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

FELTG Newsletter | Vol. XIV, Issue 2 | February 16, 2022

The Fallout of Prohibited Substance Use

I'm an Olympics nerd, and proud of it. Every four years (or five, if there's a global pandemic) I tune in to watch the greatest athletes in the world compete for the gold. Summer, winter, swimming, snowboard half pipe, beach volleyball, Super G, track & field, figure skating – I'm here for it all.

An Olympics cycle never goes by without suspicions or actual findings of athletes who fail drug tests, and Beijing 2022 is no exception. But, Olympic athletes aren't the only ones who sometimes use banned substances; did you hear about the Federal employee who claimed the two big brownies he ate at a barbecue were laced with marijuana, unbeknownst to him? We'll discuss the outcome in that case, plus much more on substance rules for Federal employees, on March 3 during the 60-minute virtual session High Times and Misdemeanors: Weed and the Workplace.

This month, we discuss the importance of accurate investigations, how to avoid discrimination in hiring, lack of candor, writing brevity, summary judgment, and IRAs.

Take care,

Deborah J. Hopkins, FELTG President

UPCOMING FELTG VIRTUAL TRAINING

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

Navigating the Realities of Employee Stress, Anxiety, and PTSD in the Post-pandemic Workplace
April 13

Emerging Issues in Federal Employment Law
April 26-29

Conducting Effective Harassment Investigations
May 3-5

FLRA Law Week
May 9-13

Promoting Diversity, Enforcing Protections for LGBTQ Employees
June 9

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.

Three Things You May Not Know About Nondiscriminatory Hiring
By Deborah Hopkins

By now, FELTG readers know that Diversity, Equity, Inclusion and Accessibility (DEIA) in the Federal workplace is a priority for the Biden Administration. And many agencies are in the process of hiring new employees, keeping in mind that the workforce should represent all of America, including traditionally underserved populations.

President Biden's recent announcement that his pick for the Supreme Court would be an African American woman has also raised questions about what is and is not permitted in the hiring process within the Federal government – something we'll be tackling in the March 16 virtual training event Nondiscriminatory Hiring in the Federal Workplace: Advancing Diversity, Equity, Inclusion and Accessibility. As we await this important event, I wanted to share three items to consider if you're involved in the hiring process in any way.

1. Sometimes it is legal to hire someone because of their sex.

Occasionally, a person's sex can legally be a *bona fide occupational qualification* (BFOQ). While this only applies in very limited circumstances, agencies can set this requirement if there is a legitimate, business-based reason. *See, e.g.*, *Dewey R. v. DOJ*, EEOC App. No. 0120142308 (May 20, 2016) (sex was a BFOQ for a correctional officer position that required performing strip searches on female inmates).

2. It is illegal to refuse to hire someone because of their sexual orientation.

While this has been the law in the Federal government since the July 2015 decision *Baldwin v. Secretary of Transportation*, EEOC Appeal No. 0120133080, it became law for the rest of the country in the June 2020 Supreme Court decision *Bostock v. Clayton County*, 140 S. Ct. 1731.

As I say in many classes, just because a law exists doesn't mean everyone follows it. In a recent EEOC decision, a complainant was discriminated against based on his sexual orientation when he was not hired for an Assistant Fire Operations Supervisor. While the agency claimed non-discriminatory reasons for the nonselection, EEOC found these reasons were pretextual.

> ***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.*

For example, the complainant was ranked as the top candidate among seven after a selection panel recommended individuals to hire. However, one of the supervisors involved in the hiring process decided to expand the field to 12 candidates and changed the weight that references held. That supervisor also did not contact any of the references the complainant provided. As a result, the complainant dropped from the top spot to eighth on the list and was not given a second interview. EEOC found this discrimination was motivated by the complainant's sexual orientation. *Bart M. v. Interior*, EEOC Appeal No. 0120160543 (Jan. 14, 2021).

3. Sometimes, the complainant doesn't even need to apply for the job in order to state a claim of discrimination in the hiring process.

