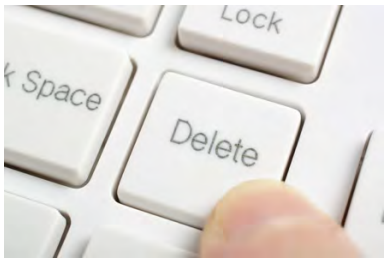
# Federal Employment Law Training Group

Teaching the Law of the Federal Workplace

FELTG Newsletter Vol. XV, Issue 9 September 13, 2023




## The Evolving Meaning of Words

In just about every language, the meaning of words and phrases can evolve over time. So when I recently perused an article titled 10 Passive-Aggressive Phrases to Avoid in the Digital Workplace, I was surprised – and mildly dismayed – to learn some of the things I write in emails have fallen out of favor and are considered passive-aggressive, including:

- Thanks in advance
- Putting [name] on CC for reference
- Re-attaching for your convenience

Legal definitions, regulations and case law also evolve over time and at FELTG we are here to give you the very latest, most updated information, so your work doesn't end up in a news article some day about what not to do in the workplace. Please check out our upcoming trainings and register for what works for you.

The September FELTG newsletter addresses recent MSPB reversals of AJ mitigations, the *Pregnant Workers Fairness Act*, confidentiality of medical records, stress and workers' comp, and retirement misinformation.

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 our upcoming virtual training sessions. Visit **FELTG's Virtual Training Institute** for the full schedule.

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

**FLRA Law Week**
September 18-22

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

**EEOC Law Week**
September 25-29

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

**Conducting Effective Harassment Investigations**
October 3-5

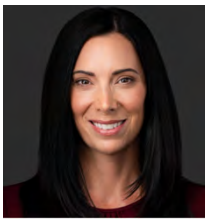
**Get it Right the First Time: Accepting, Dismissing, and Framing EEO Claims**
October 24-25

**Up to the Minute: The Latest Changes to Reasonable Accommodation for Pregnancy, Disability, and Religion**
November 7

*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.*

## *Board Reverses AJ Mitigations and Reinstates Agency Penalties*

**By Deborah J. Hopkins**



The Merit Systems Protection Board holds a number of functions; chief among them is reviewing agency penalty selections in cases of appealable discipline. The Board's role is not to displace management's responsibility in a penalty determination with its own, but to determine whether management exercised its judgment and issued a penalty within the tolerable limits of reasonableness. *Alaniz v. U.S. Postal Service*, 100 M.S.P.R. 105, ¶ 14 (2005). The same is true of the role of MSPB administrative judges (AJs).

***ASK FELTG***

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

In reviewing recent nonprecedential cases, I noticed several where the Board reversed an AJ's mitigation and re-imposed the agency's initial removal penalty. What follows are summaries of two such cases.

### The FBI Special Agent Who Fired His Service Weapon on a Would-Be Car Thief

From a window on the second floor of his home, an FBI special agent saw a man attempting to break into his wife's car in front of his home. The agent yelled at the would-be thief to get him to stop, but the man persisted. The agent then brandished his service weapon, identified himself as a law enforcement officer, and fired one round, injuring the individual.

At the time he fired his weapon, the appellant was approximately 10 to 25 feet higher than the individual, and 30 feet horizontal distance from the individual.

The agency removed the appellant. On appeal, the AJ mitigated the removal to a 60-day suspension, finding the agency improperly considered certain *Douglas* factors to be aggravating. The Board disagreed with the AJ and reinstated the agency's removal penalty, relying on three aggravating factors:

- The appellant's refusal to accept responsibility,
- The appellant's prior disciplinary history, and
- The appellant's "refusal to cooperate with the investigations."

In addition, the Board agreed with the agency that the misconduct was "directly related to the agency's mission and the appellant's ability to exercise reasonable use of force in the performance of his duties in the future." *Kalicharan v. DOJ*, NY-0752-16-0167-I-4 (Jul. 20, 2023).

