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

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Is It Possible to Be Both Pro-Management and Pro-Employee?

In the business of Federal employment law, practitioners are often categorized as either pro-management or pro-employee. But during a recent training session of our flagship class, UnCivil Servant, we had a discussion about how holding employees accountable for performance and conduct issues is not solely a pro-management position – it's also pro-employee because it helps promote productivity and morale among the workforce employees who perform well and maintain appropriate workplace conduct. Employees appreciate when supervisors recognize meaningful differences in performance.

Don't believe me? Check out any *Federal Employee Viewpoint Survey* from the past several years and you can verify the results. Taking performance and conduct actions is not just good for management – it's good for employees too.

This month's newsletter tackles workplace violence, EEO official time, settlement agreements, effective communication and categories of harassment.

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**.

Emerging Issues in Federal Employment Law
April 18-21 – ***happening this week, still time to register for sessions!***

Conducting Effective Harassment Investigations
April 25-27

FLRA Law Week
May 1-5

Advanced Employee Relations
May 9-11

Discovery Done Right: Avoiding Sanctions Before the MSPB and EEOC
May 24

UnCivil Servant: Holding Employees Accountable for Performance and Conduct
May 24-25

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.

One Way to Help Prevent Mass Murder in a Federal Workplace
By William Wiley

Did you hear about the recent deadly mass shooting at a Louisville bank? According to stories in the media, the killer was a 25-year-old employee. He had worked at the bank for six years, first just in the summers, then full time beginning in 2021. No doubt, he knew most everyone who worked there. Had he been in the Federal civil service, we would say that he had completed probation and was on track to becoming a career employee.

He had a master's degree in finance from the University of Alabama. Only about 13 percent of the adult population in the U.S. has an advanced degree, so he would be among the more highly educated in most any workforce. He participated in sports in high school.

Apparently, he had raised complaints, perhaps within his workplace. At one point he said, "They won't listen to words or protests. Let's see if they hear this."

So far, there's nothing unusual about the history of the shooter or the job he held. His description could easily parallel the history of many Federal civil servants: Start your career while young in college, stick to the same type of job for several years, get a good education to prepare yourself for advancement. In fact, that's exactly how the writer of this article started working for the federal government. Nothing outstanding or exceptional to make this guy stand out.

And then, the twist. He found out that he was about to be fired. As of this writing, we don't know the reason for that removal decision, but perhaps it was misconduct or unacceptable performance. Soon after, on Monday, April 10, he walked into his workplace with an AR-15 rifle and killed five coworkers, at least two of whom were management officials. He set up an ambush and shot a responding police officer in the head. It is clear he probably would have killed more people if not for the heroic response by law enforcement.

Could this tragedy have been prevented? Could these five innocent lives have been spared? Although there are a number of hypotheticals that could have prevented these killings, the one most relevant to every reader of the *FELTG Newsletter* is this: Had the employee-shooter been barred from the workplace as soon as the tentative decision to fire him was made, he could not have accessed the workplace with his weapon and his murderous intent. This all happened in a *bank*, for goodness' sake, probably one of the most secure workplaces around. Take away his employee hard-pass, instruct security not to let him through the door, and the chances are good he would not have been able to do this terrible thing. I don't think it takes a great mind to see the advantage to keeping an individual away from the workplace once a tentative decision has been made to fire him. Even good people sometimes make bad decisions.

Now let's look at the procedures relative to addressing the tentative removal of a Federal employee. Unlike in the private sector, a Federal employee is entitled to three important procedural steps relative here:

- A written notice proposing removal and explaining the reasons for the tentative firing,
- An opportunity to respond, and
- 30 days of pay prior to the implementation of the proposal.

Nothing in law requires an employee be allowed to access the workplace during this 30-day notice period, not even for the response. It is completely consistent with the Federal statute that lays out the removal

procedures for a civil servant for the proposal notice to tell the employee that he will be paid for 30 days, but he is barred from the worksite until a final decision is made. Given what happened in the Louisville mass shooting, one might think it prudent to do exactly that. Unfortunately, that is not what the government's regulations require. Check this out, taken from 5 CFR § 752.404, with my comments in parentheses.

1. Under ordinary circumstances, an employee whose removal has been proposed will remain in a duty status in his or her regular position. (That means IN THE WORKPLACE.)
2. In the "rare" circumstances in which the agency determines that the employee's presence in the workplace may pose a threat, the agency may:
   A. Assign the employee to other duties, (Elsewhere in the workplace?)
   B. Allow the employee to take leave (Why would an employee use up accrued leave when there is a legal guarantee of full pay until a decision is made on his proposed removal?), or
   C. Place the employee in a paid leave status, away from the workplace, e.g., bar the employee.

