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

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The True Cost of Accommodation

I recently asked an onsite training class how much the average reasonable accommodation (RA) costs an employer. Guesses varied between $500 and $10,000 – and they were all too high. According to a recent report issued by the Job Accommodation Network (JAN), the average cost of an RA is $300, and over 49% of RAs cost the employer nothing at all. Not a dime.

As RA requests continue to increase, coinciding with return to the workplace orders, we know you still have questions, so join us for Reasonable Accommodation: Meeting Post-pandemic Challenges in Your Agency, June 14 from 1-3pm eastern. We'll discuss new requests for telework, revisiting existing accommodations, what happens now that the vaccine requirement is over, and more. Or, if your focus is more on attendance-related RA issues, including employees who are too sick to come to work, join us for Absence, Leave Abuse & Medical Issues Week June 5-9.

May's newsletter addresses EEO reprisal, deciding official mistakes, reassignments, the excepted service, and applicant notification of EEO rights.

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**.

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

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

Reasonable Accommodation: Meeting Post-pandemic Challenges in Your Agency
June 14

EEO Counselor and Investigator Refresher Training
June 21-22

Addressing Bias and Microaggressions to Advance Agency DEIA
June 29

Federal Workplace 2023: Accountability, Challenges, and Trends
July 31-August 4

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.

Don't Become a Meme: Know What Is a Protected EEO Activity
By Dan Gephart

Record scratch.

Freeze frame.

"Yep, that's me. You're probably wondering how I got here."

I often think of this movie-cliche-turned-meme when I read or hear about EEO reprisal. I picture a supervisor, sitting in an EEOC-ordered training, explaining how an employee made claims about discrimination that had no basis, and were eventually dismissed. However, in a huff of frustration or anger, that supervisor said or did something rash that cost his agency and landed him in the training.

The EEOC defines reprisal, aka retaliation, as "treating employees badly because they complained about discrimination on the job, filed a discrimination charge or complaint, or participated in any manner in an employment discrimination proceeding."

It's human nature. A knee-jerk reaction. Someone has accused you either directly or indirectly of a violation of the law and, in the moment, you say or do something that is influenced by your emotional state. It's no wonder reprisal claims make up such a big bulk of EEOC's case load. And what we've seen trip up many supervisors is that you don't have to be directly accused of discrimination for reprisal to be found. The employee doesn't even have to file a complaint before the reprisal claim arises. Remember that definition in the previous paragraph and consider the key words: "or participated in any manner in an employment discrimination proceeding."

The complainant in *Green v. Secretary of Navy*, EEOC Appeal No. 01964701 (1997) alleged he was subjected to discrimination in retaliation for prior EEO activity, naming the following incidents:

- He was forced to assume duties and responsibilities without commensurate pay and adequate personnel.
- He was forced to work in an unsafe environment.
- The agency failed to remit documentation to him.
- He was forced to work under "management personnel who commit waste, fraud and abuse."
- The agency threatened to eliminate his position.

The agency dismissed this portion of the appellant's complaint for failure to state a claim. Basically, the agency's response was: What EEO activity? Before this all went down, the employee had notified the agency of his intention to testify on behalf of other employees alleging discrimination. But he never actually testified.

Doesn't matter, the EEOC ruled: Simply notifying the agency of his intention to provide testimony on behalf of other employees alleging discrimination was participation in protected EEO activity.

On a related note, a seminal case in this area is the Supreme Court decision *Thompson v. Northern American Stainless, LP*, 131 S. Ct. (2011). In *Thompson*, it wasn't the employee who participated in an EEO activity – but the employee's fiancée. Previous courts, including the District Court in this case, had ruled that retaliation was limited to "persons who had personally engaged in protected activity by opposing a practice, making a charge, or assisting or participating in an investigation."

The Supreme Court decided differently: "We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."

So, add close relationship/association with individuals who file complaints as close enough to constitute protected activity. Just how close should that association be? Well, we don't really know that. In *Thompson,* the Supreme Court declined to "identify a fixed class of relationships for which third-party reprisals are unlawful."