### The Disrespectful VA Practical Nurse

The agency removed the appellant, a practical nurse for the VA, based on three charges. On appeal the administrative judge found the agency proved only one charge, inappropriate language, with two specifications:

- While the appellant was in the breakroom with a male coworker, a female coworker called that individual on the telephone and the appellant "yelled out something along the lines of kill that b-tch."
- During a meeting with management regarding the appellant's alleged interpersonal conflicts with the female coworker, he admitted to calling the coworker a "b-tch" on one unspecified occasion after she had allegedly lied about him acting inappropriately towards her.

The AJ mitigated the penalty of removal to a 30-day suspension largely because she sustained what she considered to be only the "least serious" of the initial three charges. In explaining the mitigation, the AJ "focused on the context in which the appellant used the

inappropriate language and the appellant's past discipline." The deciding official considered these to be aggravating factors, but the AJ disagreed.

The Board overturned the AJ's mitigation and reinstated the removal, after considering as aggravating factors "the appellant's work in a healthcare setting with veterans, the high standard of conduct and behavior towards patients and other VA employees expected of an individual in the appellant's position, and the notoriety of the offense in negatively affecting the trust of veterans and the public in the level of patient care at the VA."

Also, this was the appellant's third disciplinary offense in less than three years. Therefore, using the principles of progressive discipline, the Board found removal did not exceed the bounds of reasonableness. *Beasley v. VA*, CH-0752-17-0273-I-1 (Jul. 19, 2023).

We'll be looking in more detail at these topics during our brand-new virtual training Advanced MSPB Law: Navigating Complex Issues, October 31 - November 2. We hope you can join us! Hopkins@FELTG.com

### Still Need End-of-FY Training?

Hoping to get training in before the calendar turns to FY 2024? Look no further than FELTG. We have numerous events scheduled for this month, including our time-trusted, engaging, and popular multi-day training programs.

**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

### *The Good News: The PWFA Is Good for Employees and Easy for Agencies*
**By Ann Boehm**

Have you heard about the newest anti-discrimination law? On Dec. 29, 2022, President Biden signed the *Pregnant Workers Fairness Act* (PWFA) into law. It's the first new anti-discrimination statute since 2008. It went into effect on June 27, 2023.

What is it exactly? The PWFA recognizes that there are gaps in the Federal legal protections for workers affected by pregnancy, childbirth, or related medical conditions, even though they may have certain rights under existing civil rights laws (gaps in Title VII, the *Pregnancy Discrimination Act*, ADA, and FMLA). 42 U.S.C. § 2000gg. The PWFA allows workers with uncomplicated pregnancies to seek accommodations, recognizing that even uncomplicated pregnancies may create limitations for workers.

[**Editor's note:** Join us tomorrow (Sept. 14) for Everything You Need to Know About the Pregnant Workers Fairness Act.]

Agencies violate the PWFA if they do not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless the agency can demonstrate that the accommodation would impose an undue hardship on the agency's operation. Sounds a lot like reasonable accommodation under the *Americans with Disabilities Act*, right?

Yes! That's precisely the goal of the PWFA. It acknowledges that a pregnancy without complications is not a disability under the ADA, but any pregnancy still might require some reasonable accommodation. And let's be honest here. Unless your employee is an elephant (elephants have the longest

gestation period of any mammal), it's usually a short-term accommodation.

What would be examples of the PWFA reasonable accommodations? Schedule changes; telework; parking spaces closer to the entrance; light duty; additional breaks, especially in more physically taxing positions; modifying the work environment; removing a marginal function such as climbing ladders or moving boxes; modifying uniforms or equipment; and adjusting exams or policies that require physical exertion.

Of course, there could be more options. It's an interactive process – just like the ADA.

Truth be told, most agencies are probably already doing these things for pregnant employees. The EEOC has long held that an employee temporarily unable to perform the functions of her job because of a pregnancy-related condition must be treated in the same manner as other employees similar in their ability or inability to work. This new law should not require substantial adjustment in how the government does business.

