-19 might have an actual disability...

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, N.2.

The guidance reminds agencies that in cases where long-haul COVID is experienced by an employee, each and every reasonable accommodation request needs an individualized analysis to determine if the employee has a physical or mental impairment that substantially limits a major life activity and qualifies for the RA process.

Here's an example of COVID-19 rising to the level of a disability:

"An individual diagnosed with COVID-19 who experiences ongoing but intermittent multiple-day headaches, dizziness, brain fog, and difficulty remembering or concentrating, which the employee's doctor attributes to the virus, is substantially limited in neurological and brain function, concentrating, and/or thinking, among other major life activities."

And here's an example where COVID-19 does NOT rise to the level of a disability:

"An individual who is diagnosed with COVID-19 who experiences congestion, sore throat, fever, headaches, and/or gastrointestinal discomfort, which resolve within several weeks, but experiences no further symptoms or effects, is not substantially limited in a major bodily function or other major life activity, and therefore does not have an actual disability under the ADA. This is so even though this person is subject to CDC guidance for isolation during the period of infectiousness."

Id. at N.4.

So, even if an employee gets a severe case of COVID-19 with a high fever, perhaps even hospitalization, unless there are long-term effects or symptoms generally lasting longer than six months, then the individual does not have a disability and, therefore, is not entitled to the RA process.

The guidance also cautions agencies to be aware of situations where a COVID-19 infection, even one that does not rise to the level of a disability, may worsen underlying conditions or even create medical conditions that rise to the level of a disability:

- An individual who had COVID-19 develops heart inflammation

- During the course of COVID-19, an individual suffers an acute ischemic stroke
- After an individual's COVID-19 resolves, the individual develops diabetes attributed to the COVID-19

Id. at N.9.

We'll be tackling all this and much more during the upcoming and updated-for-2022 Virtual Training Event [Managing COVID-related EEO Challenges in the Federal Workplace](#) on February 8. Hope you'll make the time to join us. Hopkins@FELTG.com

Upcoming EEO Webinars

FELTG's webinar programs are short (60-90 minutes) instructor-led focused on providing you with the appropriate tools and the latest developments in the world of Federal employment law. Here are our upcoming EEO-related webinars:

Stop the Spread of COVID-related Retaliation in the Federal Workplace

January 19, 1-2:15 pm ET

Register [here](#).

Winning EEO Cases Through Summary Judgment

February 24, 1-2 pm ET

Register [here](#).

Damages and Remedies in Federal Sector EEO Cases

March 24, 1-2 pm ET

Register [here](#).

Reasonable Accommodation: The Mistakes Agencies Make

April 21, 1-2 pm ET

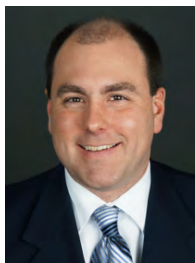
Register [here](#).

The Changing Nature of Hostile Work Environment Claims

May 19, 1-2 pm ET

Register [here](#).

***If the EEOC Orders Training,
Who Ya Gonna Call?
By Michael Rhoads***



No one is perfect, and mistakes are bound to happen over the course of a career. So, what happens when a manager is found to have made a mistake related to an EEO complaint? Occasionally, the EEOC will order training for the supervisor in question or, if the behavior is pervasive throughout agency, for all supervisors. The goal is to make sure everyone is in compliance with the law. Some recent EEOC cases are a good reminder that no matter how many times you say something, it's best to mind your Ps and Qs to avoid getting yourself and your agency in trouble. Below are some recent cases from the EEOC which serve as a good reminder of what you can and can't say, and what should be avoided at all costs.

No Substitute

In *Foster B. v. Department of Health and Human Services*, EEOC Appeal No. 2019005682 (April 12, 2021) the Complainant, a supervisory health system specialist, filed an EEO complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment on the bases of sex (male, sexual orientation) and disability. An employee working under him used sex-based epithets against gay men several times over the course of two years.

The complainant's supervisors encouraged him to file an EEO complaint but did nothing to stop the employee's discriminatory behavior. The EEOC found that the agency's lack of discipline emboldened the employee to continue with the epithets. The employee used the epithets in the presence of the complainant's supervisor and other employees on several occasions.

The EEOC found the agency did not provide a clear complaint procedure. The most important lesson to learn from this case is, "... the EEO process is not a substitute for the Agency's internal process." The law is the foundation, but the agency still needs to come up with an actionable plan to assist employees with processing EEO complaints.

The EEOC also ordered the supervisors to attend eight hours for training related to eliminating harassment in the workplace. FELTG is holding a session on Wednesday, March 9, 2022, from 1:00-3:00 ET, [Honoring Diversity: Eliminating Microaggressions and Bias in the Federal Workplace](#).