What other activities are protected? Here are some activities that are a little more obvious, yet still too-often overlooked:

- Contacting an EEO counselor.
- Filing a formal EEO complaint, even if it's a frivolous complaint.
- Testifying at an investigation or hearing.
- Representing a complainant.
- Providing documents to a complainant.
- Requesting a reasonable accommodation.

Look at all the different activities that are protected. It's no wonder there are so many successful reprisal claims. If you want to avoid the being a meme, think before you talk, only take actions based on legitimate business reasons, and, oh yes, join Bob Woods this Thursday (May 18) at 1 pm ET for Avoid the Pitfalls of EEO Reprisal. (Register now.) Gephart@FELTG.com

Reasonable Accommodation in the Federal Workplace in 2023

Our annual reasonable accommodation webinar series starts in July.

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

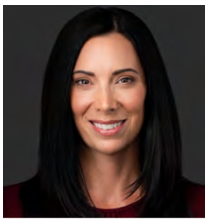
July 27: How Do I Know if an Accommodation is an Undue Hardship?

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 Accommodation Requests Different from Disability Accommodation Requests?

The Board Saves the Deciding Official; Agency Prevails Despite DO Mistakes
By Deborah J. Hopkins



As we work our way through all the cases coming out of MSPB's backlog, some catch our attention more than others, including *Lott v. Army*, SF-0752-16-0490-I-1 (Apr. 10, 2023)(NP).

In this decision, the material facts were not in dispute. The appellant suspected that her husband was having an affair with a soldier in his unit. She improperly accessed agency databases containing Personally Identifiable Information (PII) to track down information on the soldier. She then passed along the PII to a colleague and asked the colleague to investigate whether the affair was occurring.

After a falling out with the appellant, the colleague reported the appellant's conduct in accessing the PII. The agency investigated and removed the appellant for "unacceptable and inappropriate conduct from an HR employee."

The Board upheld the appellant's removal despite the Deciding Official making multiple mistakes:

1. *The DO inappropriately held the appellant to a higher standard based on perceived fiduciary responsibility*. At the hearing, the DO "testified that she believed the appellant held fiduciary responsibilities, despite not being entrusted with anything related to the agency's finances, by virtue of her access to employees' personal information." The Board clarified that fiduciary responsibilities under the *Douglas* factors only apply to an employee who has access or responsibility to an agency's finances in some capacity – not PII.

2. *The DO wrongly concluded the agency's Criminal Investigation Command (CID) determined the appellant had committed a crime*. Both the PO and DO relied on information that CID determined the appellant committed a criminal offense. In reality, CID only found that it had probable cause to believe the appellant committed crime but did not have enough evidence to actually prosecute. Therefore, it was error to consider the appellant "actually committed" a criminal offense.

ASK FELTG

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

3. *The DO improperly found the appellant's remorsefulness was not mitigating because the appellant argued that similarly situated employees were not similarly disciplined.* Among her defenses, the appellant attempted to blame the coworker who printed out the PII, as well as the colleague who took the envelope of PII to look into the information. According to the Board, "it is generally inappropriate to use an employee's attempts to defend herself in disciplinary proceedings as an aggravating factor or an indication that she lacked remorse." While the AJ found the DO did not view the appellant's "finger pointing" as an aggravating factor but instead merely viewed it as a factor relevant to determining the degree of mitigation to warrant her remorsefulness, the Board disagreed and found "that the deciding official inappropriately viewed the appellant's attempt to defend herself as an aggravating factor."

4. *The DO failed to give considerable mitigating weight to the appellant's mental health conditions*. The appellant asserted that, at the time of her misconduct, she was "extremely distressed" and dealing with depression and insomnia, and that she made a "rash and impractical decision" as a result. The Board found that this medical condition could have played a part in the charged conduct, and that the DO did not give it considerable weight as a mitigating factor.

