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

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What Messages Are You Getting – or Sending?

Last week, I was on the West Coast for onsite supervisor training and I had the opportunity to visit the Monterey Bay Aquarium. The aquarium is one of the best in the world and is filled with incredible displays of sea life, but somehow my favorite exhibit featured a small starfish that appeared to be ... relaxing and enjoying the moment (*pictured above*).

Nonverbal cues (including body positioning) can say so much, and are an important part of any workplace interaction. FELTG's newest faculty member, Susan Schneider, will be sharing tips on that as well as verbal communication, managing conflict, and having difficult workplace discussions Sept. 12 during the brand-new two-hour virtual training Effectively Managing and Communicating With Employees. I hope you can make it.

This month's newsletter discusses pregnancy discrimination, security clearance revocations, hostile work environment, appeal rights, and stress claims in workers' compensation. Read and enjoy.

Take care,

Deb

Deborah J. Hopkins, FELTG President

UPCOMING FELTG VIRTUAL TRAINING

The FELTG Virtual Training Institute provides live, interactive, instructor-led sessions on the most challenging and complex areas of Federal employment law, all accessible from where you work, whether at home, in the office or somewhere else. Here are some of our upcoming virtual training sessions. Visit **FELTG Virtual Training Institute** for the full schedule.

Drafting Enforceable and Legally Sufficient Settlement Agreements
August 23

All Clear? When Employee Security Clearances are Revoked or Suspended
August 24

Dealing with Behavioral Health Challenges
August 28

Writing Final Agency Decisions
August 29-30

UnCivil Servant: Holding Employees Accountable for Performance and Conduct
September 6-7

Nondiscriminatory Hiring in the Federal Workplace
September 13

Everything You Need to Know About the Pregnant Workers Fairness Act
September 14

Setting the Bar: Advancing Diversity, Equity, Inclusion and Accessibility for FY 2024
September 26

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.

What Should be Expected When Employees are Expecting
By Dan Gephart

The Equal Employment Opportunity Commission published its Notice of Proposed Rulemaking to implement the *Pregnant Workers Fairness Act* last week. Members of the public wishing to comment now have approximately 55 days to do so.

The *Pregnant Workers Fairness Act* (PWFA) has generally flown under the radar. If you haven't yet paid attention, now might be the time. The EEOC is already accepting charges under PWFA, which requires employers to provide "reasonable accommodations" to a worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an "undue hardship."

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

Does the act create a new EEO category? How do pregnancy protections under the PWFA differ from those under Title VII and the *Americans with Disabilities Act*? What are the common effective accommodations for pregnant employees? If you want answers to these questions, register now for FELTG Instructor and Attorney at Law Katherine Atkinson's upcoming two-hour virtual training class Everything You Need to Know About the Pregnant Workers Fairness Act on Sept. 14.

In the meantime, here are a few points to remember:

1. Do *not* tie an individual's job performance or pay to their history of pregnancy. This seems kind of obvious now, right? But back in 2008, an air traffic controller was denied a pay increase for the previous performance year. How do we know her maternity was the reason? Well, her manager said the quiet part out loud. "Just keep doing what you're doing and I'll see what I can do for you next year," the manager said, "unless you plan on taking maternity leave again. You don't have something you need to tell me, do you?" *Complainant v. Fox,* EEOC App. No. 0120122370 (Oct. 24, 2014)

2. It's not your role to "protect" a pregnant employee. A desk officer was selected for a new position, which was contingent on her completing a two-week training session. Per the agency, which cited "team camaraderie," the training needed to be completed during one two-week stretch. As it got closer to the training, the agency made the decision to *not* allow the employee to attend the training because her due date fell "within the final two weeks." The employee requested accommodations that would allow her to attend the training. The agency admitted that the employee's pregnancy played a role in its decision, and that supervisors were concerned about her driving and taking the stairs. Well-meaning discrimination is still illegal discrimination. *Roxane C. v. DoD*, EEOC App. No. 0120142863 (Jul. 19, 2016)

3. Treat individuals who are pregnant (or have pregnancy-related conditions) the same as others on the basis of their ability or inability to work. A letter carrier on a one-year appointment had an excellent attendance record, until her high-risk pregnancy forced her to miss work due to pre-natal appointments and medical incapacitation. According to the letter carrier, one supervisor told her she should have an abortion unless she wanted to be fired.

