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

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Returning to the Physical Workplace May Be a Morale-Buster for Many

Last week, FELTG held its first in-person open enrollment training since March 2020. While we've done a few onsite classes for agencies over the past two years, most of us have been stuck in Zoomland on days of the week that end in -y. (That said, thank goodness for Zoom.)

We had some interesting (face-to-face!) discussions last week about how the return to the workplace transition was going at various agencies. And it turns out that a LOT of employees don't want to report back at all because they've been successfully doing their jobs from home for the last two years.

Return to the workplace requirements are drastically impacting things like employee morale, retention, and more. We'll keep you posted as we learn what agencies can better do to prepare for Navigating the Return to the Post-pandemic Federal Workplace.

In this month's newsletter, we discuss whistleblowing, post-*Santos* guidance, pronoun use, and much more.

Take care,

Deborah J. Hopkins, FELTG President

UPCOMING FELTG VIRTUAL TRAINING

The FELTG Virtual Training Institute provides live, interactive, instructor-led sessions on the most challenging and complex areas of Federal employment law, all accessible from where you work, whether at home, in the office or somewhere else.

Here are some of our upcoming virtual training sessions. For more information on each session, click on the titles below. For the full schedule of virtual offerings, visit the **FELTG Virtual Training Institute**.

Making Performance Plans Work for Remote, Hybrid, and Onsite Employees
July 26

Navigating the Return to the Post-pandemic Federal Workplace: Harassment, Reasonable Accommodation, and Misconduct
July 27

Hearing Advocacy: Presenting Cases Before the EEOC and MSPB
August 3-4

Addressing Pregnancy Discrimination in the Federal Workplace
August 10

Workplace Investigations Week
August 15-19

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

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 Good News:
New MSPB's Recent Whistleblower Decision Makes a Lot of Sense
By Ann Boehm

The new, fully constituted three-member MSPB (HOORAY!) sure surprised the heck out of me with its recent decision in *Skarada v. Department of Veterans Affairs*, 2022 MSPB 17 (2022). Skarada filed an Individual Right of Action appeal claiming whistleblower retaliation, and he *lost* the appeal. Although he made a protected disclosure, he did not demonstrate by good ol' "preponderant evidence" that he suffered a "covered personnel action."

The MSPB tends to interpret "covered personnel action" quite broadly, but not in this case. In the decision, the MSPB reminds us that the employee has the burden to show a "significant change" in duties, responsibilities, or working conditions. *Id.* "[O]nly agency actions that, individually or collectively, have practical and significant effects on the overall nature and quality of an employee's working conditions, duties, or responsibilities, and are likely to have a chilling effect on whistleblowing . . . will be found to constitute a covered personnel action." *Id.*

So, what, pray tell, did Skarada think was reprisal? He said his chain of command removed some of his previous duties and responsibilities. He was told to stop attending certain meetings and was excluded from the interview and hiring process for two new hires – not enough to be a significant change in his duties or responsibilities, according to the MSPB.

He also claimed his chain of command subjected him to a hostile work environment. (We see that allegation a whole heck of a lot!) The alleged offenses: "his supervisor avoided him or walked away from him on multiple occasions, often responded to his questions by stating he did not know the answer and failed to provide him adequate guidance." *Id.*

In addition, he claimed his chain of command treated him in a "hostile manner." His supervisor "yelled" at him that he needed to fix something. His supervisor "'grabbed [his] arm to pull [him] into a room'" and "yelled" at him about reporting improper patient care; and the Chief of Staff "yelled at him, accused him of 'making up our service data,' and told him to 'shut up' during a meeting. *Id.* Lots of "yelling," eh?

