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

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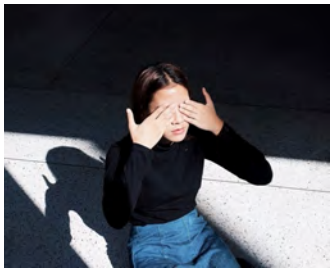
Blind Hiring: Bad Name, Good Idea?



I was recently discussing a relatively new hiring technique with another FELTG instructor: blind hiring, sometimes known as blind interviewing. Despite the problematic name, this is a hiring technique that blocks out candidates' names, ages, and sometimes other factors, so that hiring officials are influenced only by a candidate's merit.

The goal of blind hiring is to eliminate any known or unconscious bias from the hiring process, and it's a way some agencies are promoting the Diversity, Equity, Inclusion and Accessibility (DEIA) mandates required by the White House. It's also a topic we'll be discussing during the April 5 virtual training class Nondiscriminatory Hiring in the Federal Workplace.

In this month's newsletter we discuss the purpose of suspensions, settlement agreements, harassment misconduct investigations, 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 the 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**.

MSPB Law Week
March 27-31

Nondiscriminatory Hiring in the Federal Workplace: Advancing Diversity, Equity, Inclusion and Accessibility
April 5

Drafting Enforceable and Legally Sufficient Settlement Agreements
April 12

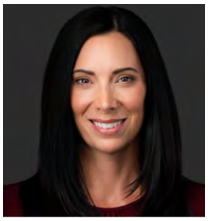
Emerging Issues in Federal Employment Law
April 18-21

Conducting Effective Harassment Investigations
April 25-27

EEO Counselor and Refresher Training
June 21-22

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.

Is Three-strikes Progressive Discipline a Thing of the Past?
By Deborah J. Hopkins



A recent MSPB nonprecedential decision has me scratching my head, as the outcome appears to go against over 40 years of case precedent. I wrote about the facts of the case in a previous newsletter article, so if you'd like the specific details please check that out. A quick recap though: The agency removed an employee based on three charges: (1) lack of candor; (2) disregard of directive; and (3) unauthorized absence. The MSPB only sustained charge 2, disregard of directive, because the appellant did not follow appropriate leave request procedures.

Because the agency only proved one of three charges, the Board mitigated the removal to a 7-day suspension. That may not sound odd to you, but here's where I'm stuck: if you look at Board's view of the *Douglas* factors analysis on pages 9-10 in the case, the appellant "was previously reprimanded and served a 3-day suspension for failure to follow the agency's leave procedures."

A principle that has been around for longer than the *Civil Service Reform Act*, progressive discipline stands for the proposition that for minor misconduct, Federal employees are generally given a "three strikes and you're out" opportunity to learn from conduct-based mistakes. Progressive discipline, which we'll discuss in more detail during MSPB Law Week March 27-31, typically looks like this:

- First offense of misconduct: Reprimand
- Second offense of misconduct: Suspension of 1-14 calendar days
- Third offense of misconduct: Removal

Progressive discipline is not mandatory, most recently confirmed during OPM's discussion of its updated regulations at 5 CFR §752.202.

There are times agencies remove an employee for a first offense (*see, e.g.*, *Pinegar v. FEC*, 2007 MSPB 140), and there are times they give more than three strikes – sometimes a lot more (*see, e.g., Blank v. Army*, 85 MSPR 443 (2000)). And that is absolutely up to the agency. But past discipline has almost always been a significant aggravating factor, and for over four decades the Board has generally upheld removals for a third offense of any misconduct. *See, e.g., Grubb v. DOI*, 96 MSPR 361 (2004).

If the Board were to follow its own precedent in the current case, the agency should have received penalty deference and the Board should have upheld the removal. Instead, the Board found other factors to be mitigating:

- The appellant worked for the agency for six years and did not have any performance problems during that time.
- The appellant was not a supervisor.
- The appellant contacted the agency "to inform his supervisor that he would be absent, albeit not in the way in which he was instructed."
- The appellant claimed he and his wife were having relationship troubles.
- The appellant claimed he was experiencing pain because of a disability.
- The agency's table of penalties recommended a "5-day suspension to removal for a third offense of failure to request leave according to established procedures."