The letter carrier was not reappointed after her term expired. The agency cited her attendance issues as a reason. She was the only transitional employee not reappointed because of attendance. Others were not reappointed because of poor work performance or instances of bad driving. Meanwhile, an employee who similarly experienced attendance difficulties because

of a foot injury was reappointed. The EEOC ordered the agency to immediately reinstate the letter carrier, and provide her with appropriate back pay, benefits, and seniority. *Robertson v. USPS*, EEOC App. No. 01956011 (Jan. 5, 1998).

4. Know all of the applicable laws. The cases detailed above were violations of Title VII, which protects employees from discrimination based on pregnancy, childbirth, and related medical conditions. The PWFA requires employers to provide reasonable accommodation, just as the *Americans With Disabilities Act* does for employees with disabilities. While pregnancy is not a disability under the ADA, some pregnancy-related conditions may be. There is also the *Family and Medical Leave Act*, which provides covered employees with unpaid, job-protected leave for certain family and medical reasons; and the new PUMP Act, enforced by the Department of Labor, which broadens workplace protections for employees to express breast milk at work. Gephart@FELTG.com

Get Your End-of-FY Training

Hoping to get training in before the calendar turns to FY 2024? Look no further than FELTG. With nearly 20 open enrollment virtual and onsite training events still to come, you're sure to find the training you need.

The events include several of FELTG's time-trusted, engaging, and popular multi-day training programs.

MSPB Law Week
September 11-15

Absence, Leave Abuse & Medical Issues Week
September 18-22

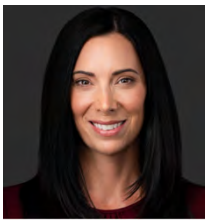
FLRA Law Week
September 18-22

EEOC Law Week
September 25-29

Onsite in Washington, DC!
Advanced Employee Relations
September 26-28

Three Things You Might Not Know About Security Clearance Revocation Cases

By Deborah J. Hopkins



Misconceptions abound when it comes to the world of security clearances. The news media and the movies don't always get it right. An employee can be denied a clearance for a lot more than selling national secrets to a foreign country. Below are three things you should know:

1. There are guidelines to help determine if a clearance should be granted, suspended or revoked. A set of 13 guidelines help the government determine if a clearance is warranted, and also if a clearance should be suspended or ultimately revoked. The guidelines vary from sexual behavior to alcohol or drug use, from personal conduct to financial considerations, and more. With clearance issues, national security remains the key interest, and according to the United States Supreme Court, "determinations should err ... on the side of denials." *Egan v. Navy*, 484 US 518 (1988).

2. The MSPB does not have the authority to review the merits of a security clearance revocation. According to *Egan*, the Board has no authority to review the merits of an agency's underlying security clearance determination. The Court stressed that clearance determinations should be made by those with "necessary expertise in protecting classified information." That job belongs to the agency experts, not the MSPB. The MSPB can only ensure the employee received due process if the agency proposed removal for failing to maintain a security clearance.

3. If an agency removes an employee who has lost his clearance, the agency must show the clearance was actually required. According to *Egan*, there are four elements required for an agency to remove an

employee for failing to maintain a security clearance:

- The agency determined that the position required a security clearance,
- The agency revoked or denied the clearance,
- The agency provided the employee adverse action rights, and
- The Deciding Official considered reassignment to a non-sensitive position.

Almost a decade ago, the Board reversed an agency's removal. The agency did not annotate the PD to show that a security clearance was necessary, did not annotate the SF-50 to show that a security clearance was necessary, and allowed the employee to remain on the job until adjudication of his clearance was completed. *Gamboa v. Air Force*, 2014 MSPB 13 (2014).