Although these procedures eventually allow the agency to bar the employee from the workplace, they do so only after stating that a barring should "rarely" be done.

As a prerequisite, the agency must somehow make the determination that it would be dangerous for this particular individual to remain at work.

Look back over the brief description of the Louisville shooter. Read more about his background if you can find it on the web. Do you see ANYTHING in his history as it was known to his supervisors that would have led them to conclude that his presence in the workplace might pose a threat? It's fair to conclude that if the shooter had been a Federal employee whose removal had been proposed, he would have been retained in his regular position, in a Federal workplace, where he would be able to avoid the metal detectors at the entry to the worksite by waiving his employee credentials at the guard.

And if that guy happened to be a coworker of yours, where might you be today?

Folks, here at FELTG, we have big drums, medium-sized drums, and tiny little drums. We beat them on occasion because we have great respect for the good work done by most every Federal employee, and because we believe the civil service is a fair and efficient system for employing the career individuals who run our country. The inexcusable and obvious horrific situation potentially created by these regulations gets our loudest beats from our biggest drum. Why, oh why, these regulations are in place, given the clearly appalling potential outcomes and easy fixes, is simply beyond our understanding.

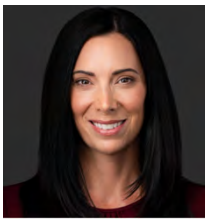
ASK FELTG

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

If you know who can change these regulations, or who can tweak your agency's own interpretation of these regulations, please implore them to DO SOMETHING. What happened in that workplace in Louisville is going to happen again if we don't act to stop it. Wiley@FELTG.com

[**Editor's note:** The recording of Shana Palmieri's recent virtual training event Assessing Risk and Taking Action is available for purchase. The session provides guidance on identifying signs of imminent violence, creating a risk assessment team, understanding personality traits and cognitive issues, responding to threats or violent acts, and much more. To bring this presentation live to your agency, email info@feltg.com.]

Can an Agency Constrain Official Time for EEO Complainants?
By Deborah J. Hopkins



A few years ago, a client asked me what to do in this scenario: The employee did not show up to work for two weeks and did not respond to her supervisor's phone calls, text messages, or emails. On the day the employee returned to work, the supervisor asked the employee where she had been. The employee said she had "been taking official time for my EEO complaints."

EEOC's regs at 29 CFR § 1614.605 establish that if the complainant "is an employee of the agency, she is entitled to a **reasonable amount** of official time, if otherwise on duty, to prepare the complaint and to respond to agency and EEOC requests for information … The agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer." [bold added]

There has been much litigation over what amount of official time is considered reasonable, and also over how much control an agency has over the complainant's use of official time. EEOC recently addressed official time in *Aline A. v. USDA/ARS*, EEOC Appeal No. 2022003111 (Mar. 8, 2023). The case discusses EEOC's long-held position that there's not a set amount of official time designated for an EEO complaint. Also, the number of hours to which a complainant is entitled will vary based on factors including the complexity of the complaint, the agency's mission, and the agency's need to have its employees available to perform their normal duties on a regular basis.

Regardless of the details surrounding the complaint, "the Commission considers it reasonable for agencies to expect their employees to spend most of their time doing the work for which they are employed, so an agency may restrict the overall hours of official time afforded." Referring to my client's scenario above, we know reasonable does not include an AWOL employee claiming 80 hours after the fact, without making a request.

In *Aline A.*, the complainant alleged the agency violated the law by denying her a reasonable amount of official time for her EEO complaint when:

- On Aug. 5, 2019, she was denied six hours of overtime pay, for official time.
- On Oct. 25, 2019, she requested three hours of official time and was denied.
- On Dec. 19, 2019, management denied her sufficient time (six hours) to meet with her designated representative regarding her pending EEO complaint.

The agency's position was that it did not violate the complainant's right to official time because:

- On Aug. 5, 2019, the supervisor stated the complainant claimed six hours of overtime for her EEO activity (premium pay) without pre-approval. The supervisor disapproved the overtime pay but provided the complainant with six hours of credit time.
- On Oct. 25, 2019, the supervisor had already scheduled the complainant's performance evaluation. He denied her request due to the conflict but approved three hours of official time for Oct. 30, 2019. (The complainant was scheduled for leave on Oct. 28 and 29, 2019.)
- On Dec. 19, 2019, the complainant's request for six hours of official time included four hours of driving and two hours for the meeting with the

representative. The agency did not think it was reasonable to provide official time for all the travel, but still granted four hours of official time, to include one leg of travel.