If removal was appropriate according to the table of penalties, why did the Board mitigate?

I will admit, proving only one specification of one charge does make one consider whether the penalty is unreasonable; in essence the agency only proved a third of its case. That said, because of the weight past discipline usually holds, I am a little surprised the Board did not defer to the agency's penalty. I wonder if the outcome would have been different if there was language in the decision letter that any charge standing alone would warrant removal? *See, e.g., Sheiman v. Treasury*, SF-0752-15-0372-I-2 (May 24, 2022)(NP).

ASK FELTG

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

This is one of the few cases under this Board where a Member dissented from the majority; Tristan Leavitt noted a dissent but without opinion, so it's anyone's guess as to why. Perhaps it's for the very reason outlined above. *Ortiz v. USAF*, DE-0752-22-0062-I-1 (Jan. 25, 2023)(NP).

At first I was thinking this might be an outlier, but two subsequent cases have seen the same mitigation despite of past progressive discipline: *Spivey v. Treasury (IRS)*, CH-0752-16-0318-I-1 (Feb. 15, 2023)(NP) and *Williams v. HHS*, DC-0752-16-0558-I-1 (Feb. 25, 2023)(NP). Read on for Bill Wiley's take on these cases and on why agencies discipline at all. Hopkins@FELTG.com

MSPB Law Week!

The MSPB has been back to a quorum for about a year. And here at FELTG, we've reviewed every one of the dozens of cases the new MSPB has issued.

In this latest installment of FELTG's flagship program, we will discuss all the changes brought about by the new MSPB decisions as well as everything that hasn't changed. Join FELTG March 27-31 to receive the best guidance and most up-to-date information on all things MSPB-related.

Why, Oh Why, Do You Ever Discipline a Federal Employee?

By William Wiley

So you just read FELTG President Deb Hopkins' article about *Ortiz v. Air Force*, DE-0752-22-0062-I-1, JAN 25, 2023, (NP). The decision is significant only because it is very unusual (some might say "weird") for the Board to impose a second suspension after a misbehaving employee has already been reprimanded and suspended without his learning to obey agency rules.

Another recent decision raised this same issue. The Board mitigated a removal to a 10-day suspension even though the agency had previously suspended the employee for five days for the same type of misconduct. *Spivey v. Treasury (IRS)*, CH-0752-16-0318-I-1 (Feb. 15, 2023) (NP). Similar to *Ortiz*, one of the charges brought by the agency in *Spivey* failed on appeal and the agency "never stated that it desired that a lesser penalty be imposed if only one of the two charges was sustained." By not stating in the decision memorandum what the penalty would be if fewer than all the charges were sustained, if one or more charges is not sustained on appeal, the deciding official, thereby, allows the Board to independently assess the Douglas Factors and select a penalty. *See LaChance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999).

This second-suspension mitigation highlights one of the great unanswered existential questions about the Federal workplace: Why do agencies discipline misbehaving employees? Suspending an employee for misconduct requires the agency to expend significant resources:

- What happens to the employee's work assignments during the suspension? Are they reassigned to hardworking coworkers who have to

bear that extra burden? Must the supervisor bring in an outside contractor to do the work? Or does the employee's work simply not get done during the duration of the suspension?
- Separate from devoting resources to the suspended employee's workload, there's the cost of defending the disciplinary action. Career Federal employees have a plethora of ways to challenge a disciplinary action: administrative grievances, union grievances, EEO complaints, complaints to the US Office of Special Counsel, complaints to the Department of Labor related to veterans' USERRA rights, MSPB appeals if the discipline is significant, etc.

