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

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Sometimes, It Pays to Settle

Settlement rates in Federal employment law disputes before the MSPB trended upward in FY 2022, according to MSPB's annual report. This isn't surprising, as it coincides with the reinstatement of clean record provisions, which had been banned by Executive Order 13839 and corresponding OPM regulations.

The settlement rate in cases involving performance- and misconduct-based actions was 61 percent, and in Individual Right of Action (IRA) appeals it was 57 percent. At the peak of the "no clean record" era, settlement rates had dropped as low as 47 percent. While some people might feel morally opposed to settlements, they are often the most efficient way to resolve a dispute – and sometimes the only way to salvage the relationship between the employee and the supervisor. We'll be discussing that later this summer during the virtual training Drafting Enforceable and Legally Sufficient Settlement Agreements on August 23.

In June's newsletter, we discuss the importance of a prompt, effective response to harassment via sexting. We also have stories on disrespectful conduct, probationary periods, DEIA training, and whether a local CBA would trump national agency policy.

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**.

EEO Counselor and Investigator Refresher Training
June 21-22

Addressing Bias and Microaggressions to Advance Agency DEIA
June 29

Mastering Sick Leave and FMLA: A Roadmap for HR Practitioners
July 11-13

Advanced EEO: Navigating Complex Issues
July 12-13

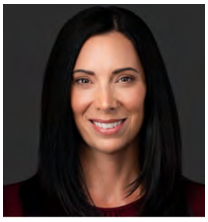
Back on Board: Keeping Up With the New MSPB
July 20

Misconduct Investigations: Get Them Right From the Start
July 25

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.

Sexting on an Agency Cell Phone: Prompt Action Required
By Deborah J. Hopkins



A new case from the EEOC on hostile work environment harassment illustrates the importance of an agency's actions in not only avoiding liability, but also (and more importantly) in protecting the victim from continued unwelcome conduct. *Joan V. v. VA*, EEOC Appeal No. 2022002963 (Apr. 20, 2023). In this case, the agency was dinged for failing to "properly address" a situation where a complainant was receiving multiple unwanted sexually explicit text messages from an unknown source, on her government-issued cell phone. The messages included "multiple specific references to female genitalia and acts to be performed to male genitalia."

The complainant requested a new phone number on March 25, 2021. On March 29, the IT Service Desk denied the request, responding via email: "'Each phone comes with a SIM card that supports a number. We pay for each number we receive. We can't change out your number due to too many calls and text messages ... The cost does not outweigh the benefit.'"

Over the next several weeks, the complainant made multiple additional attempts to get a new phone or phone number. She was given what we Midwesterners call the "run-around." She finally received a new phone number on May 21 -- eight weeks after her initial request.

Unfortunately, the sexually explicit messages began coming to her new number. Over the course of the next several weeks, her number was changed yet again. In August 2021, five months after the initial request, the complainant received a third new phone number and requested that the "number not be placed in the Global Address Listing (GAL)." The agency granted her request and this resolved the problem. She finally stopped receiving unwanted text messages. The case does an excellent job setting out the legal standard for HWE claims: To establish a claim of harassment, the complainant must show:

(1) she is a member of a statutorily protected class;
(2) she was subjected to unwelcome verbal or physical conduct involving the protected class;
(3) the harassment complained of was based on the protected class;
(4) the harassment had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and
(5) there is a basis for imputing liability to the employer.

[Citation omitted.]

Based on the number, duration, and egregious nature of the text messages, the EEOC found the first four elements satisfied. The discussion on element 5 – agency liability – took into consideration the agency's delay in providing prompt, effective correction action:

> The Agency is under an obligation to do "whatever is necessary" to end harassment, to make a victim whole, and to prevent the misconduct from recurring… The ongoing nature of the harassing behavior demonstrates that actions taken by the Agency were not effective in alleviating the harassment. As such, we find that Complainant established that she was subjected to harassment based on sex for which the Agency is liable.