The Commission sided with the agency on all three official time claims and found the complainant "did not establish that the Agency improperly denied her official time for her EEO activity." Specifically on the Oct. 25 denial, the commission ruled: "[T]he Agency reasonably delayed Complainant's request for three hours of official time to balance her need with business reasons," namely the performance evaluation.

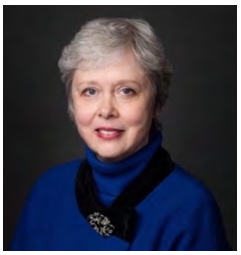
Other recent cases have discussed official time including:

- Complainants are not entitled to unlimited official EEO time, just because they request it. *Jeanie G. v. USDA/ARS*, EEOC No. 2021003820 (Feb. 28, 2023).
- A supervisor requiring a complainant to obtain approval prior to every official time request does not violate 29 CFR Part 1614. *Angela R. v. DOD/NGA*, EEOC No. 2022002317 (Feb. 21, 2023).
- A supervisor requiring advance requests of EEO meetings related to official time, when the supervisor does not ask details about where the complainant was specifically going and with whom the complainant was meeting, does not violate 29 CFR Part 1614. *Bryan F. v. Army*, EEOC No. 2022002206 (Feb. 16, 2023).

Hope this helps. Hopkins@FELTG.com

Don't Miss This Investigation Training!
Conducting Effective Harassment Investigations, April 25-27, covers everything you need to know from investigation harassment complaints to writing the report.

Pay Attention: Avoid These Compensation Issues That Derail Settlement Agreements
By Barbara Haga



I'm wrapping up this series on settlement agreements with a couple of cases where the agency agreed to a condition regarding a pay matter that could not be legally done.

You can find my settlement agreement article from last month's FELTG Newsletter here.

[**Editor's note:** Did you miss the recent Drafting Enforceable and Legally Sufficient Settlement Agreements earlier this month? Then mark down this date – August 23 when it will be held again. You can register now.]

Overtime pay. In *Farrell v. Interior,* 86 MSPR 384 (MSPB 2000), the Board found that a mutual mistake regarding the rate of overtime pay rendered the settlement agreement unenforceable. Farrell, an employee of the Park Police, was downgraded from the position of lieutenant to a sergeant under 752 procedures.

The underlying issue in the case was Farrell's authorship of a "parody" entitled "The Quest: The Final Passage Home." This document insinuated that certain female officers were lesbians, identified some employees as "Moorish," and contained sexually explicit passages. A copy of the document was placed in the inbox of one of the senior officers. An investigation by the Internal Affairs Office ensued. Farrell admitted he had written it at home, typed it on the computer at work, and distributed copies within the Police Department over several months.

To settle the case, the parties agreed that Farrell would receive back pay and benefits, the agency would pay $7,500 in attorney's fees, and Farrell would retire at the end of his

27th year of service. Also, he would be retained in the sergeant position, but paid as a lieutenant for the remainder of his employment. The agency delivered on all provisions.

The sticking point was the settlement agreement also stated that he would be eligible for overtime pay. In the sergeant position, OT is be paid a rate of one and a half times his lieutenant pay, a difference of roughly $15 per hour. While the number of hours, and thus the value of this difference, is not specifically identified in the decision, it must have been a considerable amount because this was the only issue raised in the enforcement proceedings.

Farrell argued before the Board that "he had entered into the settlement agreement only because he could replace the potential lost income from the demotion with overtime pay." Farrell also argued that the original representative who entered into the agreement understood the settlement to mean that overtime would be paid at one and a half times his lieutenant's pay.

What went wrong? The agency was prohibited by law from paying the agreed-upon rate of overtime. The agency cited the section of the D.C. Code, which said that an individual paid at the rate of a lieutenant was only entitled to overtime at his basic hourly rate.

The agency argued they were in compliance because they had paid everything that they could, but the Board set aside the agreement. That led to an AJ decision in 2000, a Board decision in 2001, and finally a Federal Circuit decision in 2002 – all arising from what should have been a settled case.