While you might think that applying for a job is a prerequisite to claiming discriminatory nonselection, there are always exceptions. A complainant need not establish that he applied for a job as an element of a *prima facie* case if he can show that he was actively discouraged by management from applying for the job in the first place, and that

discouragement was tied to or motivated by the complainant's protected EEO category or EEO activity. See *O'Connor v. Secretary of Veterans Affairs*, EEOC Appeal No. 0120112072 (2011).

We've got plenty more, which we'll be sharing with you in this space and in our upcoming training sessions. We hope to see you there. Hopkins@FELTG.com.

The Federal Supervisor's Workshop: Building the Best Toolkit for Managing Today's Workforce

FELTG's annual supervisory training event returns in 2022 with a new look and focus. We're still offering comprehensive training that expands upon legal principles to provide you with the necessary tools and best practices to manage the agency workplace effectively and efficiently. But this time, we take a laser focus on the unique challenges Federal supervisors face with very specific and targeted sessions.

These monthly 60-minute webinars provide you with the legal foundation for managing distinct situations regarding performance and conduct accountability, reasonable accommodation, sick leave, harassment, and labor relations (for those of you who supervise bargaining unit employees.)

Register now for one or more or all the following sessions:

March 8 - Understanding Performance vs. Misconduct

April 12 - Insubordinate Employee? Don't Mess With the Wrong Elements

May 10 - The Roller Coaster Employee: Managing Up-and-Down Performance

June 14 - Reasonable Accommodation: The Interactive Process

July 12 - Effectively Handling Sick Leave and Abuse

August 9 - The New Hostile Work Environment

August 23 - Do I Need to Invite the Union to this Meeting?

Ambulance Company Fails to Respond Properly to Harassment Allegation

By Dan Gephart

Within 24 hours of receiving an unwelcome picture of a sexual nature from a coworker, EMT Andrea Vasquez was fired.

For sexual harassment.

How does something like that happen?

Vasquez v. Express Ambulance Service, 835 F.3d 267 (2d Cir. 2016) is a private sector case. And it's a few years old now. Yet, it vividly illustrates what happens when an employer relies on evidence of questionable validity. *Vasquez* is also an example of lazy investigation and victim-blaming. It is one of many cases that will be discussed during Workplace Investigations Week. The virtual training event runs from February 28-March 4, and will focus on employee misconduct, including workplace harassment.

Here are the details:

Ambulance dispatcher Tyrell Gray flirted regularly with Vasquez. This included touching her shoulders, putting his arm around her, and asking her out. Vasquez regularly rebuffed Gray's advances. One night, Vasquez reminded Gray that she had a boyfriend. Gray told her that he "could make her leave her man" and promised to send her something during her shift.

Common parlance for what Gray sent Vasquez is as crude as the actual action – a naked picture that made famous people like Brett Favre and Anthony Weiner infamous. Gray captioned the photo with "Wat u think?"

When her shift ended, Vasquez reported the photo incident to her supervisor, who told her to file a complaint right away. Gray saw a visibly shaken Vasquez filling out paperwork and surmised that she was reporting him. He

left the room and asked a coworker to lie to supervisors that Vasquez and Gray had a romantic relationship. The coworker declined, and Gray left the building.

Vasquez filed the report. An HR official and supervisor thanked her and assured her that they won't tolerate this behavior and that they would "sort the situation out." Vasquez offered to show them the phone messages, but they declined.

The employer's response sounds reasonable so far, right? Not so fast.

Gray altered a text chain with another woman to make it look like he and Vasquez were having a romantic relationship, and then provided copies of that altered text chain to a supervisor to "prove" that he and Vasquez were dating.

By the time Vasquez was to meet with a committee that included a union rep, the HR official, and the owner of the company, Gray's "evidence" had already been considered, and Vasquez was told that that she had been terminated for having an "inappropriate sexual relationship" with Gray.

The investigation was certainly prompt, though it was clearly far from effective. What can agencies learn from this debacle? Here are a few points to consider:

- Gather *sufficient* evidence to establish uncontested facts in case. How was reviewing the alleged harasser's text messages consider sufficient, while refusing to review the complainant's phone?