The moral of the story: It shouldn't take five months to provide prompt, effective corrective action to a victim of harassment. For more on harassment and other challenging EEO issues, join FELTG on July 12-13 for Advanced EEO: Navigating Complex Issues. Hopkins@FELTG.com

The Good News: Words and Attitude Matter — and Can Justify Removal
By Ann Boehm

Frequently, folks in FELTG training classes ask how to handle an employee who is rude, or angry, or disruptive, or makes inappropriate comments, or writes inappropriate emails. Often, these folks mention complaints from other staff members or supervisors about the employee's behavior. And for some reason, they often fear taking action against the employee for the disruptive behavior.

A FELTG trainee's recent inquiry about an employee's disruptive behavior prompted me to look at Merit Systems Protection Board (MSPB) cases to see whether the Board thinks these types of matters merit discipline and even removal. Lo and behold, the Board does!

In one case, the agency removed an employee based upon 18 (!!) specifications of conduct unbecoming a Federal manager. *Hornsby v. FHFA*, DC-0752015-0576-I-2 (April 28, 2022) (NP).

One of the 18 specifications involved an incident that occurred during a meeting with a colleague. The employee held up an email from another employee and said he found it to be "'[expletive] offensive.'" *Id.* at 8. The colleague wanted to leave the meeting based upon the employee's use of the expletive. Although the Administrative Judge did not think the single use of the expletive was conduct unbecoming, the Board disagreed. *Id.*

The Board sustained the specification, noting that it has "frequently held that *rude, discourteous, and unprofessional* behavior in the workplace is outside the accepted standards of conduct reasonably expected by agencies and can be the subject of discipline." *Id.* at 9 (emphasis added). The Board cited two cases sustaining removal for such behavior. *Id.* [Side note*:* Those are good cases to review if you have an employee who is rude, discourteous, disrespectful, or using abusive language. They are *Holland v. DoD*, 83 MSPR 317 (1999), and *Wilson v. DOJ*, 68 MSPR 303 (1995).]

The Board ended up sustaining only five of the 18 specifications, including the use of the expletive. It also sustained the specification about the employee revealing the name of an EEO complainant to those without a need to know; one where the employee put his hands over the mouth of a colleague to stop him from speaking in a meeting (who does that in the workplace!?); one where he intimidated agency attorneys by suggesting that if they did not edit a memo to his liking, the memo could be a "'career ender'"; and one where he asked the Human Resources Director to intervene to make his supervisor give him a higher performance rating (that one included an email directing the intervention and threatened legal action). *Id.* at 9-14. These actions were all enough for the Board to reinstate the removal that had been reversed by the Administrative Judge. *Id.* at 23-27.

Other inappropriate conduct to take very seriously is anything threatening harm to others — especially in today's violence-filled environment. In *Barker v. Department of the Army*, DC-0752-15-1056-I-1 (May 22, 2023) (NP), the employee said, "'They are pushing me over the edge. You think they would be concerned about that with all these shootings.'" The agency removed him based on charges of conduct unbecoming a Federal employee and lack of candor. *Id.*

Even though the Board sustained only the conduct unbecoming charge, it still found the penalty of removal to be reasonable. *Id.* at 11-14. Factors that supported the reasonableness of removal included the employee's past 14-day suspension for threatening to kill his supervisor (which, in my opinion, should have been a removal), and

because the employee's comment was made soon after a shooting at a nearby Fort. *Id.* at 13-14.

As human beings, we know what constitutes inappropriate workplace behavior, yet I fear agencies tolerate it more than they should. Take the allegations seriously and investigate. Then see what the Board has said about similar misconduct. And always, always, always take threats seriously.

We have plenty of good employees in the Federal government. Don't subject them to rude, angry, inappropriate, and threatening behavior by the bad ones. The Board says you should be able to remove the bad ones for such conduct. That's Good News! Boehm@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.

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

A Painful (and Costly) Lesson About Last-Minute Probationary Removals
By Deborah J. Hopkins

We get a lot of questions about probationary periods. There can be confusion if employees switch agencies, are rehired after a break in service, or have veterans' preference.