Those four mistakes aside, the Board also held that removal was within the bounds of reasonableness. Because the nature and seriousness of the offense is the most important *Douglas* factor, the Board agreed with the AJ who "noted the deciding official's testimony that she considered the appellant's misconduct to be a serious offense that went to the core of her duties as an HR employee."

In addition, the "appellant herself testified that, as an HR employee, she was responsible for protecting PII."

The Board also identified several mitigating factors:

- The appellant had 15 years of Federal service.
- She consistently received the highest performance ratings.
- She had never been disciplined.
- Her depression may have played a part in the misconduct.
- Difficulties in her marriage and personal life played a central role in her decision to engage in the misconduct.
- She expressed remorse for the misconduct.

In addition, based in part upon demeanor evidence, the Board deferred to the AJ's credibility assessment "that the appellant could not be trusted to maintain her professional judgment in the event she again suffered difficulties in her personal life."

Therefore, the Board upheld the appellant's removal despite the mitigating factors and the error made by the PO and DO.

For more on drafting legally sufficient disciplinary charges and making defensible penalty determinations, join me on Aug. 1 for Charges and Penalties Under the New MSPB, which is part of our five-day Federal Workplace 2023: Accountability, Challenges, and Trends event. Hopkins@FELTG.com

Federal Workplace 2023: Accountability Challenges, and Trends

FELTG's annual Federal Workplace event returns with a new format – 5 days of in-depth, engaging, half-day training sessions. As always, these classes will provide up-to-date, guidance-filled instruction to help you effectively manage the Federal employment law challenges that are new, complicated, and critical to your agency's success.

The event has something for everyone – HR professionals, supervisors, team leaders, EEO specialists, investigators, attorneys, and more.

Monday, July 31

The Post-pandemic Federal Workplace: Telework and Hybrid Work Challenges

Tuesday, August 1

Charges and Penalties Under the New MSPB

Wednesday, August 2

The Race Ahead: Breaking the Cycle of Racial Bias by Rewiring the American Mind

Thursday, August 3

Successful Hiring: Effective Techniques for Interviewing and Reference Checking

Friday, August 4

Bad Detective: The Mistakes That Hamper Agency Investigations

The Good News: Reassignment May Be the Best Thing for Everyone
By Ann Boehm

Our FELTG classes on performance and misconduct emphasize that before supervisors take action against a problem employee, they try everything else first.

Reassignment is one of the suggested things to try.

I worked in the Federal government long enough to realize that, too often, reassignment means "dump the bad employees over there." That's not a good solution to a problem employee situation. But there can be reassignments that benefit the supervisor, the employee, and the agency! The key is being creative and flexible enough to figure out whether the right reassignment exists.

In my own career, I had bosses I liked more, and bosses I liked less than others. Sometimes, my personality did not mesh with the supervisor – and that's OK. Recognizing personality differences, and the impact they have on workplace interactions, is a good thing. One thing I believe in strongly is that there is no way to change someone's personality – yours or the employee's. Finding a supervisor whose personality meshes better with the employee may turn a bad employee to a good one – or at least a better one.

Another thing that can impact on an employee's job satisfaction is organizational change. It could be a change in leadership, mission focus, work schedule – you name it. I used to joke that any time I said I loved my job, something would change to make me dislike it. Agencies are constantly changing.

When I found myself in an unhappy workplace situation, I took it upon myself to seek out details or other reassignment

options in the agency. During my career, those efforts worked well for me.

Not all employees will have the confidence to seek out their own reassignments, even when they are miserable in a job. Sometimes, it is because they fear they will be labeled as a complainer. Sometimes, it is because they do not like change. But if a supervisor encourages that change, it may result in the colloquial "win-win" situation.

How does one go about suggesting a reassignment without it seeming like an attack on an employee? Often it starts with a conversation asking the employee if they are content with their position. That can morph into questions about whether they have thought about any other jobs within the agency that interest them. And with the information gathered, the supervisor can start to explore options.