As I often say with any request for a reasonable accommodation – treat the employee requesting it like a human being. The agency's mission must be accomplished, but supervisors should figure out a way to accommodate a pregnant employee's needs for the limited time the accommodations are needed. It's always been a good idea. And now it's the law. For so many reasons, that's Good News. Boehm@FELTG.com

**Comprehensive Reasonable Accommodation Training**

Fail to stay up to date on accommodation and you'll end up on the wrong side of a complaint. Mark your calendars for Nov. 7, when FELTG presents **Up to the Minute, the Latest Changes to Reasonable Accommodation for Pregnancy, Disability, and Religion**.

***Confidentially Speaking: Be Very Careful With All Medical Information***
**By Dan Gephart**

The overworn idiom about the road to a certain scorching and undesirable place (no, I'm not talking my former state of residence, Florida) being "paved with good intentions" applies to the *Rehabilitation Act*. Just replace the H, the E, and both hockey sticks with an even spookier term -- compensatory damages.

In *Complainant v. GSA*, EEOC Appeal No. 0120083575 (2009), that amounted to $3,000.

The lesson of *Complainant v. GSA* is this: When it comes to medical records or any information about an employee's medical condition, you *must* remember the information is *confidential*. It should not be shared except in limited prescribed circumstances – and good intentions is not one of those circumstances.

The employee, who had multiple disabilities, had moved between jobs while working for the agency over a decade. When one job ended due to lack of work, the employee was transferred to a warehouse facility. Instead of reporting to the new workplace location, she applied for the agency's voluntary leave program.

Her application contained a certification from her doctor stating that she suffered from "panic disorder without agoraphobia, adjustment disorder unspecified, and occupational problems." The application also noted that the complainant had a negative sick leave balance of 231.7 hours and had used 240 hours of advanced sick leave.

The employee's request for voluntary leave was approved.

Everyone is happy. Great solution. End of story, right? Umm, not so fast.

While soliciting voluntary leave donations for the employee, her supervisor emailed coworkers and happened to mention the employee suffered from PTSD/anxiety disorder "with" agoraphobia.

As a result, the employee experienced a drastic increase in insomnia, anxiety, stress, major depression, emotional distress, shame, loss of self-esteem, and radical weight fluctuations. It's more powerful in her own words:

> *I was at least able to hide my mental conditions before my diagnosis was publicly released. After my diagnosis was released, I suffered nausea and pain in my stomach for several weeks. My head hurt me constantly. I was too depressed and ashamed to leave my home unless it was for something that was absolutely necessary such as to buy food or other necessities. I tried to hide when I was in public for fear of running into someone that saw the email. The subject e-mail was even forwarded outside of the agency.*

There was not a widespread email in *Becki P. v. Dep't of Transportation*, EEOC No. 0720180004 (2018). Nor was there any mention of a specific disability. Yet, the results were similar.

A supervisor had a heated discussion with an employee. After the employee left, the supervisor tried to explain the employee's behavior to a contract employee who had witnessed it. The supervisor told the contractor the employee is "on medication."

This, FELTG Nation, is a *per se* violation of the *Rehabilitation Act*.

Once again, the disclosure caused distress for the employee with a disability. In the employee's words:

> *It became known around the office that I was on mental medication and my symptoms-psychological and physical-worsened. I felt greatly embarrassed and I was deprived of my dignity. I felt even greater distress and sadness, fell into a deeper depression, and became more withdrawn.*

The AJ awarded the employee $1,000. Upon review, the commission determined an award of $2,000 was more consistent with awards in similar cases.

It's important to note that there were multiple claims in each of these cases, and yet the only finding of discrimination in both was for the inappropriate disclosure of medical information.

Join us next week (Sept. 18-22) for Absence, Leave Abuse & Medical Issues Week where leave, medical records, confidentiality, and more will be discussed. Click here for the day-by-day description and register here for one day, all five days, or anything in between. Gephart@FELTG.com

**FELTG Helps You Meet Your DEIA Goals for FY 24**

**Setting the Bar: Advancing Diversity, Equity, Inclusion, and Accessibility for FY 24** returns on Sept. 26 to provide the foundation you need to jump start your agency's DEIA program or take it to the next level. Attend this half-day virtual event and you'll learn to:

- Identify the laws, regulations, and Executive Orders that require your agency to promote DEIA in the workplace.
- Understand legally problematic selection processes and learn remedies to overcome the imbalance.
- Overcome the tendency to exhibit microaggressions.