The end date of an employee's initial appointment probationary period, however, is not a mystery. The probationary period lasts one year; it ends when the appointee completes his scheduled tour of duty on the day before the anniversary date of his appointment. 5 C.F.R. § 315.804(b). Therefore, an agency can pinpoint the exact moment the probationary period ends, and they can do so from the very first shift the employee works.

A recent MSPB case reinforces a lesson that's important to share with all supervisors, advisors, and agency leaders: If you want to remove a probationary employee, do NOT wait until the very end of the probationary period to do so. Give yourself a cushion of at least a few days. Here's a timeline to help clarify what happened in (*Stewart v. DOT*, 2023 MSPB 18 (May 16, 2023))

- The appellant began working for the Department of Transportation as a career-conditional GS-12 Safety Recall Specialist on Jan. 22, 2017. His regular work schedule was Monday through Friday, 7 a.m. to 3:30 p.m.
- On Jan. 11, 2018, his Division Chief recommended that he be terminated for post-appointment reasons.
- Also on Jan. 11, the Division Chief informed the appellant that, unless he resigned his position on or before Jan. 15, he would be terminated.
- On Jan. 16, the appellant tendered his letter of resignation, to be effective Monday, Jan. 22.

- HR advised the division chief that Jan. 22 was AFTER the end of the probationary period, so the Division Chief requested the appellant change his resignation date to Friday, Jan. 19, his last scheduled workday before the expiration of his probationary period. The appellant declined, yet he returned his laptop and PIV at the end of his tour Jan. 18.
- On Jan. 19, HR "obtained the signatures from the relevant officials and completed the paperwork necessary to effect the termination action."
- Also on Jan. 19, the appellant was out on previously scheduled sick leave so the agency sent the termination notice "effective at the close of business on January 19, 2018" to his work email address, and by overnight delivery to his home address.

ASK FELTG

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

Do you see a problem yet?

According to the Board, "we find that a termination **at the end** of a probationer's final tour of duty does not satisfy the regulatory requirement that a termination be effected **before** the end of his final tour of duty. See 5 C.F.R. § 315.804(b)." [bold added]

Even if the appellant had somehow logged in to his work email at some point before 3:30 p.m. on Jan. 19, which is disputed as he had returned his laptop the day before, the language in the letter controls. The appellant was clearly informed he was being separated after his probationary period was completed. And because he was no longer a probationer, he was removed without due process.

Thanks to the lack of quorum at the MSPB, this case sat in the stack of PFRs for more than five years, until last month when the Board ordered the agency to restore the appellant to his previous position and pay five-plus years of back pay, plus other costs.

For more on this topic, join us on Aug. 1 for Everything You Need to Know About Probationary Periods – a comprehensive one-hour virtual training.
Hopkins@FELTG.com

Get Up Federal Workplaces: Make DEIA (and B) Training Your Jam!
By Dan Gephart

Several years ago, Verna Myers, VP of Inclusion Strategy at Netflix, explained the focus of her job by telling attendees at a Cleveland Bar event: "Diversity is being invited to the party, but inclusion is being asked to dance."

Several years later, Myers' quote still pops up regularly on LinkedIn and Facebook, and during D&I-related presentations.

We should give Myers at least partial credit for dispelling the confusion around what inclusion means. Inclusion is no longer such a seemingly abstract concept, and no longer diversity's "and one." It is one of the four pillars of President Biden's Executive Order on Diversity, Equity, Inclusion and Accessibility (DEIA).

FELTG has done numerous DEIA training sessions for agencies since the President signed EO 14035 in June 2021, and we cover every letter in that acronym. Sometimes, per agency request, we'll add another letter to make it DEIAB training. Where the heck did that "B" come from and what does it stand for?

FELTG Nation, meet "belonging." You may already know it, as belonging is among the buzziest of HR words these days. Belonging

is tied closely with psychological safety, a concept we discussed earlier this year, and one that J. Bruce Stewart defined as the "ability of a person to feel safe in speaking up at work or in the community, especially if that person has a different perspective or viewpoint." [**Editor's note:** Join Bruce on Aug. 2 for The Race Ahead: Breaking the Cycle of Racial Bias by Rewiring the American Mind.]