He claimed the meeting exclusions were also part of the hostile work environment. Plus, apparently the agency "convened investigations against him." *Id.*

But was any of this harassment? Not according to the MSPB. Skarada failed to show that the agency's actions "constituted harassment to such a degree that his working conditions were significantly and practically impacted." *Id.*

In my humble opinion, the way the MSPB explains these allegedly harassing working conditions is good for the Republic: "[h]is chain of command may have been unresponsive to his requests or untimely in providing guidance, *but such deficiencies do not amount to harassment*." *Id.* (emphasis added). Also, three incidents of "yelling" were "spread out over the course of a year and, *while unprofessional, were not sufficiently severe or pervasive to significantly impact the appellant's working conditions*." *Id.* (emphasis added).

The investigations were only "inconvenient" and did not result in any action against Skarada. The "remaining allegations represent *mere disagreements over workplace policy*." *Id.* (emphasis added). Even though the MSPB acknowledged that he may have had an "unpleasant and unsupportive work environment," he did not demonstrate a "significant change in his

working conditions" under the Whistleblower Protection Act.

There you have it, my friends. Being unhappy at work does not equate to a hostile work environment. I don't recommend supervisors yell at and grab their employees, but this case shows that a hostile work environment, at least in the whistleblower context, is much more than an unpleasant work environment. And that's Good News.
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Editor's Note: Register now for the 60-minute webinar The Why, When, and How of Whistleblower Law Under the New MSPB on September 8.

She/Her/Hers, He/Him/His, They/Them/Theirs: Pronouns in 2022

By Deborah J. Hopkins

There are many polarizing topics (abortion, gun control, COVID-19 vaccines, political affiliation) in this country. We're going to address another topic that generates feelings almost as strongly in certain circles: pronoun use and gender identity.

Last month, the EEOC introduced a gender marker option X for non-binary individuals who wish to file complaints. The State Department allows gender X on passports and travel documents, and some agencies are considering requiring all employees to identify their preferred pronouns in their email signatures.

Pronouns are an important piece of the gender identity equation, including within the context of the workplace. Refusal to use an employee's preferred pronoun, or name, has been problematic for agencies in recent years, not just from a liability perspective but because of the impact of the harassment on the complainants.

As more employees share their pronouns in email signatures, on social media, and in participant lists on Zoom sessions, it's worth a review of the law on this topic.

Pronouns fall under the sex discrimination umbrella of Title VII workplace protections, within the sexual orientation and gender identity (SOGI) category, and violations of pronoun or name use could result in illegal discrimination or harassment. *Complainant v. USPS*, EEOC Appeal No. 0120122376 (February 19, 2013), request for reconsideration denied, EEOC Request No. 0520130241 (Jan.10, 2014). EEOC recently addressed a specific question in a Q & A document:

Q. Could use of pronouns or names that are inconsistent with an individual's gender identity be considered harassment?

A. Yes, in certain circumstances. Unlawful harassment includes unwelcome conduct that is based on gender identity. To be unlawful, the conduct must be severe or pervasive when considered together with all other unwelcome conduct based on the individual's sex including gender identity, thereby creating a work environment that a reasonable person would consider intimidating, hostile, or offensive. In its decision in *Lusardi v. Dep't of the Army* [EEOC Appeal No. 0120133395 (Apr. 1, 2015)], the Commission explained that although accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII, **intentionally and repeatedly** using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment. [bold added]. EEOC's *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity*, Q. 11. [bold added]

FREE DEIA RESOURCE!

FELTG's DEIA Resources Page provides information on upcoming DEIA training, news articles, and resources all in one location.

While intentional misuse can violate the law, accidental misuse of a transgender employee's preferred name and pronouns does not generally violate Title VII. EEOC's *Sexual Orientation and Gender Identity (SOGI) Discrimination*. Take, for example, *Colleen M. v. USDA*, EEOC Appeal No. 120130552 (May 25, 2016). In this case, the supervisor referred to the complainant, a trans female, as "Eric" even though the complainant no longer used that name. There was no evidence the supervisor used that name intentionally, and "when it was brought to [the supervisor's] attention that he made an error, he went to the union and explained to them that there was no malicious intent, and he apologized to Complainant." This one instance followed by a prompt apology, did not state a claim.