Thrown Under the Bus

In *Jane H. v. Dept. of the Air Force*, EEOC Appeal No. 2020003198, (May 19, 2021), an employee filed 19 complaints, which the Agency investigated. The complaints alleged that the agency subjected her to a hostile work environment over a five-year period on the bases of sex (female), and reprisal for prior protected EEO activity.

The hostile work environment complaints are related to the behavior of two co-workers and the complainant's supervisor. Some of the behavior included:

- The complainant's computer software folder was intentionally deleted
- The complainant was taken off overtime shifts
- Items were stolen from the complainant's desk
- A large trash can and dead bugs were left on her desk
- A co-worker repeatedly made loud noises "causing complainant to have a panic attack and seek medical attention."

However, the both the AJ and the EEOC found the hostile work environment claims by the complainant to be unpersuasive. "Even construing any inferences raised by the

undisputed facts in favor of Complainant, a reasonable factfinder could not find in Complainant’s favor.”

However, due to one errant comment by the supervisor, the EEOC remanded the AJ’s finding of no discrimination on the bases of reprisal back to the agency for further processing. The EEOC also ordered the supervisor to attend eight hours of EEO training. The comment from the supervisor was in response to a request from the complainant for union time. “[The Chief] and I were both thrown under the bus due to your EEO complaint. If I don’t give you time, you’re just going to file a grievance.”

But for this one comment, the Agency’s case would stand. We’re all human, however, supervisors are held to a higher standard when it comes to the words chosen when addressing an employee. Don’t let hurt feelings hurt an EEO case by using chilling language toward a complainant. Understanding how to avoid retaliatory situations like this is where FELTG shines. We will offer [Stop the Spread of COVID-related Retaliation in the Federal Workplace](#) on January 19 from 1-2:15 pm ET.

As we begin 2022, let this be a year of increased understanding and thoughtfulness between all employees. We at FELTG are here to offer the right training and guidance to help you avoid common EEO pitfalls and mistakes. Stay safe, and remember, we’re all in this together. Rhoads@feltg.com

Advance Your ER Skills

Taught by FELTG Senior Instructor Barbara Haga, [Advanced Employee Relations](#) provides in-depth training on topics including leave, performance, misconduct and more.

The program will be held February 15-17. Classes run from 9:30 am – 4:30 pm each day and are already approved for 18 HRCI general recertification credits. [Register now.](#)

Office Odyssey 2022: The Workplace of the Future is Already Here

By Dan Gephart



Science fiction writer Arthur C. Clarke once said: “Trying to predict the future is a discouraging, hazardous occupation.” It’s hard to argue against the *Space Odyssey* series author when you read what people once [predicted](#) the workplace of the 2000s would look like.

- Fifteen-hour workweeks?
- Seven weeks of vacation?
- The disappearance of the letters c, x, and q?

It’s hard to pick the prediction that’s most ridiculous.

Yet, Clarke himself made some amazingly prescient prognostications ([watch the YouTube video](#)) back in 1964, when he suggested (again, he did this nearly 60 years ago) that remote work and instantaneous communication would be the norm.

Well, welcome to 2020s, Ghost of Sir Arthur C. Clarke. Your predictions were right on the money. As we ease our way cautiously into 2022, we look at what today’s workplace experts are predicting for this year and the challenges this new workplace will create.

Hybrid workplaces

Every workplace expert agrees: Remote work is here to stay. In its [workplace re-entry](#) guidance last summer, OPM suggested that agencies “take this opportunity to adjust their telework policies to reflect a new understanding about how telework has worked at their agencies.”

That doesn’t mean you need to turn off the lights and lock the office doors behind you. The physical workspace won’t disappear any

time soon. The word of 2022 will be ... say it with me: *hybrid*.

Ultimately, however, the performance success of a hybrid work environment will come down to managers and supervisors. Based on anecdotal evidence over the past year, there are quite a few Federal supervisors out there who aren't yet up to this challenge.

As the hybrid model becomes entrenched, supervisors need to avoid what workplace experts call the "two-tiered workforce." That means ensuring equity between employees who report to the office and those who work remotely, sharing consistent messaging, and holding all employees equally accountable for performance and conduct, regardless of where they physically work.

FELTG can help you with that. We can bring courses directly to your team with guidance on improving your management and communication skills, providing employee feedback, setting expectations, and taking the appropriate action for performance and conduct deficiencies. Or you can join FELTG President Deborah Hopkins on February 9-10 for [UnCivil Servant: Holding Employees Accountable for Performance and Conduct](#).