If your agency has employees with security clearances, you shouldn't miss FELTG's upcoming two-hour program on Aug. 24 -- All Clear? When Employee Security Clearances are Revoked or Suspended. Hopkins@FELTG.com

Effectively Managing and Communicating With Employees

Effective communication has the power to persuade, educate, motivate, and praise. However, when it goes off track, communication can alienate, insult, anger, and frighten.

Attend Effectively Managing and Communicating With Employees on Sept. 12, and learn how to: Identify your own and others' communication styles; modify your style based on the purpose of the interaction; interact productively with difficult personalities; identify conflict types and use conflict manage skills, be prepared for handling unplanned interactions, and much more.

Good News: Hostile Work Environment is Harder to Prove Than You Think
By Ann Boehm

A "hostile work environment" as a form of discrimination has been prohibited since the 1980s. The Equal Employment Commission's guidance and regulations on what constitutes sexual harassment, from the 1980s through now, describe illegal harassment as conduct that creates an "intimidating, hostile, or offensive working environment." 29 C.F.R. 1604.11(a)(3). The EEOC's guidance on harassment based upon any of the protected statuses (race, color, religion, sex, national origin, age, disability, or genetic information) uses similar descriptive terms—to be unlawful, the conduct would be considered "intimidating, hostile, or abusive." https://www.eeoc.gov/harassment

Although "intimidating," "offensive," and "abusive" are used along with "hostile" to describe illegal harassment, the phrase that has stuck in the lexicon as prohibited harassment is "*hostile* work environment." Yes, folks, we talk about an "HWE," not an "IWE" or "OWE" or "AWE." Unfortunately, I think the word "hostile" lends itself to being misinterpreted by many, many employees.

The *Merriam-Webster* online dictionary defines "hostile" as "of or relating to an enemy; marked by malevolence; having or showing unfriendly feelings; openly opposed or resisting; not hospitable." Employees focus on the word "hostile" and think any slight in the workplace is a hostile work environment.

Based upon the dictionary definition of "hostile," that makes sense. But this definition is very different from what is considered a "hostile work environment" under the EEO laws.

EEO practitioners know that to establish a discriminatory "hostile work environment," an employee first must show physical or verbal conduct. Second, that conduct must be unwelcome and based upon the employee's protected status. Third, the conduct must be so severe or pervasive as to alter the terms, conditions, or privileges of employment.

Employees know that they are protected from a "hostile work environment" under the EEO laws, but they often stop with the word "hostile" and fail to understand the requirements of what is legally a "hostile work environment." Being asked to do an assignment the employee does not like is not a "hostile work environment." A supervisor failing to say good morning is not a "hostile work environment." Being given a low performance rating based upon legitimate performance concerns is not a "hostile work environment."

[**Editor's note:** Hostile work environment will be covered along with numerous other EEO issues during EEOC Law Week Sept. 25-29. Register now.]

I could go on and on. The perception among too many employees is that any perceived wrong by a supervisor is a "hostile work environment."

Don't get me wrong. Illegal harassment still happens far too often, and it is not acceptable. I just feel that the frivolous or non-meritorious complaints get in the way of the legitimate ones.

Employees have the right to complain about perceived discrimination. But it is unfortunate that they do not understand what an EEO hostile work environment is. Would it be a better world if we used "offensive work environment" instead of "hostile?" Perhaps. We are stuck with "hostile," though.

How do we fix this? First thing – educate. Training can help. If an employee starts the EEO process, EEO counselors can educate them on what must be proven in a hostile work environment case. Mediators, judges, and counsel involved in the EEO process can all educate too.

Education may not rid us of wrong-intentioned hostile work environment complaints, but it may help. For those complaints that are not resolved, agencies need to have the fortitude to litigate the hostile work environment cases and ensure the legal requirements of a discriminatory hostile work environment are properly analyzed. What an employee perceives is "hostile" is not necessarily illegal harassment.

