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

FELTG Newsletter | Vol. XIV, Issue 10 | October 19, 2022

Muscle Memory For the Win – or at Least, the Finish

Longtime readers may recall that I used to be a semi-competitive triathlete. There was a period of years where I completed several Ironman triathlons, in addition to shorter distance triathlons, and even a few marathons. I still occasionally "race" at events but I don't put in the same amount of training that I used to and, therefore, my times aren't quite as fast. Last weekend, I ran a half marathon, and while my time was nowhere near my PR, I was pleased that years of experience and muscle memory carried me across the finish.

What in the world does that have to do with FELTG training? Well, if you attend training and keep up with what you need to know, when it comes time to act (provide a Reasonable Accommodation, draft a settlement agreement, do a Douglas analysis), you'll be prepared to do exactly what you should do.

This month we discuss conditions of employment, what the EEOC is up to, how far you must go in *Weingarten* notifications, F-words, and much more.

Take care,

Deb

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 we'll be doing over the next several weeks. For the full schedule of virtual offerings, visit the **FELTG Virtual Training Institute**.

Back on Board: Keeping Up with the New MSPB
October 20

Advanced Employee Relations
November 1-3

The Power of an Inclusive Mentality
November 8

Drafting Enforceable and Legally-Sufficient Settlement Agreements
November 16

Reasonable Accommodation: Meeting Post-pandemic Challenges in Your Agency
November 17

MSPB Law Week
December 1-5

Drawing the Line: Union Representation or Conduct
January 19

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.

And Now a Word With …
EEOC Commissioner Keith Sonderling
By Dan Gephart

Efficiency.

Enforcement.

These two words are probably not among the first to spring to mind when you think of the Equal Employment Opportunity Commission. But EEOC Commissioner Keith Sonderling has a whole lot of statistics to explain why they should be.

Let's look at FY 2021, the last year for which data is currently available. The EEOC collected a total of $485 million for more than 15,000 victims of discrimination. Out of that large sum, almost $100 million went to 2,169 Federal employees.

"When I speak across the country and I talk about that statistic, people are shocked," EEOC Sonderling said. "That's a big chunk of change from an overall picture."

What about efficiency? Try on this statistic: The 7,664 hearing requests received in FY 21 was a decrease of 6.2 percent from the previous fiscal year. This can be partly attributed to the resolution of 9,082 complaints by the Commission's hearings program. "Getting 9,000 complaints out the door, that's really efficient."

Meanwhile, employees took advantage of the EEOC's free mediation program. More than 600 Federal sector mediations were conducted, resulting in another $8.4 million for Federal employees and applicants.

"We've seen a lot more interest in mediation since the pandemic when we went virtual," Sonderling said. "Before, you had individuals hesitant to enter mediation. Think of an old-school mediation. You go into a conference room with the person who discriminated against you and your old boss. You never want to see these people again. It's traumatic. But virtually, you can be in a separate breakout. You don't even have to see the people."

The EEOC has been criticized in the private and Federal sectors about case backlogs. Progress is being made there, too, according to Sonderling. In the Federal sector, the aged inventory was reduced by 11.5 percent. And resolutions result in a 6 percent reduction of cases that were more than 300 days old.

"The reduction of pending and aged inventory will have a positive impact on the agency's ability to more timely process the hearings complaints received and better serve participants in the hearings process."

The agency is developing its next Strategic Enforcement Plan – an important document that will determine the Commission's priorities for the next five years. The last strategic plan was approved in 2016. It set the EEOC's focus over the past five-plus years on, among other things, eliminating barriers in recruitment and hiring, protecting vulnerable workers in underserved communities, ensuring equal pay, and preventing systemic harassment.

Why is this important? Of the EEOC's 99 findings of Federal sector discrimination in FY 2021, 83 were "identified as implicating one or more Strategic Enforcement Plan priorities, including numerous decisions addressing equal pay or other wage discrimination issues."

There have been three hearings on the new SEP, all are available on the EEOC's YouTube page. There will be an opportunity to submit formal comments through the Federal Register. As the agency looks forward, we thought it was a good time to check in with Commissioner Sonderling (pictured at top next page) about priorities, trends, and more. "The most important thing for me and, I think, for all of us at the EEOC is to ensure that the Federal government is

leading in creating an inclusive, barrier-free workplace because the US government is the largest employer in the country," Sonderling said. "It's important for Federal government to be the model employer. That falls on the EEOC to give guidance to the agencies compliance assistance to prevent discrimination and also from an enforcement perspective when discrimination occurs.

DG: Charges of discrimination are down. Why is that?

KS: I'd love to say it's because (employees are) realizing employers are trying to do the right thing and prevent discrimination from occurring. Or that the EEOC has provided enough information to employees to know what happened may not have been discrimination. Also, too, with the economy we have now and so many jobs available, instead of going down this very long road of filing charges of discrimination, they may give up because they got another job and think, "I don't need this anymore."

DG: Reprisal continues to be a major problem for agencies. Based on the cases before you, what can agencies do best to limit reprisal?

