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

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Mark Your 2024 Calendars

Happy fall, FELTG readers! You will be happy to know we've just posted the Winter/Spring 2024 schedule for FELTG's week-long virtual training events. Stay tuned for an announcement on other calendar additions, but for now mark your calendars, or register, for any (or heck, all) of these programs:

- Calling All Counselors: Initial 32 Hour Plus Refresher Training, Jan. 29 - Feb. 1
- Workplace Investigations Week, March 4-8
- EEOC Law Week, March 18-22
- MSPB Law Week, April 15-19
- FLRA Law Week, May 6-10
- Absence, Leave Abuse & Medical Issues Week, June 3-7

We've got a lot more on the calendar: check here for everything by month.

The October FELTG newsletter tackles conduct unbecoming, hostile work environment, lack of candor, and reasonable accommodation.

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:

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

Advanced MSPB Law: Navigating Complex Issues
October 31-November 2

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

Clean Records, Last Rites, Last Chances, and Other Discipline Alternatives
November 14

Advanced EEO: Navigating Complex Issues
November 15-16

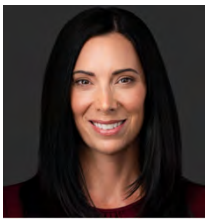
Discovery Done Right: Avoiding Sanctions Before the MSPB and EEOC
December 12

Misconduct Investigations: Get Them Right From the Start
January 17

Visit **FELTG's Virtual Training Institute** for the full schedule.

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.

Apparently, This is NOT Conduct Unbecoming a Supervisor
By Deborah J. Hopkins



The Merit Systems Protection Board has taken a several-week break from issuing decisions while it updates its e-Appeal online system. The system was scheduled to go live this week.

In the meantime, I wanted to highlight an interesting recent case involving a supervisor who was demoted for conduct unbecoming, but who the Board reinstated because the supervisor's impatient and unprofessional demeanor did not rise to the level of actionable misconduct. *Glass v. Treasury*, NY-0752-19-0200-I-1 (Aug. 16, 2023)(NP).

The appellant, a supervisory national bank examiner, was demoted based on five specifications of conduct unbecoming a supervisor. According to the case, the misconduct involved the supervisor's interactions with four subordinates and the specifications all related "to the manner in which the appellant dealt with these individuals regarding work-related matters." *Id.* at ¶7. The administrative judge (AJ) agreed with the agency and upheld all five specifications and the demotion.

The Board, however, disagreed. Among the relevant details:

Specification 1: The appellant addressed one of his subordinates in a scolding manner, told him his work-related project explanations were "not a good excuse," and told the subordinate that he was ill-prepared for a meeting. In addition, he called the subordinate a liar during a performance review.

According to the Board, "It is the job of a supervisor to address the performance of his subordinates and the making of inaccurate or false statements about a work-related matter is serious. Although the appellant's language may have been direct or indelicate, that does not make his conduct actionable." *Id.* at ¶9.

Specification 2: The appellant was having a discussion with another of his direct reports and was trying to clarify how many work items were pending. When the direct report did not understand the appellant's question, "the appellant held up one finger from each hand in her face and said, loudly enough so that others could hear, words to the effect of 'Here's one finger and here's one finger. How many fingers?'" in front of several other staff members. *Id.* at ¶10.

The AJ found this behavior disrespectful and inappropriate because the direct report felt intimidated and embarrassed. The Board disagreed and said the appellant was asking for information about a work-related matter, which is a supervisor's responsibility, and even if the statement was exaggerated and made the subordinate feel uncomfortable, it did not rise to the level of actionable misconduct.

Specification 3: This specification involved the same direct report from Specification 2, above. In this instance the direct report asked the appellant a question about a work-related matter and the appellant responded, "We have talked about this five times!" *Id.* at ¶12.The AJ found that the appellant's obvious annoyance and anger was not tactful and was unbecoming a supervisor, but the Board disagreed because the conversation was about "a work-related matter and his response to her was in the context of his supervisory role…To the extent that the appellant's response reflected that he was frustrated by the question, it does not amount to actionable misconduct." *Id.* at ¶13.

Specification 4: The appellant asked a different subordinate to schedule a meeting to include him and two other agency officials, and after the subordinate made several attempts to confirm the appellant's attendance, he replied, "I told you this three

times. We have to go over this again?" *Id.* at ¶14. As in Specification 3, the Board held that the discussion was work-related and the appellant was acting within the scope of his responsibilities, and even if he appeared annoyed and made his subordinate feel belittled, it did not rise to the level of actionable misconduct.