## *New MSPB Case Highlights Dangers of Retirement Misinformation*

**By Barbara Haga**

FELTG President Emeritus Bill Wiley sent me an MSPB decision last week. Many of you are aware I spent most of my Federal career working for the Navy, and Bill spent some time there, too. At the end of my years with the Navy, I worked in the organization that oversaw the operation of the Civilian Benefits Center, which figures prominently in the decision. I was part of the transition team that worked on the original plans to centralize benefits functions in the Department.

The case is *Edwards v. Navy*, DC-3443-17-0636-I-1 (Aug. 29, 2023)(NP). It was part of that pile of cases that accumulated when there was no Board to issue decisions. The Board has now ruled that a hearing is required to determine the answer of whether Edwards' retirement was involuntary. The Board says this is a non-precedential decision, but I think it takes a different tack (good Navy term) than what has been followed in misinformation cases previously.

At the time of the events in this case, the Navy used a system called EBIS (Employee Benefits Information System), which allowed employees to complete transactions, such as insurance changes, on their own. Another self-service function was obtaining a retirement estimate. EBIS is replete with warnings that the EBIS annuity could be overestimated if the employee had any part-time service or unpaid deposits or redeposits (Edwards had both). The system also warned that an individual should not retire solely based on the information in the EBIS estimate.

DoDI 1400.25, Volume 830 sets policy on processing Civil Service Retirement applications. This instruction was in place at when the events in this case occurred. It states: "Within the DoD, servicing human resources offices and benefit centers will ensure that employees are provided adequate and timely information and assistance necessary to make informed decisions about retirement and to complete retirement applications." Under the Navy benefits process, no one is supposed to retire without reviewing their service history and obtaining an estimate from a retirement specialist.

Edwards, a GS-12 auditor, applied for retirement in May 2016 to be effective February 2017. She obtained an EBIS estimate prior to submitting the application showing a monthly annuity of $3,640 per month. When she submitted her retirement application, she was assigned a retirement specialist. The retirement specialist indicated she would provide the estimate and service history. Six months passed without that happening, so Edwards contacted the retirement specialist who said she would mail the estimate and history the following week. The documents were not received, and despite alleged continued attempts by Edwards, the information never arrived. She retired as planned. Her estimate and service history were mailed roughly one month later. That estimate showed a monthly annuity of $1,991 without a deposit/redeposit to cover the time not credited. The official annuity computed by OPM was less at $1,810 per month.

It is not clear what steps Edwards took next when she realized the annuity was so much less than the original estimate. We can't tell if she tried to get her job back or went to the Benefits Center staff to raise these issues, but she did file an involuntary separation appeal in June 2017.

The AJ dismissed the case, finding that it did not meet the test for involuntariness because the agency did not provide any misinformation to Edwards, and she did not make a nonfrivolous allegation that she reasonably relied on the inaccurate EBIS annuity estimate when she decided to retire.

There are a fair number of retirement misinformation cases that have been decided over the years. Sometimes HR specialists have given bad information and sometimes managers have. Here are two examples of cases the Board has found when an employee relied to his/her detriment on misinformation regarding benefits:

*Hardin v. Treasury,* 95 M.S.P.R. 416 (2004) (NP). This is a case where the manager gave bad information. Hardin was PIPed and didn't improve. She was given a few days to think about what she wanted to do. She was advised by management that if she didn't resign, she would be removed and she would lose all her benefits. The truth was that she met the requirements for discontinued service retirement, so if the IRS removed her for unacceptable performance, she would have qualified for an annuity on that basis.