KS: Well, let me tell you: It's not just the Federal government. It's across the board. It's the number one filed alleged basis of discrimination in the United States. Hands down. Those are the most claims. It's a persistent thing.

It's not just at EEOC and in the discrimination context. The NLRB has retaliation provisions. Department of Labor, OSHA has provisions, as well.

Back in 2016, the EEOC put out broad guidance and tried to define reprisal very broadly. It's treating employees differently because they complained about discrimination on the job, filed a complaint, participated in any manner in a charge or proceeding -- theirs or someone else's. Second, something negative has to happen

to your employment, generally, in addition to just filing charge of discrimination. What happens if you're resisting sexual advances? Or you requested an accommodation for disability or religion? Did your work situation change in an adverse way once that occurred?

For agencies, it's really just maintaining plain language anti-retaliation policies.

We simplified the definition in our guidance available to the public. Federal agencies' policies and retaliation reporting procedures must do the same, just make it simple. Make it so plain language with examples of what is retaliation and what is not retaliation.

If you are fired or demoted because you are not performing well at work, you're not hitting your goals, or just not doing the job, that's not retaliation. But, if you are fired or demoted because you were sexually harassed or filed a charge, that's a different story. Make it clear: This is retaliation, and this is not.

And it must come from the top. We saw this really changed with the MeToo movement. When the movement happened, it was national news. Harvey Weinstein and offending CEOs were fired. New management teams came in: What was the first message they were saying? From that CEO level, they were saying: "We're not going to tolerate this harassment. We're willing to fire the CEO. We're willing to fire our rainmakers, our best performers if they are sexually harassing. And the same needs to happen here. In cabinet agencies, it needs

to come from the top. It needs to come from the highest career SES, the cabinet secretaries themselves, the leaders of the agencies. This is just not going to be tolerated. We have an open-door policy. If you feel like you're being harassed, here's the mechanism we put in place in our agency. If you don't feel comfortable going to that, here are alternate ways to report harassment, so you're not dealing with the harasser or the direct manager. You can go to neutral HR or the civil rights office in your agency and not have that fear of reprisal."

DG: Policies are important.

KS: Let's make them easier to understand, and let's have that commitment come from the top. So that from very first day, they know the leader of the agency is against this and it's part of the culture at this agency.

That's my best advice.

DG: Federal agencies often require a bar on reemployment as a term in an EEO settlement agreement for an employee who no longer works at the agency and filed an EEO complaint. Does the EEOC have a position on whether such clauses constitute retaliation *per se*?

KS: Yes, the EEOC has dealt with this. And the Supreme Court has dealt with this in the private sector. They basically said: Look, it's a contract and the parties in the settlement agreement or consent decree or however you get there, if you agree to this no re-hire policy, if it's very clear and if it's a legitimate nondiscriminatory reason for refusing to re-hire, then it's valid. That is the key.

Even if settling claims of discrimination, if you're putting in no-hire provisions, they should be explainable, and if it is later challenged, you may have to be able to provide the reasons the no-re-hire position was related to legitimate nondiscriminatory reasons. Basically, it's a contract claim. However, Courts will not enforce contracts about future discrimination. So even in the event you have a no-rehire clause and you re-hire the individual, you cannot waive future claims of discrimination.

The EEOC dealt with this in 2003 in a Federal sector opinion [*Jablonski v. NLRB*, EEOC Appeal No. 01A23730]. That was a case of an employee against NLRB. We upheld that a no re-employment clause in a settlement agreement with a former employee was valid. The agency also declined to impose a reasonable limitation on the no-rehire period.

Like the Supreme Court, the EEOC finds that settlement agreements are contracts between the complaint and the agency. If the intent of the party is in the contract, that's what's going to control. We rely on the plain meaning of the contract.

Where confusion arises when settling with current employees is waiving future claims of discrimination, including retaliation that has not yet occurred. Even if you had that no re-hire, and agency goes and prevents you from getting another job, that's still retaliation.

DG: What impact did the pandemic have on employees with disabilities?

KS: Employees with existing disabilities have been largely impacted by the pandemic. For instance, they had a disability before and now the disability is more severe and now they need additional accommodations. Or, you have Federal workers who weren't disabled and now need those accommodations because of long haul COVID.

So many Federal workers who were not disabled suddenly have become disabled post-COVID and we're seeing that across the board, related to long haul COVID.

We've given out a lot of guidance on this to help Federal agencies make that determination: What is a disability now post-COVID? What is long haul COVID? Our guidance has very specific examples of the

types of long haul COVID, like needing supplemental oxygen, having heart-related issues, severe fatigue, heart palpitations versus what is not COVID -- a cold, congestion, sore throat.

I think the Federal agency EEO/Accommodation manager will be flooded with these requests, especially as more employees come back to the office.

[Editor's note: Join FELTG for Reasonable Accommodation: Meeting Post-pandemic Challenges in Your Agency on Nov. 17, from 1-3 pm ET.)

DG: Technology is accelerating at such a fast pace, especially workplace technology. Is accessibility to this technology keeping up the same pace?