Given that there can be a considerable cost to an agency when it suspends an employee, and given that an agency usually doesn't expend resources without some gain in return, what is the benefit that the agency hopes to attain in exchange for a misconduct suspension? Two possibilities come to mind:

- The agency hopes to motivate the employee to obey workplace rules. Behavioral psychologists call this technique for controlling behavior "negative reinforcement." The theory is that by suffering pain (physical, mental, financial), the individual will learn to avoid that same pain in the future by refraining from engaging in the behavior that resulted in the pain. Cats sit on a hot stove only once. A child may learn acceptable social behavior as a result of the pain of isolation by being told to sit in a corner. In theory, a Federal employee deprived of part of a paycheck by a suspension will refrain from engaging in the misconduct that resulted in the monetary loss. It's fair to say that the primary reason agencies suspend employees is to "correct behavior."
- Is there some element of just plain old *retribution* in workplace discipline? An eye for an eye, a tooth for a tooth. You stepped on my foot; I'm going to stomp on yours. You caused me to suffer (by breaking a workplace rule), I'm going to make you suffer (by suspending you without pay) in retribution. Frankly, I would hope that this punishment-for-the-sake-of-punishment, separate from a desire to correct behavior, is not a desired "benefit" for an agency when it suspends an employee. However, when I look at how agencies have handled disciplining employees over the years, and how MSPB has validated those actions, I'm left with a belief that there is *something* beyond correcting behavior that motivates agencies to suspend.

If we accept that the primary objective of an agency suspending an employee is to correct behavior, then the Board's mitigation to a second suspension in *Ortiz* raises a series of fundamental questions:

- If the agency's initial suspension of three days did not motivate the employee to abide by workplace rules, what makes the Board think that a second suspension of seven days will teach the employee that breaking rules is to be avoided? In practice, a seven-day suspension is only five workdays, two workdays of lost pay more than the initial three-day suspension. Is the Board thinking that those extra two days of lost pay will cause the employee to begin to obey the agency's rules even though the first suspension did not?
- How long should an agency have to tolerate a disobedient employee in its workforce? If these extra two days of lost pay do not result in the employee becoming obedient to the agency's rules, is MSPB suggesting

> that another incident of this employee disregarding a directive should result in a suspension of an additional two or three more workdays of pay? What evidence is there that incrementally increasing the length of a suspension might eventually get the employee to obey the agency's rules?

Perhaps the agency could have done more to protect itself from a mitigation. Not only did the deciding official not testify as to the penalty that would have been imposed if only one of the three charges had been sustained, but the agency's own table of penalties indicates that a suspension is within the range of appropriate penalties for a third offense -- "five-day suspension to removal."

In *Spivery*, the table of penalties also allows for a suspension for a third offense. Effectively, agencies that have suspensions within the range for a third offense in their penalty table are acknowledging that a Federal employee who violates workplace rules may remain a Federal employee indefinitely.

There is a significant philosophical question in all of this, one that has not clearly been addressed. Why *should* agencies discipline employees? I would offer three plausible reasons and encourage agencies to adopt one, then clearly incorporate that into agency discipline policies:

1. **Suspensions are intended to correct behavior**. If this is the agency's objective, then the discipline policy should state it clearly. If the agency uses a table of penalties, then it should incorporate the three-strikes rule for guidance: reprimand, suspend, then removal. If a single suspension does not correct the employee's behavior, there's no evidence that a second or third suspension will.
2. **Suspensions are intended to punish**. If this is the agency's objective, then the discipline policy should leave room for more than one suspension, state in what situations more than one suspension would be reasonable, and then be prepared to have any removal mitigated to another suspension. The agency also should be prepared to continue the employment of individuals who repeatedly do not obey workplace rules and expend the resources necessary to do that.
3. **Suspensions have no place in a modern Federal workplace**. This is the philosophical position adopted by a number of private sector companies. It is based on the belief that in a mature workforce, employers should not have to inflict pain on employees to get them to obey rules (and the employer should not have to bear the expense and inconvenience of a suspension).

Here's one way the third option works. The first time an employee engages in misconduct, the supervisor tells the employee in writing that he has violated a workplace rule and that he should adhere to all rules in the future. This notice would be analogous to a reprimand in the Federal system. After notification, if the employee again violates a rule, the supervisor informs the employee of the rule violation and sends the employee home with pay for a day to contemplate whether he is willing to adhere to the company's rules. If after this opportunity for contemplation the employee again violates a workplace rule, the supervisor offers the employee the opportunity to resign. If he refuses, the supervisor fires the employee. No punishment of the employee, no suspension-harm caused to the employer. Just the civil no-fault resolution of an inability to correct behavior situation.