- Gather *as much evidence as possible* on contested facts so the fact finder can reasonably draw conclusions. Beyond looking only at the alleged harasser's text chain, why was the coworker asked to lie not interviewed?

- Consider the *reliability* of the evidence. The fact that the alleged harasser just happened to have photocopies of amorous email exchanges on the very morning that he's accused of harassment should have been important to the fact finder in drawing conclusions.

And remember this: Failure to appropriately investigate claims of harassment will come back to bite you.

Vasquez filed a retaliation complaint. Although a district court granted Express Ambulance Service's motion to dismiss, the Second Circuit Court of Appeals reversed that decision.

In its decision, the court wrote:

> "Although Vasquez does not use the term "negligence" in her complaint, we conclude that she has pled facts from which a reasonable person could infer that Empress knew or should have known that Gray's accusations were the product of retaliatory intent and thus should not have been trusted."

What can be trusted is FELTG training. We hope to see you later this month at Workplace Investigations Week.
Gephart@FELTG.com

HIGH TIMES AND MISDEMEANORS

Recreational marijuana is legal in more than a dozen states and the District of Columbia, and its use for medicinal purpose is legal in 30-plus states. What does that mean for Federal workers in those locations? Could their careers go up in smoke for a legal activity? Are you required to accommodate an employee's medically certified marijuana usage? There are a lot of questions, but Deb Hopkins has the answers.

Register now for this 60-minute webinar, held on March 3 from 1-2 pm ET.

The Good News: Brief is Better
By Ann Boehm

Communication in 2022 is dominated by Twitter, which limits users to 280 characters per Tweet. Online news organizations provide news feeds specifying number of words and expected reading time. Brevity is so important that online news organization, Axios, has trademarked and is marketing the concept of "Smart Brevity."

So FELTG friends, stop writing such long discipline documents!!!

No one wants to read a 10-, 15-, or heaven forbid, 25-page proposal to remove or suspend.

Why do managers, employee relations specialists, and attorneys write such long documents? Probably because of fear. The fear is unjustified.

Writers of documents with legal implications believe that providing more words will protect in the event of a lawsuit. In reality, more words are likely to prove detrimental.

We write the way we talk, and in oral communication, silence is uncomfortable. Writing becomes excessive because of unnecessary space fillers — comfort words. Learn to recognize those and cut them! Examples: therefore; essentially; literally (I hope you don't use that, but suspect you may); henceforth, the, that, etc. Writing is not the same as speaking.

We also worry that failing to cover every possible detail will hurt our case. Judges are guilty of this. Long decisions prevail. If you asked judges, though, they probably prefer to read shorter documents from litigants.

The challenge to concise writing is knowing what is important to the reader. I imagine news organizations now providing word counts and reading times had to adjust to the societal desire for brevity. But reading these news feeds provides the information you need to know without the fluff. People love it!

I challenge you to read the now-prevalent shortened communications. Note how effectively people on Twitter communicate with 280 characters. Pay attention to how news feeds highlight critical information.

Next, apply what you learn to your writing. Resist long factual narratives and put relevant factual information in specifications supporting charges. Trust me. Try it. You will be amazed.

Then, edit your documents. Cut out extra words. Read for what matters. Take out what does not. This takes confidence. The benefits will be significant. You will save time and energy for all subsequent readers. Those readers are likely decision-makers. They will see points concisely and cogently and will not get mired in extraneous details.

This will be an adjustment. It will take confidence. It will improve the discipline process. And that's good news! Boehm@FELTG.com

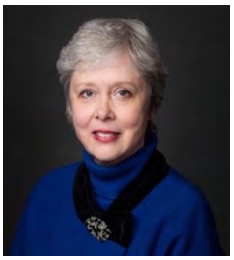
[**Ann's note:** The original version of this article had 491 words. After editing, it has 396 words. You didn't miss a thing!]

WINNING EEO CASES THROUGH SUMMARY JUDGMENT

The EEOC allows parties to file motions for summary judgment, potentially eliminating the need for a time-consuming, expensive, and risky hearing. Yet many agencies fail to take advance of this opportunity.