KS: In the private sector, companies are rapidly implementing technology like artificial intelligence to make decisions about their workforce, whether to recruit, whether to hire. The future is now.

A big concern is that workers with disabilities have the same ability to use these platforms with their disability as they would any kind of screening test. Federal agencies have had these assessment tests for decades, and a lot of them are going online. The agencies know they must accommodate both applicants and employees who are being subject to these tests.

The technology can certainly affect workers with disabilities when it comes having to do your interview online or having to take your test online.

Make sure these newer technologies don't discriminate against any of the categories we enforce here, especially workers with disabilities. Outside of retaliation, disability discrimination is our number one cause of action in the private sector. Employers using these technologies should go through the same interactive process on the front end for applicants and during the life cycle, so employees feel comfortable asking for requests without fear they're not going to get the job because they're not using the program the employer spent a lot of money on buying and implementing.

With artificial technology in the ADA space, there are three takeaways:

1. It needs to provide reasonable accommodation.
2. The tool can't intentionally or unintentionally screen out employees with disabilities.
3. Make sure these tools are not seeking disability-related inquiries or not medical examinations and relevant to the job.

These are the same principles we know for reasonable accommodation, but they can't be lost here. With HR technologies, you can't have that set-it-and-forget-it approach.

Gephart@FELTG.com

The Power of an Inclusive Mentality

What do rats addicted to heroin, Rosa Parks, a third-grade schoolteacher, a prize-winning stage director, Miles Davis, and a little girl who has a form of autism called Williams Syndrome have in common? They have figured out the code to great performance. And that code? It is Inclusive Mentality.

In this interactive and highly engaging presentation Dr. Bruce Stewart, former Deputy Director for Diversity and Inclusion for the Office of Personnel Management and creator of OPM's New IQ, will explain what the inclusive mentality code is and how it can be unlocked to unleash the full potential of diverse teams, in line with President Biden's DEIA initiatives.

The two-hour Power of an Inclusive Mentality will take place on Nov. 8 from 1-3 pm ET. Register now.

Why F-Words Get Agencies in Trouble
By Deborah J. Hopkins

For as long as we've been a company (since 2001, in case you're wondering), FELTG has taught agency reps and supervisors that if you're charging misconduct that begins with an f-word (falsification, fraud, false _____, etc.), you'd better make sure you have evidence the employee intentionally provided false information. Otherwise, you will lose the charge, which often means losing your case.

So, it was no surprise to see a recent MSPB decision, *Conaway v. Commerce*, CH-0752-16-0166-I-2 (Sept. 22, 2022)(NP), that overturned an agency's discipline because of an f-word the agency couldn't prove. The real heartbreaker is that this case cost the agency eight years and more than a quarter million in back pay, thanks to the lack of quorum at the MSPB. And to be fair, it also dragged out for eight years on the appellant's side which is no picnic either.

In *Conaway*, the agency removed the appellant, a Census Bureau GS-6 Field Supervisor, on one charge of **providing false information regarding Census Bureau questionnaires**, with one specification regarding a March 24, 2014, interview.

The MSPB equates this type of charge to one of **falsification**. In order to have a falsification charge upheld, the agency must prove the following by preponderant evidence:

(1) the appellant supplied incorrect information; and
(2) did so knowingly with intent to defraud, deceive, or mislead the agency for her own private material gain.

Boo v. Department of Homeland Security, 122 M.S.P.R. 100, ¶¶ 10-12 (2014).

The basic premise of Conaway's misconduct was that she entered information into a survey form she had obtained in a months-earlier interview with a questionnaire respondent, even though procedures required her to ask the respondent questions and enter information in the current interview (held March 24, 2014). At hearing, Conaway presented unrebutted testimony that the respondent had provided her with information during an interview weeks prior to the March 24 interview, and had told her that "nothing had changed" during her phone conversation with the respondent about the March 24 questionnaire.

Here's how the case fell apart for the agency, according to MSPB:

> [While] the record clearly established that the appellant entered information into the survey …that she did not obtain from the March [24], 2014 interview, the agency has not provided any evidence suggesting that this information was incorrect, as required to prove a charge of falsification. To the contrary, it is likely this information is correct given the appellant's unrebutted testimony…
>
> Moreover, even if this information was incorrect, we find that the appellant had a reasonable good faith belief in the truth of the information, which precludes a finding that she acted with deceptive intent. Therefore, we find that the agency has not proven a charge of falsification.
>
> Although the appellant's handling of the … survey may have been contrary to established procedures or otherwise improper, the agency did not assert such a charge against her. Rather, as stated above, the agency charged her with providing false information … The Board is required to review the agency's decision on an adverse action solely on the grounds invoked by the agency and may not substitute what it considers to be a more adequate or proper basis. Therefore, we cannot sustain a charge of

> failure to follow survey procedure against the appellant, and such failure cannot serve as a basis to sustain a charge of falsification. In light of the foregoing, we reverse the initial decision in part and do not sustain the appellant's removal. (Citations omitted.)