A number of cases can help determine the point when pronoun misuse becomes severe or pervasive and creates a hostile environment. It's a topic your agency is sure to deal with more frequently as the Administration continues its advancement of Diversity, Equity, Inclusion, and Accessibility (DEIA) in the Federal workplace. Training is a vital component to getting this right, so please bring your entire agency (supervisors, employees, and contractors) and join me on August 2 from 1 - 2pm ET for the webinar Promoting Inclusion: Pronoun Use and Gender Identity in the Workplace. Hopkins@FELTG.com

UPCOMING FELTG WEBINARS

FELTG's webinars provide specific, timely, and useful guidance – and they do it in just 60 minutes.

Promoting Inclusion: Pronoun Use and Gender Identity in the Workplace
August 2

Federal Supervisors Workshop: Building the Best Toolbox for Managing Today's Workforce Webinar Series
Remaining sessions: August 9, August 23

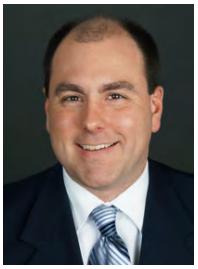
The Why, When, and How of Whistleblower Reprisal Under the New MSPB
September 8

Feds Gone AWOL: Understanding the Charge and Applying it Correctly
October 6

High Times and Misdemeanors: Weed and the Workplace
October 27

Visit our Webinar Training page.

Supervisors: Learn to Recognize Signs of Suicidal Ideation
By Michael Rhoads



For far too long, mental health services have carried a stigma. It's important to know where to turn when you're experiencing a mental health crisis or suicidal ideation.

The 988 Suicide & Crisis Lifeline came online last week, offering nationwide 24/7 access to mental health care. The Lifeline provides free and confidential support for people in distress, prevention and crisis resources, and best practices for professionals. This is a step forward and elevates mental health to the emergency service some desperately need. Of the many topics surrounding mental health, suicide is one of the most, if not *the* most, taboo.

According to the CDC's website on suicide facts, an estimated 12.2 million American adults seriously thought about suicide in 2020. More than 3 million planned a suicide attempt, and 1.2 million attempted suicide. It affects all ages. In 2020, suicide was the second leading cause of death in people ages 10-14 and 25-34. It affects our friends, family, and our community at large.

The good news is suicide is preventable. Agencies can create policies that promote a protective environment and a culture of good mental health. It is important for supervisors to recognize the signs of those who might have suicidal ideations. FELTG Instructor Shana Palmieri, LCSW will conduct a 75-minute session on Managing a Potentially Suicidal Employee on August 30 from 3 - 4:15 pm ET.

If you or someone you know is experiencing a mental health crisis or suicidal ideation, please seek help at your nearest hospital or crisis intervention center. Or dial 988. Be safe, and remember, we're all in this together. Rhoads@FELTG.com

Post-Santos: *Timing, Precedents, Retroactivity in Performance Cases*
By Deborah J. Hopkins

Most Federal employment law practitioners remember the day last year when the Federal Circuit issued *Santos v. NASA*. It set a new requirement for agencies to provide substantial evidence of unacceptable performance before implementing a performance improvement plan (PIP).

One of the questions that had lingered for more than a year was how the new MSPB would interpret and apply *Santos* to the performance-based removals and demotions in its PFR backlog. Would the ruling be retroactive or only apply to performance-based removals after March 11, 2021? Would MSPB reject *Santos* or try to find a way around it?

> ***ASK FELTG***
> *Do you have a question about Federal employment law? Ask FELTG.*

Well, because we have a functional MSPB, we now have an answer to those questions, and along with a new framework for agencies to follow in implementing removals or demotions under Chapter 43. Let's look at the language of the case:

> To defend an action under chapter 43, the agency must prove by substantial evidence that:
>
> (1) OPM approved its performance appraisal system and any significant changes thereto;
> (2) the agency communicated to the appellant the performance standards and critical elements of her position;
> (3) the appellant's performance standards are valid under 5 U.S.C. § 4302(c)(1);
> (4) the appellant's performance during the appraisal period was unacceptable in one or more critical elements;
> (5) the agency warned the appellant of the inadequacies in her performance during the appraisal period and gave her an adequate opportunity to

demonstrate acceptable performance; and

(6) after an adequate improvement period, the appellant's performance remained unacceptable in at least one critical element.