*Sink v. Energy*, 2008 MSPB 231. Sink received a directed reassignment and declined to relocate. The HR Specialist informed Sink that if he didn't retire before the decision to remove was effective, he would lose his health benefits. This was not true. He would also have qualified for discontinued service retirement had the removal decision been issued. The Board described the agency's actions regarding the advice on health benefits eligibility as "negligent."

Underneath all of this is the issue of the disservice to longtime Federal employees who are trying to collect their pensions. The fact that Edwards never got the official estimate in time to make an informed decision is unacceptable. We might see that word "negligent" in another decision.

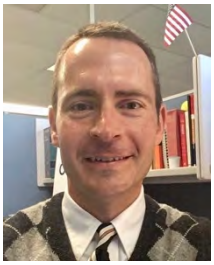
The idea of centralizing benefits in DoD in the 1990s was the subject of huge debate. Taking processing of retirements out of the local offices where someone could go to their HR office and talk to a retirement specialist and switching to a centralized, heavily online system was not something most in HR were excited to see. However, DoD staffing cuts made it impossible to operate as we had before. Unfortunately, this case highlights the difficulties we were afraid it could present for employees and how their lives could be impacted.

What might have been the thinking in 2017 when Edwards' claim surfaced? The Navy position would likely have been that EBIS contained disclaimers that employees should not rely on the estimate alone. Edwards was an auditor. By OPM's qualification standards, that means she would have to have a degree in accounting, auditing, or a similar business field or a combination of education and experience in accounting. I think it is a reach to say that someone with that type of education and experience would not understand that the funds she had previously withdrawn from the retirement system would have a significant impact on her annuity. At her level in the organization, she should have known how to escalate the matter if her retirement decision depended on the estimate. The other Navy consideration would likely have been that no one in the Benefits Center improperly advised her. In other misinformation cases, someone answered something incorrectly or gave a misleading answer, but not here.

The complication in 2017 could have been that Edwards' employer didn't want her back. Maybe with nine months' lead time, they had already offered her job to someone. Maybe they had cancelled that position and used that slot for another job that was officially offered to someone. In 2017, the risk in letting the appeal proceed would have been viewed as small – 120 days for an initial decision and maybe 12 more months to get a full Board review. Now they are facing over seven years' worth of potential back pay, and attorney's fees --and that will be paid by the employing organization, not the Benefits Center. If Edwards wins, she'll have seven more years of service and plenty of money to make the deposit/redeposit.

We will keep an eye out for the AJ's decision.
Haga@FELTG.com

***When Emotional Stress Can (and Can't) Support a Workers Comp Claim, Part 2***
**By Frank Ferreri**



Just how much stress does it take to support a workers' compensation claim? That's a question we started to answer last month by breaking down recent cases that address when stress turns into an occupational disease for Federal workers, and when it doesn't.

This month, we look at a few more cases.

*S.G. and Department of Labor, Occupational Safety & Health Administration*, No. 22-0495 (ECAB November 4, 2022)

**Alleged injury:** A 44-year-old safety and occupational health inspector alleged he developed anxiety, depression, stress, and post-traumatic stress disorder after being accused of creating a hostile work environment. OWCP denied his claim, noting the allegations were not factually substantiated.

**Holding:** ECAB remanded the case to OWCP, finding that while the inspector provided a detailed response to OWCP's development letter, along with supporting documentation, no response was received from the employing establishment.

"Once OWCP undertakes to develop the evidence, it has the responsibility to do so in a proper manner, particularly when such evidence is of the character normally obtained from the employing establishment or other government source," ECAB wrote. "It shall request that the employing establishment provide a detailed statement and relevant evidence and/or argument regarding his allegations."

*C.D. and U.S. Postal Service*, No. 20-1445 (ECAB October 3, 2022)

**Alleged injury:** A 55-year-old electronic technician filed an occupational disease claim, alleging he developed hypertension, anxiety, and stress due to factors of his Federal employment. He reported that his job could be dangerous due to the involvement of moving machine parts and that he had to keep up with an increasing workload due to other mechanics leaving his work facility. He also reported he had started to fear dying by being "sucked into" a machine and that he had experienced a racing heartbeat. OWCP denied the claim.