I talked to FELTG Founder Bill Wiley about this case. He believes the agency made two notable mistakes, both of which FELTG addresses in our training:

> 1. If you charge The Effing Word (Falsification), you have to prove, inter alia, that the information provided is false. That's straight from the Charges day of MSPB Law Week, next held December 5-9. Here, although the employee did not follow procedures, the actual information provided was in fact true. Therefore, bye-bye Effing charge.
>
> 2. The agency did a decent job of describing how the employee failed to follow procedures. However, they did that in some sort of "Background" section rather than in the "Charge" section of the proposal. Agency representatives who attend FELTG's MSPB Law Week and learn not to waste words in a Background section hardly ever have to tell payroll to cut a backpay check for over a quarter of a million dollars.

We hope this helps you think twice before the next time you charge an F-word. Lots to learn from these new Board cases, and lots of lessons re-affirmed too.
Hopkins@FELTG.com

MSPB Law Week in December

With the newly constituted MSPB back in action, now is the time to sharpen your skills and refresh your knowledge. Join FELTG for MSPB Law Week, December 5-9. Sessions run from 12:30-4:30 pm ET each day. Register now.

The Good News: With Weingarten*, The Law Is Enough!*

By Ann Boehm

Once again, I'm writing about the *Weingarten* union representation right. This time I want to emphasize something that may seem overly obvious: Stick to the law!

Let's start with a refresher about the statutory language. The *Weingarten* right is established in 5 U.S.C. § 7114(a)(2)(B). To trigger the *Weingarten* right, there has to be an *investigation* by the agency. That typically means a misconduct investigation. If there's no investigation occurring, you can pretty much stop there—no right to a union representative.

If there is an investigation, the next consideration is whether the representative of the agency is *examining* a bargaining unit employee, or to put it another way, asking questions. No questions, no right to representation.

If there is an investigation, and there is an examination of a bargaining unit employee by an agency representative, the employee still has to *reasonably believe* that disciplinary action against the employee could result from the examination in order for the employee to have a right to union representation in that meeting. No reasonable fear of disciplinary action, no right to union representation.

One big part of the statutory *Weingarten* right is this: The *employee* has to *request* a union representative. The agency representative has *no statutory obligation to notify the employee* of their right to representation (other than the agency's an obligation to inform employees of the right annually). It's up to the employee to seek the representation. No request for representation, no right to representation.

Here's a problem I discovered during a recent training session. An attendee said, "Our attorneys strongly suggest we advise the employees of their *Weingarten* right." Good heavens! Why in the world would that be a good idea? The statutory language makes it crystal clear that the agency representative does not have any such obligation.

Another way the agencies and unions go beyond the statutory language is by negotiating into the collective bargaining agreement an obligation on the agency to inform the employee of the *Weingarten* right before questioning an employee during an investigation. Good heavens! Why in the world would that be a good idea? Congress did not require it, so why agree to more than what Congress established in section 7114(a)(2)(B)?

There is really no practical reason to go beyond what the Statute says. In the worst-case scenario, if the agency proceeds with an interview without allowing the union representation, a typical unfair labor practice remedy would be to order a re-do of the interview with a union representative present (the "interview remedy"). The interview remedy may not even be necessary. A 2018 case from the FLRA indicates an interview remedy is not necessary if the *Weingarten* violation did not negatively impact on the outcome for the employee. *U.S. Dep't of Justice, FBP, FCI Englewood*, 70 FLRA 372 (2018).

In *FCI Englewood*, the employee tested positive for marijuana on a random urinalysis drug test. The agency investigated his drug use, and a urinalysis retest confirmed the original results. When the agency interviewed the employee about the drug test, he requested a union representative. A union representative attended, but the agency investigator told the representative to stop asking questions. The employee then admitted to using marijuana. The agency removed the employee from his position, and the union filed a grievance challenging the removal. The arbitrator reduced the penalty to a 14-day suspension.

The union also filed an unfair labor practice charge, claiming violation of the *Weingarten* right based on the agency's refusal to allow the union representative to participate actively. The General Counsel filed a ULP complaint. The Administrative Law Judge found the agency committed a ULP, and ordered an interview remedy. *Id.* at 373.

The agency challenged the ALJ's interview remedy, claiming that it would be a duplication of effort and resources, and the FLRA agreed. The FLRA explained that the interview remedy would be appropriate if allowing the union representative's participation would reasonably suggest no discipline would have been imposed. But in this case, "there is no dispute that some type of discipline was justified" because the employee tested positive for marijuana use. The FLRA set aside the interview remedy. *Id.*

The law provides enough protection for the employee. Agencies, you do not need to go beyond that. And that's Good News! Boehm@FELTG.com

High Times and Misdemeanors: Weed and the Federal Workplace

President Biden recently issued a pardon for people convicted of simple possession of marijuana and set the wheels in motion for the drug to be re-classified. Marijuana is legal recreationally in more than a dozen states, and it can be purchased medicinally in 30-plus states.

What does this all mean to Federal workers in those locations? Are you required to accommodate an employee's medically certified marijuana usage? Get the answers during High Times and Misdemeanors: Weed and the Workplace, which will take place on October 27 from 1-2 pm ET. Register now.