The Federal Circuit's new precedent in Santos applies to all pending cases, regardless of when the events at issue took place.
Lee v. VA, 2022 MSPB 11 (May 12, 2022). [bold added]

The new element here is number 4, proof that the appellant's performance at any point during the appraisal period (but before the PIP) was unacceptable. While most agencies pre-*Santos* likely did not make such information part of their removal cases, I imagine (or do I just hope?) that most agencies will be able to provide this information on remand. One of FELTG's best practices has always been for agencies to keep documentation of the reasons why the supervisor implemented the PIP, even if that information wasn't given to the employee. Anecdotally, I can tell you that most of the supervisors in my training classes have such documentation before they move to implement a PIP.

What does a remand look like in these cases? In *Lee*, MSPB ordered that "[o]n remand, the administrative judge shall accept evidence and argument on whether the agency proved by substantial evidence that the appellant's pre-PIP performance was unacceptable. The administrative judge shall hold a supplemental hearing if appropriate."

Some of you might be wondering why this VA case discusses use of a PIP. Under the 2017 *VA Accountability and Whistleblower Protection Act*, a PIP isn't required for the VA to remove an employee for unacceptable performance. That's because the events in this case occurred before the implementation of the new VA law, and the MSPB agrees with the Federal Circuit "because it is based on performance that occurred several years before the Act went into effect. Accordingly, the appellant's removal must be adjudicated under chapter 43 on remand."

One case has provided us with a couple of very important answers to long-held questions. We at FELTG anxiously await the 3,300 remaining decisions yet to be issued. Hopkins@FELTG.com

FELTG FLAGSHIP TRAINING

FELTG offers new, unique, and updated training on dozens of federal employment law topics each year. But each year, we offer numerous opportunities to attend our multi-day flagship training programs. Click on the training titles below for more specific information.

Advanced Employee Relations*
August 2-4

Workplace Investigations Week
August 15-19

UnCivil Servant: Holding Employees Accountable for Performance and Conduct
September 7-8

MSPB Law Week
September 12-16

EEOC Law Week
September 19-23

FLRA Law Week
September 19-23

Absence, Leave Abuse & Medical Issues Week
September 26-30

Conducting Effective Harassment Investigations
October 4-6

EEO Counselor and Investigator Refresher Training
October 12-13

**All training events will be held virtually except Advanced Employee Relations in August, which will be held onsite in Norfolk, VA.*

No BS: Prepare Your Agency for Possible BA.5 Wave
By Dan Gephart

Folks, it ain't over yet. Forget the crowds of unmasked frolickers you've seen on your summer adventures or the lack of above-the-fold headlines about death rates or hospitalizations. COVID is still very real. And there's a chance we are in for some hard times ahead. How hard those times will be, though, is still not certain.

The BA.5, the most dominant variation of omicron, has residents across Europe and China bracing for a widespread wave and potential lockdowns. Here in the United States, however, we don't really know what we're dealing with. Some far-reaching areas of the web will have you believe the BA.5 variant is more contagious than strep throat at a high school party. But ask others about BA.5 and they might think you're talking about a new boy band.

Since most people take COVID tests at home and others don't test at all, the numbers being reported each day could be woefully underestimated. Or not. The mixture of conflicting information and COVID fatigue makes it hard to get an accurate sense of the situation – and to get people to care about it.

Regardless of its level of transmissibility, the BA.5 variant is poised to hamper efforts at bringing employees back to physical offices, endanger those who already work in those offices, and diminish agency productivity. Serious repercussions of BA.5 could happen in the next couple weeks. Or picture this: A COVID wave running through your agency as you and your colleagues are trying to put a wrap on the fiscal year. What can you do?