Our civilization has evolved beyond the indentured servitude and physical bondage

of earlier generations of our work forces. We no longer publicly flog or use a pillory with indentured servants who do not work hard enough. We are no longer in the early days of the last century when blue collar employees were seen as a lower class of citizen, beholding to and under the absolute control of their upper-class employers. The modern workplace is an egalitarian organization of knowledge workers with many flexibilities and employment options that were unheard of just a few decades ago.

Our Federal civil servants are getting older. Over the next few years, we can expect a large number of retirements from government service, with those senior citizens being replaced by younger workers who expect to be treated with respect as human beings rather than being forced and coerced into performing their jobs.

Perhaps, it is time for our management approach in the Federal government to evolve beyond discipling and punishing by suspending misbehaving employees, and instead focus on filling the civil service with individuals who follow directives without the need for pain. Wiley@FELTG.com.

Reasonable Accommodation in the Federal Workplace 2023

FELTG's annual reasonable accommodation webinar series returns to answer your most frequent RA questions.

July 20: How Do I Know if Someone is Making an Accommodation Request?

July 27: How Do I Know if an Accommodation is an Undue Hardship?

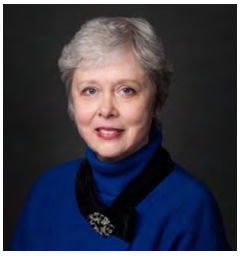
August 3: How Long is This Accommodation Supposed to Last?

August 10: Do I Have to Approve This RA Request for Telework?

August 17: How are Religious Accommodations Requests Different from Disability Accommodation Requests?

When Settlement Agreements Fall Apart: Leave Issues

By Barbara Haga



I enjoyed putting together the columns on clean record agreements so much that I thought we should follow that thread. This month, we look at things agreed to in settlement agreements that were ruled to be illegal and resulted in the MSPB overturning the settlement. These types of provisions fall in the "mutual mistake" category. Sometimes, there is a lot more to these agreements than back pay and attorney fees. This time we are going to look at leave issues.

Crediting Leave. In *Franchesca V. v. Department of Veterans Affairs*, EEOC Appeal No. 0120170632 (Mar. 2017), the complainant filed an age discrimination and reprisal claim. She retired while the complaint was being processed. A settlement agreement was ultimately executed to resolve the complaint. The agreement said, among other things: "The Agency will, within 60 days of execution of this Agreement initiate restoration of the necessary amount of sick leave (approximately 606 hours) so Complainant retires with a balance of one year [in addition to her other years of service]."

The agency immediately ran into problems executing this portion of the agreement. The payroll office (DFAS, outside of VA) said it was a violation to grant this amount of leave under these circumstances. The agency's servicing HR office intervened. Finally, the payroll office processed it and submitted the corrected record to OPM.

This lengthy process resulted in the complainant alleging a breach of the agreement, which escalated the matter to the agency HQ. They requested review of the matter, which included the following:

> Complainant retired with 29 years and 4 months in service. The OGC staff attorney wrote that the intent of the sick leave restoration provision was to round up Complainant's service to the next full year for retirement purposes. She wrote that when she negotiated the settlement agreement, she did not know this type of provision was frowned upon and considered an inappropriate use of retirement benefits. The OGC staff attorney wrote that DFAS made it clear that since Complainant never used 606 hours of sick leave, the Agency was asking to credit her more sick leave than she earned, which was not possible. Referring to the settlement negotiations, she wrote that she thought everyone assumed that Complainant would have spoken up if the Agency was offering the "restoration" of leave she never took.

After reviewing the information and consulting with the Department of Justice, the VA's benefits and leave administration expert determined the provision was not just frowned upon but a violation of the law. The agency could not credit sick leave in excess of what the employee would have earned during her career.

Administrative Leave. In *McDavid v. Army*, 46 MSPR 108 (MSPB 1990), the appellant was found to be medically disqualified from flying. He was removed from his supervisory pilot position effective July 23, 1987. McDavid appealed the removal, and it was settled on Nov. 3, 1987. One of the settlement provisions stated the agency agreed to pay him his salary from the date of the agreement until his retirement on Sept. 30, 1988, meaning roughly ten months of administrative leave would be granted.