Specification 5: In an email exchange between the appellant and one of his direct reports, he told her to "submit her questions either to him or another named individual, and to 'PLEASE stop emailing'" another agency employee. *Id.* at ¶16. The AJ found the tone of the email unprofessional, but the Board disagreed. It held a supervisor has authority and responsibility to "direct who should be provided certain information and to whom questions should be addressed. Putting a written word in all capital letters is generally intended to draw the reader's attention to it." *Id.* at ¶17. Although the subordinate testified she felt "beaten up" by the email, according to the Board "those feelings cannot serve to turn the appellant's email into actionable misconduct." *Id.*

If you are surprised by this outcome, let me draw your attention to a footnote where the Board explained, "We do not suggest that a supervisor's conduct may never be actionable and therefore supportive of discipline, but only that the appellant's conduct in this case does not rise to that level." *Id.* at p. 7. For more on advanced topics such as these join us for the all-new program Advanced MSPB Law: Navigating Complex Issues, October 31 - November 2. Hopkins@FELTG.com

To Accept or Dismiss?

During the two-day class **Get it Right the First Time: Accepting, Dismissing, and Framing EEO Claims**, we'll review the lawful reasons for dismissing a claim, how to make that determination, and much more. Join us on October 24-25.

Register now.

It's a Bumper-to-Bumper Ride When Determining Hostile Environment
By Ann Boehm

While teaching a recent class about hostile work environment, a participant asked me if an offensive bumper sticker on a co-worker's car could create a hostile work environment.

Hmmmm. Interesting question.

Let's work through this, shall we?

First, what is a hostile work environment? To establish a hostile work environment, an employee has to show that: "(1) he belongs to the statutorily protected class; (2) he was subjected to unwelcome conduct related to his membership in that class; (3) the harassment complained of was based on [the protected status]; (4) the harassment had the purpose or effect of unreasonably interfering with his work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer." *Xavier P. v. Patrick R. Donahue, Postmaster General*, EEOC Appeal No. 0120132144 (Nov. 1, 2013).

[Editor's note: Hostile work environment is one of the challenging topics that will be covered during Advanced EEO: Navigating Complex Issues on Nov. 15-16 from 1-4:30 pm ET each day. Register now for one or both days of training.**]**

Next, is a picture or symbol something that can create a hostile work environment? According to the above-cited *Xavier P.* case, the answer to that question is most certainly, "yes."

What created the HWE in that case? "Caucasian employees in [the employee's] work area wore t-shirts featuring the Confederate flag several times a month, and

management took no action despite receiving complaints about it." *Id.*

The union president informed the postmaster that some employees found the t-shirts offensive and asked management to take action to prohibit the t-shirts in the workplace. The postmaster had a subordinate supervisor tell employees "not to wear revealing clothing or clothing with 'political' messages." *Id.* The employees "were never instructed not to wear or display images of the Confederate flag." *Id.*

The EEOC concluded the t-shirts subjected the employee to unlawful racial harassment. It also found the agency liable for not taking appropriate corrective action to stop the harassment.

If wearing a Confederate flag t-shirt in the workplace constitutes racial harassment, could that carry over into the parking lot? I think so, but I did not find much guidance in case law on bumper stickers.

I did find one EEOC "bumper sticker" case. *Lockwood v. John E. Potter, Postmaster General*, EEOC Appeal No. 0120101633 (2010). The employee did not claim HWE, only discrimination based on race and sex after seeing a bumper sticker in the office trash can that said, "When All Else Fails Blame The White Male." The bumper sticker was removed from the trash can, and it eventually was placed on the complainant's personal vehicle – but not while the car was parked on agency property. (Can we all agree that the facts of this case are just plain weird? Who puts a bumper sticker, particularly one that could be offensive, on someone else's personal vehicle?)

The EEOC found no discrimination because the complainant "failed to show how the alleged incidents resulted in a personal harm or loss regarding a term, condition, or privilege of his employment." *Id.*

So, what about an offensive bumper sticker on a personal vehicle parked on agency property? Sorry to do this. I have to give a lawyerly answer here.

It depends.

The EEOC told us that a Confederate flag in the workplace was racial harassment. Logically, that could cross over into an agency parking lot. Things that could impact on creating a hostile work environment: location of the parking lot (do people have to pass the car?; is it a small parking lot with few cars or large parking garage with many floors?); whether certain employees have assigned parking spaces (the union president or senior officials – knowing who is displaying the bumper sticker could make a difference); and the particular symbol on the bumper sticker (Confederate flag; sexually suggestive pictures or phrases).

Would a bumper sticker of a skeleton hand extending a middle finger create a hostile work environment? (Yep, I drove onto a government facility behind that one.) Offensive, perhaps. Hostile work environment, probably not. Hard to say that one is tied to any particular protected status.

ASK FELTG

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

What's an agency to do?

Employees have a right not to be subjected to a hostile work environment. Offensive symbols or pictures can create a hostile work environment. There is the potential for a bumper sticker to create a hostile work environment. It all comes down to a fair analysis of the totality of the circumstances in light of the legal standard.

The big takeaway from all of this – take a complaint about an offensive bumper sticker seriously.

Instead of telling you that's Good News, like I usually do with this article, I'm just going to say: Good luck out there!