Some of you may not value an employee's comfort in speaking up. I can hear you now: "Implement something that's going to make people feel more comfortable about complaining even more? No way!" To those skeptics, I'd say you're doing that whole baby and the bath water thing. Yes, some employees in a psychologically safe workplace will feel the need to complain about *everything*. But, as we all know, those employees are very capable of complaining regardless of the psychological safety of the environment.

When employees feel they belong, they don't fear punishment for mistakes and feel comfortable enough to take risks and share creative ideas. This is the kind of workplace environment that leads to improved engagement, heightened morale, and increased FEVS scores. Oh, and fewer EEO complaints. Would you rather have an employee tell you that something "felt like a microaggression" and allow you to appropriately address it? Or would you rather hear about it later from the Office of Federal Operations?

There are several ways you, as a supervisor, can create a sense of belonging. Ask for feedback about your management of a meeting. Encourage collaboration instead of competition and replace blame with curiosity.

FELTG Instructor Katherine Atkinson will address belonging as part of her Addressing Bias and Microaggressions to Advance Agency DEIA on June 29 from 1-3 pm ET and in Setting the Bar: Advancing Diversity, Equity, Inclusion, and Accessibility for FY '24 on Sept. 26 from 1-4:30 pm ET.

[**Editor's note:** You can bring either of these classes to your agency virtually. Just contact us at info@FELTG.com. For more on bias and microaggressions, check out Advanced EEO: Navigating Complex Issues July 12-13.]

If you're looking for a pithy saying to encapsulate what belonging means, we can build onto Myers' quote, as Indeed Executive LaFawn Davis did on the company's website.

"Diversity is being invited to the party, but inclusion is being asked to dance," Davis wrote. "I love that quote — and I'd like to adapt it by adding that *belonging is knowing all the songs*. Knowing all the songs goes beyond simply being invited to the party; you feel like you belong there. And you can't help but dance; it's your jam!"
Gephart@FELTG.com

Ask FELTG: Does a Local CBA Trump an Agency's Nationwide Policy?

Here's more context from the loyal FELTG reader who posed the question:

Let's say, hypothetically, management at a regional outpost agrees to terms regarding office workspace with their local union, and then enters into a CBA articulating those provisions. Later, the national agency management team creates a policy on office workspace that is inconsistent with the local CBA.

Which policy controls at the outpost? Is it the local policy as stipulated in the CBA or the national policy? Can the actions of a manager at the local level essentially prevent the agency's leaders from having a universal policy?

Here's FELTG's answer:

The union agreement always trumps an agency's new policies with two exceptions:

1. The agency can demonstrate that the new policy is related to the "necessary functioning" of the agency and the change is in response to an "overriding exigency." *See SEC v. FLRA*, 568 F.3d 990 (DC Cir, 2009).
2. The new policy is implementing a new law. (The incontrovertible law part of the new policy is effective right away. However, the agency still must bargain I&I and any flexible parts of the law).

So, let's say local management agrees to office space of a specific size, and the agency head later decrees that office space will be less than that, the agency is obligated to continue the bargained-for office space if and until it can bargain its way out of it.

Here's an example we like to discuss during FLRA Law Week (next held September 18-22). Years ago, the Secretary of HHS declared through a new policy that the work places within HHS would be smoke-free. He reasoned that given the word "health" in the name of his agency, he should prohibit things that by their very nature are not healthy. Very reasonable reason for a new policy, we tend to think.

However, it conflicted with several local CBAs, including at NIH, which had old provisions allowing designated smoking areas.

There was a huge welcome sign as you entered the main campus of an HHS sub-agency that states it is a "totally smoke-free environment."

Several times, we had to plead with FELTG Past President Bill Wiley to not add a comment to the sign, stating "unless you're in certain bargaining units."

Have a question, Ask FELTG.

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

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?