**Holding**: ECAB remanded the case for further development because, after the employer did not respond to its requests, OWCP did not make any further attempt to obtain comments from a knowledgeable supervisor regarding the accuracy of the technician's allegations, the technician's position description, and information regarding whether there were staffing shortages that affected the technician's workload or extra demands for any reason.

*P.T. and Department of Veterans Affairs*, N0. 20-0825 (ECAB September 23, 2022)

**Alleged injury:** A 50-year-old licensed practical nurse alleged that he sustained post-traumatic stress disorder, anxiety, panic attacks, nightmares, and insomnia related to work. Allegedly, the nurse was treated differently due to his sexual orientation, given disciplinary counseling based on hearsay, was sworn at, called a "drama queen," shoved, stalked, had $6,000 removed from his bank account, had a fake Facebook account created in his name with damaging information, and had his automobile vandalized. OWCP denied the claim, finding the evidence insufficient to establish compensable factors of employment.

**Holding**: ECAB agreed with OWCP, noting the nurse's allegations involved administrative actions involving his supervisors. But what about the alleged

harassment the nurse faced at work? ECAB found the evidence too thin.

"The employing establishment investigated his allegations in this regard and found that the investigation did not substantiate a hostile work environment," ECAB wrote.

"[The nurse] has not established with corroborating evidence that any specific threat was made against him and has not alleged or established that management ignored or tolerated any alleged threats or that it failed to take preventative action."

*M.V. and Department of the Treasury, Internal Revenue Service*, No. 20-0397 (ECAB September 8, 2022)

**Alleged injury:** A 38-year-old IRS agent alleged she developed fear, anxiety, insomnia, panic attacks and post-traumatic stress disorder after being assaulted by a taxpayer while in the performance of duty. The attack caused her to have flashbacks.

During the incident, the agent, who was seven months pregnant at the time, had a package thrown at her, and it struck her arm. Then, her manager ordered her to photocopy the contents of the package, which took 45 minutes. Following the incident, the agent was hospitalized due to preterm labor and delivered the baby prematurely.

OWCP denied the agent's claim due to deficiencies in her factual and medical evidence.

**Holding:** ECAB sent the case back to OWCP, finding that more evidence was needed all around. Although the board found that the agent did not establish that management put her in an unsafe position, it also determined that OWCP failed to sufficiently develop the evidence regarding whether she was assaulted at work while in the performance of duty, particularly since there may have been video evidence of the encounter, and no such evidence was disclosed.

*T.H. and U.S. Postal Service*, No. 22-0658 (ECAB September 1, 2022)

**Alleged injury:** A 55-year-old city carrier filed a claim for anxiety, depression, headaches, chest wall strain, and post-traumatic stress disorder while in the performance of duty. She indicated the postmaster called her into his office, swore at her, and jumped out of the chair as if he was going to hit her. During an incident in which the carrier complained about employee who "don't do s***," the postmaster allegedly responded, "You don't do s***," and an argument ensued. In another incident, the postmaster alleged yelled at the carrier, "You haven't done s***," and "You don't do a f***ing thing, you don't do s***; what the f*** do you do?" OWCP denied the carrier's claim, finding she had not established a compensable factor of employment as causing or contributing to her diagnosed emotional condition.

**Holding**: ECAB sent the case back to OWCP because the carrier provided "reliable and probative" evidence in the form of multiple witness statements with respect to her allegations of a hostile work environment, harassment, and abuse, specifically the postmaster's yelling and swearing at her.

As these cases and ECAB precedent show, where the disability results from an employee's emotional reaction to her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA. On the other hand, the disability is not covered where it results from factors such as an employee's fear of a reduction-in-force or her frustration from not being permitted to work in a particular environment or to hold a particular position.

What makes the difference is the evidence, and ECAB tends to rely on what a claimant puts forward to back up her allegations, which often come in the form of coworkers' statements, and medical evidence. Info@FELTG.com