First, take care of yourself. Your best tools are still to avoid crowds, mask up when necessary, and get vaccinated.

As for your agency, you may decide to screen employees for COVID. Some agencies have temperature screening plans in place. As the EEOC notes in its guidance, measuring an employee's body temperature is a medical examination, which is not permissible under the Rehabilitation Act, with a few exceptions. Because "the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature."

But temperature screens are not that useful. An ongoing UK study found fewer than one-third of the people who self-reported COVID symptoms included fever among them.

Requiring employees to take a COVID test *before* they return to the workplace is an option, although this is also tricky. The EEOC updated its guidance on COVID tests just this month. Like temperature screens, COVID tests are considered a medical examination, yet they can be used in certain situations.

The EEOC's guidance:

> *A COVID-19 viral test is a medical examination within the meaning of the ADA. Therefore, if an employer implements screening protocols that include COVID-19 viral testing, the ADA requires that any mandatory medical test of employees be "job-related and consistent with business necessity." Employer use of a COVID-19 viral test to screen employees who are or will be in the workplace will meet the "business necessity" standard when it is consistent with guidance from Centers for Disease Control and Prevention (CDC), Food and Drug Administration (FDA), and/or state/local public health authorities that is current at the time of testing. Be aware that CDC and other public health authorities periodically update and revise their recommendations about COVID-19 testing, and FDA may*

revise its guidance or emergency use authorizations, based on new information and changing conditions.

When assessing whether you meet the "business necessity standard" to administer COVID tests, consider the following:

- The level of community transmission.
- The vaccination status of employees.
- The degree to which breakthrough infections are possible for employees who are up to date on vaccinations.
- The ease of transmissibility of the current variants.
- The possible severity of illness from the current variant.
- How much contact employees have with each other in the workplace.
- Potential impact on operations if an employee enters the workplace with COVID.

That's a lot of information. If you want to keep your employees healthy and productive, keep an eye on guidance from the CDC and EEOC. That's what we're doing at FELTG. Every session we offer provides the most up-to-date information available. These upcoming events can help make your return-to-workplace transitions smoother:

- Deborah Hopkins presents Navigating the Return to the Post-Pandemic Federal Workplace: Harassment, Reasonable Accommodation, and Misconduct on July 27.

- FELTG Instructor Ricky Rowe will present *Preparing for COVID-19 EEO Challenges in FY23* during FELTG's annual Federal Workplace 2022: Accountability, Challenges, and Trends event August 29-September 1. Ricky's session, which will take place on Tuesday, August 30 from 1-2:15 pm, will cover the latest on COVID tests and temperature screening.

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Ask FELTG: Can Discipline Be Used as a 'Prior' to Advance the Penalty?

A FELTG reader shared the following hypothetical scenario:

An employee is issued a decision to suspend dated July 1. The dates of the suspension stated in the decision are August 3-7. If any misconduct that happens between July 1 and August 7, can that be considered as a "prior" offense in a future disciplinary action?

Also, how are paper suspensions implicated in this type of scenario?

And FELTG's answer:

Discipline may not be relied upon as a prior until it has been fully served. In the example above, the discipline is not a considered a prior until after the suspension ends on August 7, regardless of the dates the proposal or decision letter are issued. See *Fowler v. USPS*, 77 MSPR 8 (1997), which discusses this concept in detail.

If the action is a paper suspension, where an employee is "suspended" on days they weren't scheduled to work, then it doesn't count as a suspension UNLESS the agency has an agreement with the employee (in writing), or a union contract says, that the paper suspension carries the weight of an X-day suspension for the purposes of discipline. Otherwise, the law at 5 USC 7501.2 requires a loss of pay in order for an action to meet the definition of a suspension.

Good luck, and remember to always check the calendar when relying on past discipline. Have a question? Ask FELTG.

The information presented here is for informational purposes only and not for the purpose of providing legal advice. Contacting FELTG in any way/format does not create the existence of an attorney-client relationship. If you need legal advice, you should contact an attorney.