Join FELTG Instructor Katherine Atkinson for this 60-minute webinar on February 24 ad learn how to identify when to file a motion for summary judgment, organize for the motion, and draft an effective motion that withstands third-party scrutiny. Register now.

Questionable Hiring Decision Leads to Bad Behavior in HR Office
By Barbara Haga



In August 2020, I wrote about a case involving an HR official who sent racists texts about other employees to subordinates, which the subordinates reported. *Jenkins v. Department of Transportation*, No. 2019-2075 (Fed. Cir. Aug. 6, 2020).

Jenkins, the HR official, was removed for (1) inappropriate conduct, (2) making disparaging remarks racial in nature, and (3) lack of candor. The Federal Circuit upheld the charges and the removal.

Jenkins had made several attempts to avoid responsibility. For example, her initial response was that she didn't send the texts, then she said she didn't remember sending them, and finally she argued that the texts were sent from her personal phone and, thus, not the agency's business. None of these attempts worked.

I didn't think I would be shocked by this kind of HR practitioner lack of candor again, but I recently found a case that I missed in the weekly MSPB report that summer, because this one was issued the very next day. The case is *Freeland v. Department of Homeland Security*, No. 2020-1344 (Fed. Cir. Aug. 7, 2020). Before we get to the lack of candor charge, let's look at the hiring of this individual by DHS.

Freeland's Story

Freeland was removed in 2017 from the position of Supervisory Human Resources Specialist in the Recruitment and Placement Branch of a DHS Human Resources Operations Center. Supervisory staffing positions would typically be concerned with ensuring that appointees are qualified for the jobs they are placed in, and that the required drug tests, physicals, and background checks are completed. Basically, their job is to ensure that the recruitment process is carried out properly and that appointments are legal.

Prior to working for DHS, Freeland had held the same type of position at an Army Civilian Human Resources organization. He resigned in May 2015 after he was issued a proposed 14-day suspension for negligent performance of duties. At the time of his resignation, he was also the subject of a workplace sexual harassment investigation. DHS brought Freeland to work on Sept. 20, 2015. Yes, that's right. They hired a supervisory HR specialist *four months* after he resigned from another supervisory HR specialist position. His SF-50 stated that he gave no reason for resignation.

Given what transpired with his security paperwork, which led to the lack of candor charge, it seems that DHS hired Freeland without knowing about the prior issues.

I regularly teach classes on interviewing and reference checking. It's important. You don't need to bring another agency's problem child onto your rolls. Freeland's recent work history should have been a flashing red light to anyone looking at his resume. He resigned with no reason given.

That's Strange

A staffing specialist resigns with no reason given? That's strange. He applies very quickly to come back to the government in a similar position? That's strange.

Federal employees and staffing folks who understand what it takes to get back onto the Federal rolls from the outside, don't resign. They apply for reassignments and transfers and promotions.

Did DHS interview Freeland? I would have asked what his reason was for resigning since none was given. He didn't have to

answer. He might have made up some story, but I would ask. I would also routinely ask:

- Have you been the subject of any sort of performance counseling in the past appraisal cycle? If so, what was the outcome of the counseling?

- Have you been questioned and/or counseled by your supervisor about any type of disciplinary infraction in the past year? If so, what was the outcome?

Suggested Questions

If I am interviewing for a supervisory position, I would ask something like, "If I contacted your supervisor and asked about your three major accomplishments in your supervisory position, what would he or she say?" I would let Freeland know that I was going to follow up on these issues with his past supervisor.

If he said I couldn't contact his last supervisor? I would tell him that it's highly unlikely he would fare well in the rest of the process if I could not validate the information he provided. If he didn't give permission, I would be very unlikely to hire him.

It's important to follow up on these questions. In this case, Freeland's selecting official should be an even higher-level supervisor in HR so he/she/they should have known that an in-depth reference check was needed.

Freeland's Army supervisor should have been asked the same things.

- The SF-50 provided doesn't give a reason for Freeland's resignation. Are you aware of a reason? (Remember there is no settlement here, so the agency wasn't prohibited from releasing information by terms of a contract.)

- Did you counsel Freeland about any type of performance deficiencies in the past appraisal cycle? What happened as a result?