Office space

As employers across America move to a hybrid environment, you will soon start hearing (that is, if you haven't already) about physical changes to the workplace. With less need for face-to-face time, some private sector companies are already re-designing their workspaces. This could mean fewer offices, as workplace experts predict more "we spaces" and fewer "me spaces."

That won't be an easy transition in the Federal government. Labor battles have been literally fought over inches of office space.

It's not a particularly easy time for unions and management, dealing with whiplash of extreme labor relations positioning.

Rebuilding management-labor relationships will be key in the upcoming year. Get yourself prepared for this year by attending [Navigating Federal Labor Relations in 2022](#) tomorrow (January 13) from 1-3 pm ET.

The 'Great Resignation'

In, perhaps, the most surprising trend to come out of the pandemic, a record number (millions per month) of employees voluntarily left their jobs in the past year. Well, it was surprising to many people, but not Texas A&M Professor Anthony Klotz, who not only predicted it two years ago, but actually coined the term "Great Resignation."

So far, the "Great Resignation" hasn't hit the Federal government. But experts predict the trend will continue, and Feds are certainly not immune. Now is the time to look over your most recent FEVS results.

What are you doing right by employees? What kind of workplace culture have you created in your unit? Will you continue to make telework an option once the pandemic ends? Do your employees feel like they have a good work/life balance? Do your supervisors hold employees accountable for performance and conduct? Do you provide a workplace that strives for workplace diversity, equity, inclusion, and accessibility?

These are all factors determining whether your best employees will soon be putting your agency's name under Recent Employment on their CVs.

But let's flip this around. Let's think about this trend as the "Great Opportunity." There is a lot of talent out there that is now available and there is still a lot that a Federal job can offer. But you need to know where to find the talent, and it's not always in the same places.

"Go to where the candidates are," FELTG Instructor Marcus Hill said last year. Consider social media, online forums, and visiting colleges and universities that aren't usually on your list.

Emphasis of DEIA

The approach to hiring will also help with your DEIA efforts, as required by President Biden’s Executive Orders.

And just so you know, the Federal workplace is not alone in its attention to DEIA. A few weeks ago, *Forbes* told its readers that the “Great Resignation” has “awakened executives and HR leaders to the importance of diversity and inclusion” and that the “time is right for taking corrective action when it comes to building a truly diverse and inclusive workforce.”

Remember when we were all told that we needed to make a “business case” for diversity? Well, it appears, that case is closed (at least for now) and we can focus on actually implementing policies.

Late last year, the Biden Administration released its [DEIA strategic plan](#), the first such plan in more than a decade. The plan suggests agencies focus on five foundational principles when advancing DEIA:

- Use data and evidence-based decision-making
- Focus on continuous improvement
- Adopt a collaborative whole-of-agency mandate with partnership engagement
- Prioritize accountability and sustainability
- Understand the perspectives of the workforce and the customers

Addressing the wide scope of what a DEIA strategy should encompass would take more than an article, or a series of articles. But, as always, we provide training that can help you on your journey. See that little icon (pictured above)? That will help you identify the FELTG training classes that meet the President’s mandate to provide training on diversity, equity, inclusion, and accessibility



in the Federal workplace. Three of our upcoming courses that meet the mandate:

- [Honoring Diversity: Eliminating Microaggressions and Bias in the Federal Workplace](#) on March 9 from 1-3 pm ET.
- [Nondiscriminatory Hiring in the Federal Workplace: Advancing Diversity, Equity, Inclusion and Accessibility](#) on March 16 from 12:30 – 4 pm ET.
- [Promoting Diversity, Enforcing Protections for LGBTQ Employees](#) on June 9 from 1 – 3 pm ET.

Just because we know what the near future holds doesn’t make it any easier. Good luck this year with all your efforts in making your portion of the Federal workplace a model employer. Gephart@FELTG.com

Get Labor Relations Training!

Substantial. Dramatic. Overwhelming. Any of these adjectives would suffice in describing the 180-degree turn in Federal labor relations in the last year. More change looms. Two Authority nominees await confirmation in the Senate. When that happens, the majority will switch back to the Democrats. Are you ready?

Navigating Federal Labor Relations in 2022

January 13, 1 – 3 pm ET
Register [here](#).

The Present and Future of the ‘Covered-by Doctrine’ in Federal Labor Relations

March 17, 1 – 2 pm ET
Register [here](#).

FLRA Law Week

May 9 – 13, 12 – 4 pm ET each day
Register [here](#).

Federal Labor-Management Relations: Working Together to ‘Safeguard Public Interest’

June 23, 1-2 pm ET
Register [here](#).