'Government Careers are Retirement Schemes for the Incompetent'
By William Wiley

Oh, did you like that one?

Well, how about this: "Federal employment is basically welfare with an attendance requirement, but not a very strict one."

Are you offended yet?

No?

Well you just might be if you read any more of the hundred or so comments relative to a recent media piece on the cable network MSN, entitled *Afraid of Being Fired? Consider Working a 'Forever Job' with the Federal Government.*

If you read the article in its entirety, you probably won't find anything new. It's a word salad of labor/employment terms, put together to gain the attention of readers who are predisposed to have a negative view of Federal civil servants. Take several labor/employment terms, throw them together in a scary way and *voila!* you have an article that makes people angry. And anger gets clicks. One of the saddest realities of life is that a lot of people would rather read something that gets them angry or reinforces a predisposition that they already hold rather than read something that might provide new information to consider.

This human tendency is nothing unusual. I remember a psychological study from the 1970s that looked at the viewing habits of people the weeks after they had bought a new car. Most people tended to pay closer attention to and view ads for longer if they were advertisements for the make of automobile that they had just bought *even though they had already committed to that brand.* They weren't looking for new information for a future purchase. Rather, they were looking for confirmation that the make of car they had just bought was as cool as they thought it was. Psychologists call this tendency "confirmation bias," a term you might have picked up on in your undergrad "Introduction to Psychology" course (if you hadn't still been recovering from your party-full weekend).

Although reinforcement of a previously held belief isn't a bad thing in itself, there is a dark side if you think about it. When someone spends time reading things that they agree with, they may forgo spending additional time to read something else with which they do not agree that could be helpful. If you bought a new Ford and then read car ads only about Fords, you might neglect to read that article that provides evidence that a Toyota is a better long-term investment. That would be helpful information for you the next time you buy a car.

With this background in human behavior, how should those of us who believe that the Federal civil service is an honorable, hard-working, and honest calling respond when someone confronts us with this kind of misinformed nonsense? Well, being experts at firing bad people from government, and with a touch of background in psychology, we here at FELTG humbly suggest the following:

1. As a society we want it to be harder to fire a civil servant than a typical employee in the private sector. That's to protect us citizens from a government composed of partisans interested mainly in their personal philosophy. Try out this thought experiment: If you are a conservative, do you really want a government filled with a bunch of socialist liberals giving away our tax dollars to dangerous undocumented immigrants? Or, if you are a liberal, do you really want a government filled with a bunch of fascists giving away our tax dollars to fat-cat billionaire polluters? If we did not have extra protections for career civil servants, every time we changed from a liberal to conservative

White House, we could expect a significant change from one biased civil service to another biased civil service. The extra protections provided by law to Federal employees is intended to keep that sort of patronage from happening.

2. Career civil servants have already proven themselves to be above average employees, theoretically among the best and the brightest. First, they have won a merit-based competition for their jobs. Then, they have survived probationary periods (during which they can be summarily dismissed) that are much longer than probationary periods in the private sector: one, two, and sometimes of even three years in length. After surviving these hurdles, a claim that they can no longer do a good job should receive scrutiny. They have proven themselves to warrant continued employment. There should be proof when it is claimed that they do not.
3. These extra-protections that career civil servants have by law are not really that onerous for an employing agency IF the agency knows what it is doing. Here is all that it takes to fire a bad government employee:

    a. The supervisor has to tell the employee what to do. That can be done by giving the employee performance standards or work instructions. There's no particular form this notification must take. It can be as simple as an email or even oral direction. It would be hard to argue that an agency should be able to fire an employee for not doing something that the supervisor never said had to be done.
    b. If the employee makes a mistake and does not do what the supervisor says needs to be done, the supervisor has to tell the employee about the mistake and usually has to give the employee the chance to behave correctly. This can be done through the initiation of either progressive discipline or a performance improvement plan. Unless the employee's mistakes are causing significant harm, sometimes this might take two warnings. But hardly ever any more than that. Yes, this is more than is required in the private sector where an employee can be fired for a first offense of coming to work five minutes late. But given the goal of our society of having a neutral, non-political civil service, this extra step should not be a big deal.
    c. If the employee continues to make mistakes, the supervisor has to give the employee written notice of what has been done wrong and allow the employee to offer a defense or explanation. Once the supervisor issues this notice, the employee must be paid for another 30 days, although there is no mandate that the supervisor keep the employee in the workplace to make even more mistakes. When the law was passed to require this 30-day paid notice period, one of the sponsors of the bill said that 30 days of salary would act as a type of severance pay, allowing the individual some time to find another job. You and I may not think such largess is warranted, but we still would need to concede that these last couple of pay checks are not a significant bar to firing the employee.

That's it. The employee is now off the government payroll and once more a private citizen. There are a few exceptions and twists to the above, e.g., sometimes the supervisor needs to give the employee only 7 days of a paid notice period instead of 30, or maybe the harm caused by the employee is so significant that there is no need to give the employee a second chance. However, in most situations, not much different from the above is required from one case to the next.