While this was a Park Police case, the GS system has a similar limitation on rates of payment for overtime. An exempt employee who earns more than GS-10, step 1 may only be paid overtime at a rate the greater of:

1. His or her hourly rate, or
2. The hourly rate for a GS-10, step 1.

(This limitation does not apply to wage employees or non-exempt employees.)

Review OPM's guidance on Title 5 overtime pay.

Pay retention. In *Day v. Air Force*, 78 MSPR 364 (MSPB 1998), the agency removed a GS-9 supervisory art specialist under 752 procedures. The settlement agreement cancelled the removal, provided back pay, and required withdrawal of the appeal. Then the agreement went off the rails. The agency agreed to assign the employee to a WG-7 position with GS-9 pay retention, step increases, and other adjustments at the GS-9 level.

There are so many problems here, it's hard to know where to start.

First, the basics. Pay retention is paid under 5 CFR 536. 5 CFR 536.102(b) sets conditions when payment of grade or pay retention is prohibited. The first situation on the list is when the employee is reduced in grade or pay for personal cause or at the employee's request. Given that Day was removed for cause and this alternative of a downgrade was reached to resolve the ensuing litigation, it would seem to me that pay retention was never appropriate to begin with. The Board didn't dwell on this aspect of the case. There was another problem.

Under pay retention, an employee does not receive step increases. The individual's pay is beyond the limit for the grade. It's also important to note that an individual remains in pay retention basically until the pay scale catches up with them. They receive 50 percent of the annual cost of living increase

each year. Again, contrary to the language in the agreement, Day could not receive "other adjustments at the GS-9 level."

There was even discussion during the enforcement proceedings that, perhaps, the agency should give Day grade retention. Even if that were appropriate (it seems very clear it's not appropriate, per OPM guidance), grade retention lasts only two years. Then the individual would go into pay retention, so the agency would be right back in the same conundrum then.

DoD has a useful plain language document on the ins and outs of grade and pay retention.

Without understanding the fine points of how the wide variety of pay issues are handled, an advocate might be lured into agreeing to something that is contrary to the pay laws in Title 5 just as the representatives in *Farrell* and *Day* did. To avoid this problem, make sure HR practitioners are available to assist agency representatives with settlement details so the provisions agreed to can actually be implemented.
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Reasonable Accommodation in the Federal Workplace in 2023

FELTG's annual reasonable accommodation webinar series returns this summer with answers to 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?

The Good News: Here's the Secret to Handling Problem Employees
By Ann Boehm

As a FELTG instructor, I regularly hear comments from class participants. Supervisors often tell me they are frustrated by what they perceive as lack of support from the Human Resources (HR) professionals. But HR professionals often tell me that they aren't psychic, and they cannot help supervisors who do not reach out to them and seek their help in dealing with a problem employee.

What we have here is a communication problem. Effective communication requires both talking and listening. And at its core, in the Federal personnel world, effective communication requires the supervisors and the HR professionals to listen and hear with the common goal of taking care of the agency's mission by taking care of problem employees.

How do we improve the communication between managers and HR?

Let's start with the talking. Supervisors need to reach out to HR when they first start realizing they have a problem employee.

Don't delay – odds are that the problem is not going to go away. Allowing the situation to fester just leads to frustration, and even may complicate the process for handling the problem employee.

In addition, supervisors need to explain not just the issues with the employee, but how it impacts the supervisor's job, their employees' ability to perform their jobs, and – here's that word again – MISSION. Supervisors, you cannot expect HR professionals to understand your workplace. They support people in very diverse areas of the agency. You need to educate them about the practical impact of the problem

employee's actions. And fundamentally, you need to ask them to help you.

Let's now turn to listening. HR professionals, please listen to the supervisors and try your level best not to respond with, "You can't do that." You need to appreciate that when the supervisor comes to you, they are frustrated with the employee. You need to focus on how you can help them.

It's highly likely that the supervisor will not understand the intricacies of discipline or performance in the Federal government, and their initial instincts may be a wee bit off base.

But HR professionals need to work with them to get them to a place of comporting with the law and still taking action to take care of the problem. Instead of "You can't do that," think about what steps can be taken to get on the path to successfully handling the problem employee. It's your turn to educate them.

This sounds very simple, right? And in practice it should be. So, let's review:

1) Supervisors, reach out to HR as soon as you realize you are having problems with the employee. Educate them on not just the employees' problems, but the impact on your workplace.

2) HR professionals, use your skills to help the supervisor get on the right path to properly handling the problem employee. Appreciate the supervisor's frustration and think creatively about the best way forward.