Here's what the Board had to say when it reviewed the enforcement action:

> In *Miller v. Department of Defense,* MSPB Docket No. DE07528810290 (MSPB 1990), the Board set aside a settlement agreement on the basis of mutual mistake on which the parties relied in reaching the agreement.
>
> In *Miller,* the parties had entered into an agreement in settlement of the appellant's appeal from his removal. The agreement provided, among other things, that the appellant would be placed on administrative leave for one year and would thereafter resign. The Board sought an advisory opinion from the Comptroller General, who found that the administrative leave was unlawful. While not bound by the Comptroller General's opinion, *see Apple v. Department of Transportation,* MSPB DE07528/C0653-1 (Sept. 14, 1988), the Board found persuasive the Comptroller General's conclusion that, except for brief absences, unless there is specific statutory authority, the agency could not expend appropriated funds where it received no benefit in return. *See Miller,* slip op. at 7-8. The Board noted that the Comptroller General advised that the provision granting administrative leave was not in furtherance of the agency's mission, because the agency had no authority to provide such benefits, even though it was granted in an agreement in settlement of a personnel action. *See Id.* at 8. Finding that the unlawful provision was central to the agreement, and numerous other provisions were dependent upon it, the Board set aside the agreement.

In today's world, OPM would be answering compensation and leave claims not covered by negotiated grievance procedures, since responsibility for these matters was moved from GAO to OMB, who in turn delegated the responsibility for adjudication to OPM in 1996. Given what we know about OPM's posture on use of administrative leave in conjunction with disciplinary and

performance actions as included in their current guidance, as well as the limitations on administrative leave that OPM included in the not-yet-finalized administrative leave regulations issued in July 2017, I would expect OPM would answer the same way today.

Unspecified Amount of LWOP. The settlement agreement in *Garcia v. Air Force*, 83 MSPR 277 (MSPB 1999), stated that Garcia would be carried in an LWOP status from the date of execution of the settlement agreement until the date he became eligible to retire from Federal service. That's all it said. There was nothing about the type of retirement or what else the agency might do in relation to the retirement.

The problem was that at the time of the agreement, Garcia was not even close to being eligible to retire optionally. He was 45 years old with almost 25 years of service. Optional retirement would have required a minimum of 55 years of age with 30 years of service. Was the agency agreeing to 10 years of LWOP? (Of course, all that LWOP would have meant Garcia wouldn't have been eligible to retire then either.) Or was it as Garcia argued? That he would be kept in LWOP for six months until he had 25 years or service and reached eligibility for discontinued service retirement - and then the agency would abolish his position?

The agency representative stated he had believed that the appellant would qualify for regular retirement at the end of six months. Unfortunately, that was not the case. The Board set aside the agreement.
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More on Settlement Agreements

FELTG Virtual Training Institute offers Drafting Enforceable and Legally Sufficient Settlement Agreements on April 12 from 1-4:30 pm ET. **Register now**.

The Good News: Prompt Harassment Investigation Can Limit Liability
By Ann Boehm

I frequently get asked, "Should the agency conduct a harassment misconduct investigation even if there is a pending EEO complaint filed by the alleged victim?" The answer is a resounding "YES!"

I should be surprised by this question, but I am not. I worked in agencies reluctant to investigate a harassment allegation for fear it could adversely impact on an EEO matter if the investigation uncovered harassment. The problem with that thinking is it does not comport with how liability is determined in a hostile work environment harassment case.

Let's review some U.S. Supreme Court case law on harassment. In the landmark sexual harassment case *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Court explained that an employer can avoid liability for sexual harassment by a supervisor if the alleged harassing actions did not occur, the alleged acts were not "unwelcome," the alleged harassment was not so "severe or pervasive" that it altered the alleged victim's terms and conditions of employment, *the employer took immediate and appropriate corrective action once it learned about the alleged harassment*, and there was no basis for liability under agency principles. *Id.* at 67; *see also Dollie T. v. Perdue, Sec'y of Agriculture*, EEOC Appeal No. 2019003298 (Sept. 21, 2020).