Agencies typically have many vacancies. The old saying, "Better the devil you know than the devil you don't," has some truth to it. Hiring someone brand new can be a roll of the dice — could be great, or, yikes, even worse. There may be a good fit for an existing employee somewhere else, and it may not require too much effort to find it.

Also, a reassignment does not have to be permanent. A temporary detail is a good way to find out if the employee will be happy in the new position, and if the receiving supervisor is happy with the new employee.

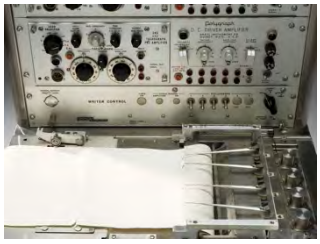
If you are dealing with a problem employee, do a thoughtful analysis of the root cause of the issues. Think about reassignment as a possibility. It may be the best thing for everyone. And that's Good News! Boehm@FELTG.com

Discovery is a critical and effective part of any litigation. Join us May 24 from 1-4:30 pm ET for **Discovery Done Right: Avoiding Sanctions Before the MSPB and EEOC**.

Applicant Failed Polygraph, But Agency Failed to Provide EEO Process Info

By Deborah J. Hopkins

A new case from the EEOC reminds us it's important to notify applicants about the EEO process. *Lela B. v. DHS/USSS*, EEOC Appeal No. 2023000348 (Apr. 20, 2023).



The complainant applied for a Uniformed Division Officer position at the U.S. Secret Service. As is mandatory for such a position, she was required to undergo a polygraph examination, which she failed on Nov. 8, 2021, "based on an inquiry regarding illegal drugs." She was then notified she was no longer being considered for the position.

She contacted an EEO counselor on April 22, 2022. After an unsuccessful attempt at informal resolution, she filed a formal EEO complaint on June 7, 2022, alleging the agency discriminated on the bases of race (African American) and sex (female) when:

1. On Nov. 8, 2021, the two agents who conducted the complainant's polygraph hindered her from obtaining a job in her career field through coercion and deceitful tactics during her test that rendered a false result.
2. On Nov. 8, 2021, the two agents who conducted Complainant's polygraph coerced her into writing a false statement following her polygraph.
3. The Assistant to the Special Agent in Charge released false information to a subsequent potential employer, a local Sheriff's Office, regarding selling illegal drugs. Complainant stated, on April 21, 2022, the Sheriff's Office informed her via email that she had "permanent disqualifiers" from employment with them, and suggested she resolve the matter with the agency.

Unsurprisingly, the agency dismissed claims (1) and (2) for untimely EEO contact, as the complainant contacted the EEO counselor months after the 45-day time limit. See 29 C.F.R. § 1614.105(a)(1). The agency also dismissed claim (3) for failure to state a claim.

The EEOC was compelled by the complainant's argument she was not aware of the 45-day statutory timeframe because she was merely an applicant and not an employee, and "there is no evidence that she was aware of the 45-day time frame through training, posters and other information."

Regarding claim 3, the EEOC found the agency erred in dismissing the claim, and that "the alleged actions render Complainant aggrieved" because she "alleged that the Agency manipulated the polygraph results and provided a negative reference to her potential employer because she is an African American woman."

As a result, the EEOC remanded the case back to the agency. Properly accepting claims will save your agency countless time and resources over a remand like this – and FELTG can help. In October, we're holding the virtual training Get it Right the First Time: Accepting, Dismissing and Framing EEO Claims – but we can bring this to your agency sooner if you have any interest. Just let us know. Hopkins@FELTG.com

Making Sense of Excepted Service, Trial Periods, and Appeal Rights
By Barbara Haga

Practitioners often ask me about when an excepted service employee has appeal rights. The answer to this question is not as simple as it might seem.

Let's look at what excepted service is all about.