Once the employee is fired, the agency may have to produce evidence that the removal was justified. And for Federal civil servants, "justified" means that it is either probable or possible that the individual really was a bad employee. These are significantly lower burdens of proof than the oft-cited "beyond a reasonable doubt" proof burden required in criminal cases. If a supervisor cannot come up with either preponderant or substantial evidence of bad employee performance or conduct, then the protections against unfair treatment for Federal employees do their job and the employee is entitled to be restored to the government payroll.

In 1883, Emma Lazarus wrote: "Give me your tired, your poor, your huddled masses yearning to breathe free." In recognition of the 44th anniversary this October of the *Civil Service Reform Act of 1978*, the law that defined these civil service protections above and made it relatively easy to fire a bad government employee, with apologies to Ms. Lazarus, I would say, "Give me your incompetent, your lazy, your no-good civil servants who think they are on welfare in a forever job." Using the procedures in the CSRA, a FELTG-trained practitioner can take it from there.

So, if I'm so darned smart, why don't I do that for you? Hey, I'm retired! Ain't nobody got time for that. Wiley@FELTG.com

Get Your Supervisors Trained on Accountability – the FELTG Way

Empower your supervisors to deal efficiently and effectively with poor performance and misconduct. Bring FELTG's flagship course Uncivil Servant: Holding Employees Accountable for Performance and Conduct to your agency – either virtually or onsite. Email info@feltg.com for information.

Or block your calendar for February 8-9, 2023. That's when the two-day open enrollment UnCivil Servant course returns. Or, better yet, register now.

Know the Warning Signs of Employee Stress and What You Can Do to Help
By FELTG Staff

Project deadlines, that one co-worker who rubs you the wrong way, work-life balance, worries about keeping your job. Sometimes, the stress of work can feel overwhelming. Even with a low unemployment rate, which allows workers more choice in job selection, people are feeling more stressed out than ever when dealing with workplace issues.

We sat down with Shana Palmieri, LCSW, FELTG Instructor, and Chief Clinical Officer and Co-Founder of XFERALL (pictured at top of following page), to find out how managers can help employees ease the tension they have at work.

FELTG: What are some of the more frequent causes of workplace stress?

SP: Reports of stress in the workplace reached an all-time high in 2021 at 43 percent, up from 31 percent in 2009 and 38 percent in 2019.

The impact on employees and employers is significant. Workplace stress leads to employee disengagement.

Current employee disengagement rates are at 50 percent, resulting in a significant loss of employee productivity. Job-related stress is estimated to cost United States Industry $300 billion annually in diminished productivity, absenteeism, and accidents. The main causes of workplace stress are:

- 39 percent report their workload
- 31 percent report interpersonal issues/conflict in the workplace
- 19 percent report juggling work and personal life
- 6 percent report job security

FELTG: How can supervisors and managers help employees deal with workplace stress?

SP: Based on all-time record highs of employee stress in the workplace and disengagement, it is critical for employers to focus on employee well-being and engagement.

Key recommendations include:

- Add employee well-being to executive dashboards.
  - Key measurements may include employee engagement, economic cost, turnover rates, productivity, healthcare and disability costs, company reputation, employee attitudes and well-being.
- Formalize and prioritize employee well-being programs.

It is important to assess and address potential risk factors for employee stress and disengagement:

- Poor team cohesion
- Lack of clarity in strategy or objectives
- Insufficient employee support
- Hostile work environment, bullying, harassment
- Employees having little or limited control over their work
- Poor management and weak communication styles
- Inflexible work hours/limited PTO
- Poor safety policies/health risks at the workplace

Employers will improve well-being and reduce disengagement by proactively creating a workplace culture that promotes physical and mental well-being and implementing practices that drive employee engagement.

FELTG: What are some of the warning signs supervisors can look for in employees which might indicate employees need professional help?

SP: High levels of stress can lead to burnout, mental health conditions and substance abuse. Some warning signs employees may need professional help include:

- Increasing use or abuse of substances
- Increased social isolation
- Increased agitation, low frustration tolerance (can be a sign of depression)
- Low mood with apathy, difficulty making decisions, tearfulness
- Increased anxiety
- Reports or comments concerning suicidal thoughts
- Extreme fatigue in combination with significant changes in mood
- A significant change in work productivity and/or decreased quality of interactions in interpersonal relationships

FREE DEIA RESOURCE!
FELTG's DEIA Resources Page provides information on upcoming DEIA training, news articles, and resources.

If an employee makes threats to harm themselves or others, it is important to obtain immediate assistance available by calling 911 or the 988 crisis line.

[Editor's note: For further insight on how to help your employees deal with stress, join Shana on Tuesday, November 1, 2022 from 1:00-2:00 PM ET for Grappling with Employee Stress in the Workplace: Improve Performance and Morale in Your Agency.]

info@FELTG.com

Conditions of Employment Revisited: VA Priest's Case Didn't Have a Prayer
By Barbara Haga

I have written several articles about conditions of employment over the years. They are typically simple cases processed under 5 USC Chapter 75. The newly constituted Merit Systems Protection Board ruled on one of these cases in September. I think it's worth looking at the issue again since this topic comes up in many of my training courses.