In 1998, the Supreme Court provided more guidance on employer liability in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). These decisions explained that an employer is always liable for harassment that results in a tangible employment action. A tangible employment action harassment case arises when a supervisor undertakes,

recommends, or threatens a tangible employment action based on a subordinate's response to unwelcome sexual demands. Examples include a failure to hire or promote; undesirable reassignment; disciplinary action; or any decision causing a significant change in benefits.

If, however, there is no tangible employment action and the allegation involves a hostile work environment, employer liability is not a certainty. An employer *can avoid or limit liability* in a hostile work environment case by showing it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and that the complainant unreasonably failed to take advantage of "any preventive or corrective opportunities provide by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 745.

What does an agency need to do to exercise reasonable care to prevent and promptly correct any harassing behavior? Along with having a policy that provides an avenue for employees to complain about harassment without fear of retaliation, the agency must have "a complaint process that provides a prompt, thorough and impartial investigation" and "assurance that the employer will take immediate an appropriate corrective action when it determined harassment has occurred." *Dollie T.*, EEOC Appeal No. 2019003298, at 14.

Simple, right? Promptly investigate a hostile work environment allegation and you are on the way to avoiding agency liability, even if the EEO process reveals there was indeed a hostile work environment. Of course, if the misconduct investigation also uncovers a hostile work environment, corrective action – typically removing the offending employee(s) from the workplace and often disciplining them – must also occur for the agency to avoid liability.

One more important aspect of this liability avoidance centers on the word "prompt." The EEOC takes that word very seriously. In the *Dollie T.* case, the agency took three months to initiate the investigation. The EEOC said "[t]he Agency simply took too long and did not address this matter in a sufficiently prompt manner." *Id.*, at 15.

Ouch!

In my many years of government experience, getting something done in the government in three months is quick as lightning. Not so in the hostile work environment world. Prompt means really prompt!

What is really prompt? The agency avoided liability in *Thornton v. Mike Johans, Secretary of Agriculture* by implementing its process for addressing reported harassment "the day it was reported," and initiating an investigation that resulted in a report being issued 54 days after the agency learned about the alleged hostile work environment. EEOC Appeal No. 01A60388 (Sept. 28, 2006).

Investigating promptly and taking effective corrective action can result in no liability for the agency. Completing an investigation in 54 days is prompt enough. Waiting three months to start an investigation is too long.

So, do you now understand my answer to the oft-asked question? Yes, you should investigate an allegation of hostile work environment regardless of whether an EEO Complaint is pending. And you need to commence it as soon as you learn about the allegation. You can avoid agency liability! You can ensure you have a workplace free of harassment. And that's all Good News! Boehm@FELTG.com

DEIA Training Alert!: Join FELTG on April 5 from 1-4:30 pm ET for t Nondiscriminatory Hiring in the Federal Workplace: Advancing Diversity, Equity, Inclusion, and Accessibility. This program meets the President's mandate for DEIA Training.

OPM Report Stresses that DEIA is STILL a Federal Workplace Priority
By Dan Gephart

If you were a private sector employer in certain parts of the country, you might hesitate before offering diversity and inclusion training to your staff. Take, for example, Valencia College in Central Florida, whose president told faculty that an upcoming *voluntary* diversity training was being postponed until they could ensure that it didn't violate the state's new "Stop WOKE Act."

But that's Florida. And you, FELTG Nation (or most of you), work for the Federal government. While there are still numerous barriers that need to be eradicated to develop a Federal workforce that reflects the country it serves, there are ***no*** barriers to stop you from offering diversity, equity, inclusion, and accessibility (DEIA) training.

In fact, it's quite the opposite. The current Administration reinforced its commitment to DEIA training recently when the U.S. Office of Personnel Management (OPM) released the recent report *Government-wide DEIA: Our Progress and Path Forward to Building a Better Workforce for the American People*.

If you're looking to the report for actual statistics or tangible results showing the impact of President Biden's 2021 Executive Order on Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce, you'll have to wait a little longer. This OPM report focuses on the steps the Federal government has taken to align itself with that EO.