As I learned from an EEOC judge years ago, employees prevail on EEO complaints at a pretty low rate. But in 100 percent of the cases, the employee is upset about something. We are stuck with the word "hostile." But what legally constitutes a "hostile work environment" is more than just a supervisor showing unfriendly feelings. Agencies can prevail in those cases. And that's Good News. Boehm@FELTG.com

What Came First: The Appointment or the Reason for Termination?
By Barbara Haga

[Editor's note: This is the third in a series of articles on excepted service, trial periods, and appeal rights. Read Barbara's first two articles here and here.]

This month, we look at even more distinctions between probationary period appeal rights and those of excepted employees. Practitioners need to ensure they have considered these distinctions when taking a termination action.

5 CFR 315 makes a distinction in processing the termination of probationary employees for reasons prior to the appointment (such as falsification of a resume or failure to disclose information on employment documents) and

reasons that arose after employment (such as unsatisfactory performance or failure to follow conduct rules on the job). If the agency does not follow the proper set of procedures for the pre-appointment actions, the Board will have jurisdiction to review the process by which termination took place, not the substance of the reasons why the action was taken.

These determinations sometimes seem like "chicken and egg" situations. In *Rivera v. Navy*, 114 MSPR 52 (2010), the employee failed to qualify for a credit card. Without a credit card, he was unable to attend the extensive training required for his police officer position. Rivera argued that the prior credit issues before his employment led to the denial of the credit card. Thus, he should have been given notice and a right to respond as required by 5 CFR 315.806. The Board wrote, "there is a distinction between a preexisting condition and the effect that condition has on an employee's performance during his probationary period." In this case, the Board found that while not qualifying for the credit card was attributable to pre-employment conditions, Rivera was actually terminated for a post-appointment deficiency.

The good news is that there is no such consideration for termination of most excepted employees. There's no differentiation between pre- or post-appointment terminations notice requirements.

Marital status and partisan politics

5 CFR 315.806(b) provides that a probationary employee may appeal a termination alleged to be based on partisan political reasons or marital status. Appeals on this basis do not extend to excepted employees except as discussed below with appointments that convert to competitive service. See *Allen v. Navy*, 102 MSPR 302 (2006). In several cases, the Board has noted that agencies have provided misinformation in their termination notices indicating that employees could appeal on these bases. See *Barrand v. Department of Veterans Affairs*, 112 MSPR 210 (2009); *Ramirez-Evans v. Department of Veterans Affairs*, 113 MSPR 297 (2010).

5 USC 75l1(a)(1)(C)(i) excludes from the definition of "employee" those (other than preference eligibles) in the excepted service serving a probationary or trial period under an initial appointment pending conversion to the competitive service.

Because these are competitive positions occupied by excepted employees, OPM has issued regulations explicitly providing competitive-type provisions to these employees. 5 CFR 307.105 states:

> Individuals serving under VRAs have the same appeal rights as excepted service employees under parts 432 and 752 of this chapter. In addition, as established in § 315.806 of this chapter, any individual serving under a VRA, whose employment under the appointment is terminated within 1 year after the date of such appointment, has the same right to appeal that termination as a career or career-conditional employee has during the first year of employment.

Given this, a VRA appointee, just like a career or career-conditional employee, may appeal his probationary period termination to the Board if he alleges his termination was based on partisan political reasons or marital status, or that his termination for pre-appointment conditions was procedurally deficient.

In *LeMaster v. Department of Veterans Affairs*, 123 MSPR 453 (2016), a probationary employee was terminated based on his failure to disclose a 2007 court-ordered probation agreement following his release from prison for bank fraud. The terms of the agreement meant that he was required to inform any employer or prospective employer of his current

conviction and supervision status. The agreement also prohibited him from possessing or using a computer with access to any online service without the prior written approval of the court.