Depending on the agencies you have worked for, you may have a different view of what the excepted service covers. Some may be familiar with jobs such as intelligence specialist or attorneys, which are always excepted. Others may work in agencies where authorities to hire Veterans Readjustment Appointees are used frequently. If you work at your agency's headquarters, you may be familiar with policy-making positions hired under excepted authorities. Presidential Management Fellows and student appointments are also excepted.

Federal hiring around the time of the Civil War was largely accomplished through political patronage. That changed with the passage of the *Pendleton Act* in 1883, which created a merit-based hiring system known as the competitive service. Even at that time, there were exceptions established to the competitive process in what was identified as Schedules A and B. With passage of the *Pendleton Act*, only about 10 percent of the Federal jobs were competitive. Over time that number increased, until by 1980 about 90 percent of Federal positions were competitive. According to the MSPB report *Federal Appointment Authorities: Cutting through the Confusion*, by 2005, only 28 percent of employees entering Federal service came in through a competitive appointment.

5 CFR 213.101 states that excepted service positions are those Executive Branch positions defined by statute, by the President, or by OPM which are not in the Senior Executive Service. Excepted positions are identified as part of Schedules A, B, C, or D. The "Excepted Schedules" are listed in Subpart C of Part 213 of the CFR. As OPM makes adjustments to the jobs in those categories, they have to publish the list of new exceptions established and any that are revoked.

In deciding whether positions should be excepted from competitive service, there are two categories of jobs to be considered. The

criteria are listed in 5 CFR 213.102(c). The first group are those where OPM has determined that the positions are indefinitely removed from competitive service because the nature of the work precludes it from being included, for example, because it is impracticable to examine for the knowledge, skills, and abilities required for the job. This category includes positions such as attorneys and chaplains.

The other group are positions that are temporarily removed from the competitive service for the ease of hiring. However, they can convert to competitive service at a later date. That category covers *Veterans Reemployment Act* (VRA) appointments and appointments of individuals with severe disabilities.

Competitive service positions are subject to the civil service laws passed by Congress in Title 5. Excepted service positions are not covered by the appointment, pay, and classification rules in Title 5. Agencies have considerable latitude in designing personnel systems for excepted positions, although many tend to structure the excepted systems in very similar ways to the competitive processes. While I was researching material for this column, I found one agency's document which briefly attempts to explain some of the differences between competitive and excepted positions.

There are some basic differences between the two services. One is an employee's ability to move to another position. Employees with competitive status can move to any other competitive position; they can also voluntarily leave the competitive service and take an excepted service position. However, when this happens, an employee must be informed of the consequences of making the switch. 5 CFR 302.102(b) requires that the agency:

1. Notify the individual that the position is excepted, and that acceptance of that position takes him/her/them out of competitive service while in that position; and
2. Obtain a written statement from employees that they understand they are leaving voluntarily to accept that excepted appointment.

Assuming the employee held a competitive appointment that would confer reinstatement rights, he/she/they could apply for competitive positions as a reinstatement eligible. Aside from the excepted positions which allow the employee to move into the competitive service, like VRAs, excepted employees may only be appointed in other excepted positions they qualify for. Unless they held a competitive appointment at some other time, they do not have status to apply under merit promotion programs for internal promotions/reassignments.

An excepted employee trying to move to the competitive service would have to be reached through an external hiring mechanism such as an OPM certificate of eligibles or Delegated Examining.

Being an excepted employee also affects an employee's status in a reduction-in-force (RIF). Page 20 of OPM's Workforce Reshaping Operations Handbook sums up what happens: "An employee with an excepted service appointment has no assignment rights under OPM's RIF regulations. However, an agency may elect to provide its excepted service employees with RIF assignment rights."

Competitive and excepted employees are listed in separate competitive levels based on the excepted authority that was used to hire them. A displaced employee could not move into a competitive position unless he/she/they had personal competitive status from a prior appointment.

Excepted employees serve a trial period rather than a probationary period. The processes can be very different depending on the kind of excepted appointment. Haga@FELTG.com