- Did you have occasion to question or counsel Freeland about a disciplinary matter in the past year? What was the outcome of that?

- What were the three most important contributions Freeland made as a supervisor?

One of my final questions would be: "If Freeland was eligible for a promotion and you had a vacant job at the higher grade that you could put him in today, would you?" Unless that Army supervisor (who is also an HR Specialist) is a seasoned prevaricator, you are likely to get him/ her/them to spill the beans during the conversation.

Freeland was issued a 14-day suspension notice on negligent performance of duties. We don't know whether this was negligence related to his staffing/recruitment duties or his supervisory functions, but I think using the in-depth questions I described might get you to a point where you figure out that something isn't right. As far as the sexual harassment investigation, there may have been no conclusions from that at the time he departed his Army job, but that could have come later. (I will do a column on annotating investigations per provisions included in the NDAA for FY 2017 in the near future.)

I was working with a supervisor on a GS-14 performance plan a week ago, and he was complaining that he had picked up a problem employee from another agency. He was upset with the losing supervisor. He said, "I did a reference check, and that person didn't tell me the truth." I knew he was frustrated. It didn't change anything we were doing, so I didn't press the issue, but I really wanted to know what questions he asked.

Did he ask, "Is this person reliable?" The answer could be yes. The work is barely acceptable, but they always turn something in on time.

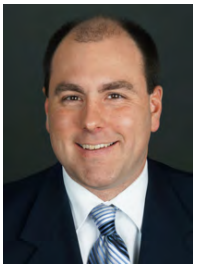
Did he ask, "Is the person regular in their attendance?" The answer could also be yes. The person is always there, but they don't do much when they are there. The losing supervisor might technically have answered what she was asked truthfully.

Without getting into in-depth areas like the questions described above, your selecting officials may not find out about issues that would cause them to move on to another candidate.

Next month, we will look at what happened once Freeland was brought on board. Haga@FELTG.com

[**Editor's note:** Would you like to bring Barbara Haga's *Successful Hiring: Effective Techniques for Interviewing and Reference Checking* to your agency, either on-site or virtually? contact Training Director Dan Gephart at Gephart@FELTG.com.]

Save Time with Summary Judgment
Michael Rhoads



Let's say your agency receives an EEO complaint and follows the EEO complaint process. You've investigated the allegations and issued the complainant the report of investigation. The complainant requests an EEOC hearing. At this point, is it possible to ask the Administrative Judge (AJ) to issue summary judgment? According to 29 CFR 1614.109(g)(2), "After considering the submissions, the administrative judge may order that discovery be permitted on the fact or facts involved, limit the hearing to the issues remaining in dispute, issue a decision without a hearing or make such other ruling as is appropriate."

The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This means both parties (complainant and agency) agree to the material facts of the case. Each side's interpretation of those facts might be different, but there's no hidden meaning or conspiracy theories.

Summary Judgment for the Agency

In *Phoebe O. v. Dep't of the Army*, EEOC Appeal No. 2020000674 (Apr. 5, 2021), the complainant requested a reasonable accommodation several times. After the second request, she was retroactively placed on AWOL. After the third request, she was issued a memorandum to report to duty. Each time, the agency addressed its denial of her RA request. Part of the complainant's request for RA was to be transferred to an open position. However, the agency decided to competitively fill the position instead.

One of the points we make in our courses at FELTG is this: The agency is performing its due diligence as long as it's participating in the interactive process to find a reasonable

accommodation for an employee's disability. An employee can request a specific accommodation, but the agency does not have to grant it in the way the employee requests if another effective accommodation is available, or if the employee does not provide information on her medical restrictions.

In this instance, the agency denied the request to transfer to an open position because the complainant did not provide medical documentation to support the necessity for the transfer.

As no material facts were in dispute, the EEOC affirmed the AJ's decision granting summary judgment to the agency.

Summary Judgment Reversed

Some cases, however, are not as cut and dried. Even though an AJ might issue a decision without a hearing, the Commission sometimes sees things differently. In *Jennifer K. v. Dep't of the Navy*, EEOC Appeal No. 2020001035 (May 20, 2021), the EEOC reversed the agency's final decision after finding the AJ improperly issued a decision without a hearing.