The VA's position was he was terminated for post-appointment misconduct for failing to disclose the probation agreement. The termination also noted his inability to use the agency's computer system prevented him from performing his job duties.

The AJ dismissed the case for lack of jurisdiction. Unfortunately for the VA, the Board had a different view. It found LeMaster's termination was based, at least in part, on pre-appointment reasons, and he was, therefore, entitled to notice and a right to respond as required by in 5 CFR 315.805.

Following that same logic, the Board found a due process violation in *Taylor v. Navy*, 124 MSPR 111 (2017). Taylor was hired by the Navy as a police officer in February 2016 under a VRA appointment with a two-year trial period. The position required her to possess a firearm. The Navy terminated her in May 2016 after they learned that a February 2016 protective order stemming from domestic violence allegations prevented her from possessing a firearm. The Navy did not give notice or provide an opportunity for Taylor to respond.

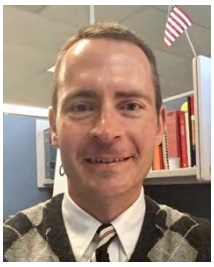
The AJ found there was no Board jurisdiction in the case. Again, the Board came to a different conclusion. The Board stated:

"Because the termination action was at least partially based on the February 3, 2016, protective order, which arose before her February 8, 2016, appointment, the appellant was entitled to the procedural protections of 5 C.F.R. § 315.805."

The Board remanded the case and asked the AJ to determine if there had been a harmful error committed.

If confronted with one of these "chicken and egg" type terminations, you can save yourself a lot of grief by giving advance notice and allowing the person to respond before you issue a decision. There is no mandatory timeframe for notice for this, so it could be very quick. That way, if the AJ or the Board determines that there are pre-appointment reasons included in your termination, you've satisfied the regulatory requirement. Haga@FELTG.com

When Emotional Stress Can (and Can't) Support a Workers Comp Claim
By Frank Ferreri



Unless you're one of a few lucky workers, chances are that, at times, work brings a little stress into your life.

While some workplace angst and frustration is a normal part of life, there are times when it becomes so severe that, under the *Federal Employees' Compensation Act*, emotional stress constitutes a compensable injury.

Just how much stress does it take to support a workers' compensation claim? To establish an emotional condition in the performance of duty, a claimant must submit:

- Factual evidence identifying an employment factor or incident alleged to have caused or contributed to her claimed emotional condition.
- Medical evidence establishing that she has a diagnosed emotional or psychiatric disorder.
- Rationalized medical opinion evidence establishing that the accepted compensable employment factors are causally related to the diagnosed emotional condition.

But, as the Employees' Compensation Appeals Board explained in *Lillian Cutler*, 28 ECAB 125 (1976), when an injury or illness

results from an employee's feelings of job insecurity, fear of a reduction-in-force or her frustration from not being permitted to work in a particular environment, unhappiness with doing work, or frustration in not being given the work desired, or not holding a particular position, the injury or illness falls outside FECA's coverage because it is found not to have arisen out of employment.

To get a sense of where ECAB currently stands on the issue, let's break down some recent cases that address when stress turns into an occupational disease for Federal workers, and when it doesn't.

C.R. and U.S. Postal Service, No. 21-0463 (ECAB April 28, 2023)

Alleged injury: A 46-year-old postmaster alleged that work stress caused him to develop kidney failure and suffer a minor stroke. The Office of Workers' Compensation Programs denied the claim, finding the evidence was insufficient to establish a compensable employment factor.

Holding: ECAB sent the case back to OWCP, finding the postmaster established several employment factors, including:

- Addressing problems with hiring and maintaining adequate staff.
- Removing equipment from workspaces.
- Securing adequate areas to carry out work functions.
- Managing paperwork for posting and cutting mail delivery routes.
- Keeping workspaces in safe, clean, and comfortable physical condition.
- Addressing high work volume and deadlines, particularly with regard to handling Amazon mail.