"In order to recruit and sustain the best talent, we must ensure every service-minded individual feels welcome and supported in contributing their talents to the Federal workforce," OPM Director Kiran Ahuja wrote in a press release. "This inaugural report highlights progress made to advance diversity, equity, inclusion, and accessibility in the workplace, and we look forward to continuing the work to break down barriers to serve and help build a Federal government that draws from the strength and diversity of its people."

The top accomplishment listed is the report was the establishment of the Chief Diversity Officers Executive Council, which includes stakeholders from OPM, EEOC, and OMB along with agency DEIA leaders. Per OPM, the council will:

- Collaborate on broad strategic and operational matters, projects or programs across the Federal government related to DEIA.
- Collaborate with member agencies and public and private stakeholders, as appropriate, on DEIA policies and programs in the Federal government and across other employment sectors.
- Assist with setting clear strategies, benchmarks, and metrics for DEIA standards of excellence and accountability to be employed across the Federal government.
- Support and advise member agencies on their DEIA strategic plans.
- Promote the DEIA priorities outlined in EO 14035, and incorporate the following operating principles:
    - Accountability and sustainability
    - Use of data and evidence-based decision-making
    - Continuous improvement and learning
    - Broad engagement with diverse stakeholders and partners

Other accomplishments listed included the development of two national programs – the Employee Resource Group Summit and the national DEIA Summit 2022, creation of a DEIA Learning Community to share best practices, and the creation of a new DEIA

index that was used for the first time in the 2022 FEVS report. The DEIA Index revealed that 69 percent of respondents report positive perceptions of agency practices related to DEIA. We'll see what that number looks like in the 2023 FEVS report and get an idea of the impact of DEIA training.

The report also details the DEIA Executive Order priorities that you should be thinking about in your organization. This list should give you an idea of where you currently stand in your efforts.

- Create a framework to address workplace harassment, including sexual harassment. This means promoting training, education, prevention programs, and monitoring to create a culture that does not tolerate workplace harassment.
- Establish or elevate Chief Diversity Officers or Diversity and Inclusion Officers within agencies.
- Improve the collection of voluntarily self-reported demographic data about Federal employees to take an evidence-based approach to reducing potential barriers in hiring, promotion, professional development, and retention practices.
- Remove barriers for low-income and first-generation professionals, including reducing reliance on unpaid internships and expanding paid internship opportunities.
- Establish new recruitment partnerships to build a more diverse pipeline into public service and facilitate recruitment, including the recruitment of individuals from underserved communities.
- Advance equity and transparency in professional development opportunities.
- Serve as a model employer for disabled employees by charging key agencies with coordinating across the Federal government to develop processes to increase accessibility and reduce barriers to employment.
- Advance equity for LGBTQI+ employees by striving to ensure that the Federal Health Benefits System equitably serves all LGBTQI+ employees and their families.
- Advance pay equity.
- Expanding employment opportunities for formerly incarcerated individuals.
- And, of course, expand the availability of DEIA training so that Federal employees are supported and have the tools to promote respectful and inclusive workplaces.

On that last point, FELTG can help. We are regularly adding DEIA training to our open enrollment offerings. Next up is Nondiscriminatory Hiring in the Federal Workplace: Advancing Diversity, Equity, Inclusion, and Accessibility on April 5 from 1-4:30. If you'd like to bring FELTG's DEIA training directly to your agency, email me at Gephart@FELTG.com

Emerging Issues is Back!

FELTG's 4th annual Emerging Issues in Federal Employment Law returns with 11 sessions over four days April 18-21.

We have something for everyone, covering topics such as PIPs, reprisal, marijuana usage, probationary periods, and meetings. You'll also get the latest MSPB, EEOC, and FLRA case law.

You'll hear from FELTG's experienced, respected, and engaging faculty, as well as special guests like J. Bruce Stewart, EEOC AJ Meghan Droste, and former MSPB Board Member and General Counsel Tristan Leavitt.

Many sessions offer opportunities to pick up CLE and EEO refresher credits and several sessions meet the President's mandate to provide DEIA training.