3) Supervisors and HR professionals, realize that the ultimate goal is to ensure the agency's mission is fulfilled.

I know I'm an eternal optimist, but I truly believe that better communication is an easy way to handle problem employees.

And that's Good News.
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Forecast Calls for Category 1-3 Harassment: What Will You Do?
By Dan Gephart

It's no secret the current administration wants the Federal workplace to be more inclusive. A key to achieving that goal is rooting out harassment. This is not a new concern. Several years ago, agencies started their own anti-harassment units, which don't fall always under the auspices of its EEO Office. These anti-harassment teams are charged with limiting harassment of all types – even those that don't result in legitimate claims of discrimination.

For years now, the EEOC has been emphasizing the need to address the broader range of harassment, noting time and again that without an exhaustive anti-harassment policy, agencies cannot be model EEO employers. You'd be hard-pressed to find an agency today that doesn't have some type of anti-harassment policy.

Yet too many people still think harassment is solely an EEO issue. Not us here at FELTG. If you've attended any of our courses that address harassment, you've heard FELTG President Deborah Hopkins and other instructors say quite clearly: Harassment *is* misconduct. It must be addressed, whether it has led to an EEO complaint or not.

And whether alleged harassment goes through the EEO process or not, an investigation will likely be required. FELTG offers numerous opportunities to improve your investigations skillset over the next few months, beginning with the three-day virtual program Conducting Effective Harassment Investigations April 25-27. Workplace Investigations Week will be held August 14-18, and the two-hour training Misconduct Investigations: Get Them Right From the Start takes place on July 25. Also, be on the lookout for the official announcement soon of

Bad Detective: The Mistakes That Hamper Agency Investigations with special guest presenter Roslyn Brown. That session will take place on Aug. 4, as part of FELTG's annual Federal Workplace: Accountability, Challenges, and Trends event.

Let's look at different categories of workplace harassment. The actual steps you need to take after each type of harassment are different. Regardless, take all harassment claims seriously and act promptly.

Category 1 – EEO harassment. An allegation has been made that someone has engaged in harassing behavior *due to* the complaining employee's protected category. (To recap: Those protected categories are sex, race, color, national origin, religion, genetic information, disability, age, participation in protected activity). Could this be a legitimate complaint of EEO discrimination? It very well may be, but at this point, it's still too early to tell. The person alleging harassment has 45 days to make contact with an EEO counselor. But you will need to investigate right away, whether they contact a counselor or not.

Category 2 – Actionable EEO harassment. Once the formal complaint is filed and the EEO office accepts the claim, the agency is on the clock. It's time for a prompt, thorough investigation to determine the facts: was there unwelcome conduct, based on a protected category, so severe or pervasive it created a hostile, intimidating or abuse work environment?

Category 3 – Non-EEO harassment. Is it just me or does it just seem like bullies are pouring out of the woodwork lately? Mocking an individual's work habits. Giving co-workers unflattering and unwanted nicknames. Pestering a peer repeatedly with requests to go on a date. Sometimes it's hard to fathom the sheer gall of these bullies.

That's not to say that these actions never meet the elements of proof for EEO harassment. They may. But smart bullies (there are a few) seem to know how to stop short of those requirements. Yet just because these actions may not lead to a legitimate EEO complaint doesn't mean they should be overlooked.

Other examples of non-EEO actions to keep an eye on are conduct that is unprofessional, threatening, intimidating, violent, and disturbing.

Category 4 – Not harassment. The final category covers actions that are *not* harassment, despite what employees say. Several agency officials have told us of an increase in complaints lodged against supervisors for actions that are, quite frankly, what you'd expect a supervisor to do.

- Assign work.
- Set deadlines.
- Create a work schedule.
- Assess performance or providing feedback.
- Manage work groups.
- Set a dress code.

Just because an employee disagrees with his supervisor's management style does not make a case of harassment. If the actions listed above are "exercised in a reasonable and professional manner," they are not harassment. The same goes for any other actions supervisors have the right to take based on 5 USC 301-302. Deb Hopkins' article from a few months ago addressed these faux claims.

Here's the takeaway: Do whatever you can to prevent harassing conduct in the workplace. If you do that, harassment won't happen, right? No, of course harassment is still going to happen from time to time. And when it does, know your options and responsibilities to correct the conduct before it happens again.

Also, it sure wouldn't hurt to get to know your agency's anti-harassment policy a little better. Gephart@FELTG.com