However, ECAB found that to succeed on remand, the postmaster would need to submit rationalized medical evidence by a qualified physician and/or clinical psychologist establishing that he had a diagnosed condition causally related to an accepted compensable employment factor.

J.H. and Department of Homeland Security, No. 22-1086 (ECAB April 17, 2023)

Alleged injury: A 35-year-old law enforcement agent alleged he developed anxiety and stress due to a significant amount of physical and emotional stress within the work environment, which caused him to seek treatment. OWCP denied the claim, finding the agent had not established any compensable employment factors.

Holding: ECAB found OWCP improperly denied the agent's request for reconsideration because he submitted evidence that:

- Management placed him in AWOL status even though he had previously apprised them of his absence.
- A supervisor admonished him but not others for addressing her by her first name.
- Management denied his request for a change in shift to facilitate his training.
- He was required to furnish medical documentation for all of his medical appointments when his coworkers were not required to do so.

ECAB remanded the case to OWCP.

B.T. and Department of Defense, Defense Commissary Agency, No. 20-1627 (ECAB January 11, 2023)

Alleged injury: A 32-year-old sales store checker, who was diagnosed with service-connected post-traumatic stress disorder, alleged she experienced undue stress and anxiety due to factors of her employment, related to, among other things, constant badgering, schedule changes, pettiness, micromanagement, and unprofessionalism. OWCP denied the claim, finding insufficient

evidence that the checker's medical condition arose during the course of employment and within the scope of compensable work factors.

Holding: The checker did not establish an emotional condition in the performance of duty because she did not submit evidence supporting her allegation she was overworked. Additionally, the checker's allegations regarding the assignment of work and modification of work schedule, denial of her request for reasonable accommodation, termination of her federal service, the handling of leave requests and attendance matters, disciplinary matters, requests for medical documentation, and the filing of grievances and EEO complaints related to administrative or personnel management actions, and mere dislike or disagreement with certain supervisory actions would not be compensable absent error or abuse on the part of the supervisor. Similarly, ECAB found that the checker's allegations of harassment were "mere perceptions" and not compensable under FECA.

W.J. and U.S. Postal Service, No. 20-1226 (ECAB January 6, 2023)

Alleged injury: A 57-year-old letter carrier alleged he developed anxiety, depression, and a sleep disorder due to factors of his Federal employment. He asserted that multiple managerial changes created a hostile workplace where he encountered disparaging remarks and constant humiliation and harassment over work methods. OWCP denied the claim.

Holding: The carrier established overwork as a compensable factor of employment based on:

- Multiple instances where management confronted him, questioned his time estimates, and the validity of his employment injury and instructed him to ignore his work restrictions to complete his route for that day.
- Management would complain about not having enough coverage and ask the carrier complete his work without assistance.
- The carrier was asked on multiple occasions to work multiple routes due to an understaffing issue.
- The carrier worked auxiliary time for various reasons despite multiple Form CA-17s suggesting that he only work for eight hours.

The carrier also established compensable employment factors with respect to allegations of harassment based partly on an incident in which the carrier's supervisor stressed him out to the point where he had an anxiety attack and was unable to complete his work for the day.

ECAB remanded the case to OWCP.

P.G. and U.S. Postal Service, No. 22-0259 (ECAB January 5, 2023)

Alleged injury: A 51-year-old rural carrier alleged that she developed post-traumatic stress order due to factors of her federal employment, including ongoing harassment by a coworker that was alleged to have included obscene hand gestures, getting in the carrier's face and saying something that could not be understood, and approaching the carrier and saying, "When I talked to you about the hen house and you got me in trouble ... what I was talking about were chickens." OWCP denied the claim.

Holding: The carrier established a compensable employment factor, and OWCP did not review the medical evidence. "Verbal altercations and difficult relationships with coworkers, when sufficiently detailed and supported by the record, may constitute compensable factors of employment," ECAB wrote in remanding the case to OWCP.

Next month, we'll look at five more cases, and then put it all together.
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