This case dealt with some confusion about discovery. But first, some background. The complainant worked as a civil service mariner for the Navy's Military Sealift Command in San Diego, Calif. When she became pregnant, she notified the agency's Placement Specialist and asked what other work assignment options were available because the current assignment involved sailing out to sea for an extended period of time. Soon after, the complainant was declared Not Fit For Duty (NFFD) by the Medical Department. The agency had trouble placing her in a vacant position because she was not considered disabled.

Between May-August 2014, the complainant used leave and leave without pay while the agency searched for suitable work. The agency offered training in Seattle, Wash., after the complainant had moved to Eugene, Ore., but the complainant declined the offer because she had already received the training being offered. Over this period, the complainant also had trouble contacting the captain of her ship to help her with her pregnancy accommodation request. Eventually an LR employee responded that they were unable to accommodate her, but would continue to seek other positions for which she might qualify.

In November 2014, she filed a complaint alleging she had been discriminated against on the basis of sex (female, pregnancy). Because of her removal after management learned of her pregnancy, she was forced to use leave and accumulated insurance debt. Complications arose when the complainant's attorney filed in the EEOC's Los Angeles office and requested the case be transferred from the EEOC's Charlotte office to LA since her last duty station was San Diego, Calif. The agency did not acquiesce, and the case remained in the Charlotte office. In July 2016, the AJ assigned to the case in Charlotte issued an Order of Sanction and Dismissing Hearing Request after the agency requested a dismissal of the hearing request. The AJ remanded the complaint to the agency for a final decision. In a separate case associated with this one, the complainant appealed the AJ's dismissal. In that case, the Commission found in favor of the complainant and remanded the complainant back to the Charlotte office.

The same AJ in Charlotte was assigned to the remanded case.

And there's more. In January 2018, the AJ ordered discovery must be initiated on or before March 5, 2018, at 5 PM. On that day, the complainant's attorney issued interrogatories to the agency, and the agency issued interrogatories to the complainant. However, there was confusion about when discovery was to be served. At 4:56 PM ET, the complainant's attorney emailed the AJ for clarification. At 5:51 PM ET, the AJ responded all discovery was due

at 5 PM ET. The complaint's attorney then requested an extension, but the AJ did not reply. The complainant's attorney then quickly served document requests, admission requests, and deposition notices to the agency on March 5, 2018, at 7:50 PM EST, which is 4:50 PM PST. However, the AJ later emailed the attorney stating the proper time zone to submit requests was 5 PM EST and found the document requests untimely.

The AJ issued summary judgment in the agency's favor, finding the complainant did not demonstrate the agency was more likely than not motivated by some discriminatory animus. The complainant appealed the decision.

On appeal, the Commission found the AJ erroneously granted summary judgment, "After a careful review of the record, we find that the AJ's issuance of a decision without a hearing was not appropriate as the complainant was not fully afforded the opportunity to engage in discovery, the record has not been adequately developed, and there are genuine issues of material fact in dispute. We further find that the AJ erred as a matter of law."

If you want to know how to make sure your summary judgment isn't reversed, join Katherine Atkinson for Winning EEO Cases Through Summary Judgment on Thursday, February 24, 2022 from 1:00-2:00 ET.

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

EEOC Law Week

Join us April 4-8 for FELTG's updated EEOC Law Week, an in-depth virtual training event that runs the gamut of EEO issues. The training will run from 12:30 – 4:30 pm ET each day. Get up to speed on EEO law and earn 3.5 EEO refresher hours per day. Register now.

Demystifying the IRA
By Deborah Hopkins

A lot of FELTG training involves how agencies should handle disciplinary actions known as Otherwise Appealable Actions, or OAAs. OAAs are suspensions of 15 days or more, demotions, and removals. OAAs get their name because they are agency actions that by statute the employee may appeal to the Merit Systems Protection Board (MSPB or the Board). You may think OAAs comprise most of the MSPB's caseload. In reality, only about half of the Board's cases deal with OAAs.