If it is a condition of employment that an employee possess, obtains, and/or maintains a license, certification, or membership status, then failure to comply is the basis for the adverse action.

To win these cases, you would need to show:

- The employee occupied a job requiring the certificate, license, or status,
- The employee failed to obtain or lost the certificate/license/status, and
- If the agency controls granting this certificate/license/status, the agency decision was made in accordance with agency procedures.

In *Gallegos v. Department of the Air Force*, 114 FMSR 185 (MSPB 2014), the Board wrote the charge of failure to meet a condition of employment contains two elements: (1) the requirement at issue is a condition of employment; and (2) the appellant failed to meet that condition. "Absent evidence of bad faith or patent unfairness, the Board defers to the agency's requirements that must be fulfilled for an individual to qualify for appointment to, or retention in, a particular position."

If the employee engaged in some misconduct that led to the loss of the license or certification granted by a third party, such as off-duty misconduct that led to the loss of membership in the bar, the agency is not required to prove anything about the underlying reasons for loss of the membership, but instead must show that the person no longer has whatever the credentials are that are necessary to fulfill the duties of the position.

'Possessing Faculties'

In my April 2019 column, I discussed conditions of employment in several different types of cases, one of which involved a Catholic priest.

That case was *Ezeh v. Navy*, 114 FMSR 13 (NP) (MSPB 2013). The condition of employment in that case was possessing "faculties," the authority to provide ministry to military members through sacraments of reconciliation, baptisms, weddings, annulments, and parish funerals, and to perform Catholic mass.

The determination to grant or deny faculties was made not by the employing agency but by the Archbishop of the Military Services (AMS), which is not a Federal position, but a position within the Catholic church. AMS is the sole endorser of Roman Catholic priests serving in positions such as that held by Chaplain Ezeh.

In this case, there is no information in the decision about the reasons behind the Archbishop's determination to terminate Chaplain Ezeh's faculties.

The new Board issued a decision on a similar set of circumstances, but in this case the information on which the termination of faculties was based is included. The case is *Dieter v. Department of Veterans Affairs*, 2022 MSPB 32 (September 2022). Chaplain Dieter worked at a VA Medical Center in Florida. His position was subject to the same requirement as Chaplain Ezeh's position discussed above, including the requirement to have faculties granted by the AMS.

[Editor's note: Attend Back on Board: Keeping Up with the New MSPB tomorrow (October 20) from 1-3 pm ET.]

The events that led to Dieter's removal began with a statement he made during Mass. His homily included the following statements:

1. During the early hours that morning, Dieter received a call from a 95-year-old veteran he knew, and the veteran stated that he was being burglarized at that moment.
2. Dieter phoned the police then went to the veteran's home and entered, where he saw two young men in the home and confronted them.
3. Dieter hit one of the young men and knocked him out. He was wearing the Roman collar at the time he knocked out the young man. He verbally demanded that the other young man get on the floor.

Someone in the congregation recorded a video of the homily. The statements were reported to the chief of chaplains. He reviewed the video and came to certain conclusions, including that Dieter failed to exercise good judgment in revealing information during Mass about the burglary and his response, including potentially being responsible for assault and battery of a minor. The chief of chaplains noted that Dieter presented himself as the rescuer of the weak and powerless and a hero and prided himself as a Roman Catholic priest for having beaten a young man.

Scope of Review

Dieter later said the statement was not true. The reviewing authorities found the statement in the homily to be totally inappropriate whether true or not. Dieter's ability to serve as a Catholic priest was terminated.

In the initial decision, the AJ notified Dieter the scope of the review was "… was limited to determining whether (1) the appellant's position required an ecclesiastical endorsement; (2) the ecclesiastical endorsement was denied, revoked, or suspended; (3) the agency provided the appellant with the procedural protections specified in 5 U.S.C. § 7513; (4) the agency complied with its own regulations regarding the matter; and (5) the agency afforded the appellant due process with respect to its decision to remove the appellant."

Dieter's arguments focused on two main points. First, because he indicated the information in the homily wasn't true, management violated his rights by not conducting an appropriate investigation into the misconduct before it was reported to Catholic officials. He said that "… if the agency had interviewed him before it provided information to the AMS, he would have 'had the opportunity to set the record straight that the homily was fictional, and he had not assaulted a minor.'"

Had that happened, he alleged that it "may well have stopped the agency's liaison to the AMS from sending the information to the AMS or may have been sufficient to convince the AMS not to withdraw his endorsement."

The Board noted that Dieter had "… no property or liberty interest in his ecclesiastical endorsement, and, therefore, the agency's failure to conduct an investigation prior to communicating with the AMS did not implicate any due process concerns."

Secondly, Dieter noted in his oral reply that he could not adequately defend himself without information regarding AMS's decision to withdraw his ecclesiastical endorsement. The AJ dealt with this matter in the initial decision stating: "Because the agency relied on the loss of the appellant's endorsement as the basis for its action, it was not required by the dictates of the due process clause to provide the appellant with notice of the matters the Archdiocese may have considered in reaching its decision to

withdraw the appellant's ecclesiastical endorsement and faculties."

The Board further addressed the issue: "We agree with the administrative judge's determination that the Board lacks the authority to review the AMS's decision to withdraw the appellant's ecclesiastical endorsement and is, in fact, precluded from doing so by the First Amendment." Haga@FELTG.com

Did You Know Advanced ER is Less Than Two Weeks Away?

Perennial FELTG favorite Advanced Employee Relations will be held Nov. 1-3. Led, as always, be FELTG Senior Instructor Barbara Haga, these three half-day classes will provide the kind of interactive foundational-based training necessary to handle your agency's most challenging and complicated situations.

Tuesday, November 1

Leave and Attendance: Administering leave, with particular emphasis on sick leave, LWOP, and FMLA. Detailed review of sick leave provisions, eligibility to use leave for care, notice requirements, acceptable documentation. Detailed FMLA provisions. And much more.

Wednesday, November 2

Performance Management: Requirements for performance plans. Procedures for conducting appraisals. Linkage between appraisals and other personnel management decisions. And much more.

Thursday, November 3

Misconduct and Related Issues: Implementation of successful disciplinary program. Nexus. Comparators. Involuntary actions. Handling situations when an employee is unable to perform, including excessive leave and disability retirement. And much more.

Register now.

Don't Forget the Accommodation of Last Resort

By Deborah J. Hopkins

In our Reasonable Accommodation training classes, we at FELTG focus on the framework set out in the law. It's the best way to ensure your agency is handling every request appropriately. Here's the basic approach once it's been established the employee is a qualified individual with a disability. This is the approach that FELTG founding father Bill Wiley calls the Accommodation Three-Step:

1. Look for a reasonable accommodation that will allow the employee to perform the essential functions of the job (by engaging in the interactive process) without causing an undue hardship.
2. If accommodation is not possible, consider the accommodation of last resort: a reassignment to a vacant, funded position for which the employee is qualified, at the current grade level.
3. If nothing is available at the employee's grade level, look for a vacant, funded position at a lower grade level.

A recent case, *Shanti N. v. IHS, EEOC* Appeal No. 2019004882 (Sept. 14, 2021), illustrates how problematic it can be when an agency stops at Step 1. In *Shanti N.*, the employee, a GS-9 staff analyst, requested full-time telework to accommodate her medical conditions (TBI, PTSD, and pregnancy). Her supervisor denied the request because in 2017 when the events of this case occurred, staff analysts were required to be in the office full-time because of the customer service nature of their positions.

(This might be a good time to mention that things have changed since then, and FELTG is holding a class on November 17 titled Reasonable Accommodation: Meeting Post-pandemic Challenges in Your Agency, where

we'll discuss how telework has altered Reasonable Accommodations – and much much more.)

Back to *Shanti N*. Once her telework request was denied, she requested a reassignment to a telework-friendly position. Her supervisor agreed, but then made no effort to conduct a search for a vacant, funded position.

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

According to the case, agency HR "experienced difficulties in completing the reassignment process because [the agency] had a policy of giving absolute hiring preference to Native Americans and Alaskan Natives and Complainant was neither." The supervisor then explained that it would be difficult to reassign the complainant to another position in the agency because the complainant would have to compete for a vacant position and would be discounted by a candidate with "Indian Preference."

On the alternative side, the complainant exercised her diligence and actually identified several positions for reassignment in another subcomponent of the agency. When she made these suggestions, the agency indicated it would be unable to complete the reassignment, and that it was on the complainant to obtain and secure the reassignment on her own.

As you can imagine, the EEOC did not take this well. They found the agency did not meet its obligation to identify vacant reassignment positions, or to confirm whether the Indian Preference policy would actually prevent a reassignment.

In addition, the EEOC found that the agency had not shown that reassigning the complainant would be an undue hardship, and it failed to engage in a good faith search for a reassignment, which violated the Rehabilitation Act.

A simple mistake that ended up being quite costly, not just to the agency but to the employee as well. Don't let it happen to you. Hopkins@FELTG.com

UPCOMING FELTG WEBINARS

Register for instructor-led webinar sessions on the topics most important to Federal law practitioners and supervisors. Attend from where you work – agency office or home. FELTG's webinars provide specific, timely, and useful guidance – and they do it in just 60 minutes.

2022

High Times and Misdemeanors: Weed and the Workplace
October 27

Grappling with Employee Stress in the Workplace: Improve Performance and Morale at Your Agency
November 1

Avoiding Mistakes in Selection and Promotion Cases
November 15

2023

The New MSPB and Roller-Coaster Employees: Managing Up-and-Down Performance
March 2

Dealing with Medical Issues in Misconduct Cases
April 6

Revisiting Existing Reasonable Accommodations
April 13

Make Your Best Case: Effectively Preparing Performance Narratives
May 4

Avoid the Pitfalls of EEO Reprisal
May 18

The New MSPB and Whistleblower Reprisal
May 23

Visit our Webinar Training page.