Generally, if an employee files an appeal to the MSPB over a 10-day suspension, reprimand, or low performance rating, the Board does not have jurisdiction and would dismiss the appeal because these actions, while unpleasant to the employee, are not OAAs.But there's an exception in which a Federal employee (or former employee) can file an appeal to the MSPB over an action that would otherwise not be within the Board's jurisdiction. It's the Individual Right of Action (IRA).

The employee is entitled to an IRA hearing if the employee claims a personnel action (reprimand, short suspension, low performance rating, significant changes to job duties, to name just a few) was motivated by the fact that the employee had:

- Exercised any appeal right that includes a claim of whistleblower reprisal;
- Cooperated with an agency's inspector general or OSC investigators;
- Refused to follow an order that would require a violation of law, rule, or regulation; or
- Assisted another employee in the exercise of that employee's rights.

5 USC 2302(b)(8)-(9).

IRAs aren't rare. In 2020, 11 percent of the Board's caseload dealt with IRAs.

The Federal Circuit has been quite busy lately (perhaps because the MSPB has been without a quorum for 1,866 days) handling appeals over the outcomes of Administrative Judge decisions on Board IRAs.

Here are a few recent and notable takeaways:

Smolinski v. MSPB, No. 21-1751 (Fed. Cir. Jan. 19, 2022)

The appellant, a visiting provider at an Army hospital, alleged several instances of reprisal for protected activity. While the court rejected most of the claims, it referenced the abuse of authority standard in whistleblower reprisal complaints: "Although 5 U.S.C. § 2302 does not define the term 'abuse of authority,' the court found it appropriate to apply the definitions found in related whistleblower protection statutes … and determined that the alleged conduct … would qualify."

In addition, the court said that in determining jurisdiction over an IRA appeal, the MSPB is not limited to the four corners of the appellant's original OSC complaint, and that it may consider other relevant agency evidence that supports the appellant's allegations.

Gessel v. MSPB, No. 21-1815 (Fed. Cir. Jan. 19, 2022) (NP)

This case involved an Air Force employee's probationary removal. While probationers don't have full MSPB appeal rights, they still may file an IRA appeal at the MSPB over the removal if they claim it was motivated by reprisal for protected activity. This employee was fired as a probationer because he lost a key to a government building, and the agency had to pay a large amount of money to have the building rekeyed. The employee claimed his removal was not for the loss of the key but rather because he was a whistleblower who made a protected disclosure. The Federal Circuit affirmed the Board's dismissal of the IRA and found the disclosures were not protected but were the result of typical workplace conflicts. Reports that his coworker made him "uncomfortable," was "confrontational and attempt[ed] to supervise or discipline him," and "often watch[ed] foolish and juvenile rap videos and other material," did not meet the standard set out in the *Whistleblower Protection Act*.

Marana v. MSPB, No. 21-1463 (Fed. Cir. Jan 20, 2022) (NP)

The appellant, a nurse at an Army hospital, was removed for conduct unbecoming a Federal employee after he inappropriately disclosed a patient's personal and health-related information to unauthorized individuals. Several of his claims were dismissed because more than two years had passed between his disclosures and the adverse personnel action for which he requested relief. There is a wealth of case law on the knowledge-timing aspect of whistleblower cases: *Costello v. MSPB*, 182 F.3d 1372, 1377 (Fed. Cir. 1999) ("A two-year gap between the disclosures and the allegedly retaliatory action is too long an interval to justify an inference of cause and effect between the two . . . ."); *Salinas v. Army*, 94 MSPR 54, 59 (2003) (the disclosure and the allegedly retaliatory act two years later were "too remote in time" for a reasonable person to conclude that the disclosure was a contributing factor to the action taken).

These can be confusing and complicated subjects, and not every personnel action gives the employee the right to file an IRA. For more on OAAs, IRAs, whistleblowing, and related topics, join us virtually for MSPB Law Week, March 28-April 1. Hopkins@FELTG.com

Want to bring a FELTG training program to your agency – either onsite or virtually? Contact FELTG Training Director Dan Gephart at Gephart@FELTG.com.