Boehm@FELTG.com

Was Employee Being Honest With Her Agency? Not Even Remotely
By Dan Gephart

Sen. Joni Ernst is clearly not a fan of remote work. She recently accused Federal teleworkers of "fraud." Dig beyond the headline and you'll see many of Ernst's claims were based on outdated reports. But she may have something when she asked how many Feds were still getting location-based pay and Washington, D.C., wages while teleworking from elsewhere.

We now know of at least one remote worker whose actions fit that description. And while those actions were not outright fraudulent, they did show a lack of candor, according to a recent initial decision by a Merit Systems Protection Board administrative judge (AJ). In *Atterole v. VA*, PH-0714-23-0184-I-1 (Sept. 7, 2023)(ID), the Veterans Benefits Administration removed the appellant for failure to follow the agency's telework policy and lack of candor.

The appellant's duty station was Baltimore. In the early days of the pandemic, she (like most of her Federal colleagues) was granted 100 percent telework. In December 2020, citing the deaths of her mother and brother-in-law, she requested to work from Port Charlotte, Fla. She said she'd work in Florida from Jan. 4 through March 4, 2021, and return sooner if needed.

The VA Telework policy did not require employees to change their duty station when they are working outside of their geographic region for fewer than six months and their absence is related to medical or other personal reasons. However, the employee was still working and living in Florida seven months later.

She failed to provide a Baltimore address to leadership and didn't update her telework agreement – violations of agency policy.

Meanwhile, the VBA, concerned about allegations that employees were living in states other than their duty station of record and improperly receiving locality pay, appointed an investigatory board. And the employee's sworn testimony before that board made matters worse.

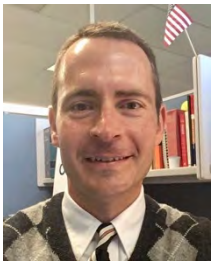
At first, the appellant invoked her Fifth Amendment right, then stated that she had "permission to be in a different state but that's all I'm going to say on the matter." She also told investigators that "there was no expiration, [that she was] waiting on stuff to handle some personal matters …," before testifying that other people on the staff were working from different locations than their geographical region. When asked to identify those people, she admitted that she knew of no one else beyond herself.

The AJ noted that while lack of candor doesn't require intent to deceive, an "element of deception must be demonstrated," and, in this case, the appellant knowingly gave "evasive and incomplete answers … with the intent to mislead the agency."

The employee countered that the agency failed to reasonably accommodate her disability and retaliated against her for that activity. Her request to work from home 100 percent of the time was denied. However, the agency granted her numerous accommodations including a light above her desk, a space heater, stand-up desk, ergonomic chair, designated parking space and, in the event her office temperature couldn't be regulated, the option to work from home temporarily. When the pandemic hit, she was granted 100 percent telework.

The AJ found the employee's "vague assertions" failed to show by a preponderance of evidence that the EEO activity was either a motivating factor in or a but-for cause of her removal. The AJ concluded that the deciding official properly considered the relevant Douglas factors and found removal to be an appropriate and reasonable penalty. Gephart@FELTG.com

Invisible Disabilities Require Same Focus as Those You Can See
By Frank Ferreri



Although the Rehabilitation Act just turned 50, and the ADA is in its 30-something stage of life, employers – Federal and otherwise – continue to struggle with accommodations, particularly for employees whose disabilities aren't visible.

A couple of weeks back, *Fortune* ran a story reporting that only 41 percent of neurodivergent employees said they received a workplace accommodation, with another 6.5 percent saying they were denied accommodations after requesting them.

In the context of Federal employment, the recent case of *Harp v. Garland,* 2023 WL 6380019 (W.D. Okla. September 29, 2023), provides an example of an agency failing to follow the law on accommodating an employee with an invisible disability.

According to a Department of Justice employee, the agency violated Section 501 of the Rehabilitation Act when it denied her request for a reasonable accommodation.

The employee alleged she asked the agency for two hours off work each week to attend therapy for her mental health condition. In response, the agency contended that the employee was able to perform the essential functions of her job without an accommodation.

At trial, the jury returned a verdict in the employee's favor and awarded her compensatory damages of $250,000.

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**.

The DOJ entered a Post-Trial Motion for Judgment as a Matter of Law (Note: Under the Federal Rules of Civil Procedure, a party can file this kind of motion within 28 days after entry of judgment, and a court may: 1) allow judgment on the verdict; 2) order a new trial; or 3) direct the entry of judgment as a matter of law.)

To show that an agency came up short in its accommodation responsibilities under the Rehab Act, an employee must show:

(1) She had a disability.
(2) She was an otherwise qualified individual.
(3) She requested a plausibly reasonable accommodation from the agency for her disability.
(4) The agency failed to provide her with her requested accommodation or any other reasonable accommodation.

Although it noted the employee performed her job duties "adequately" immediately following the denial of her request for an accommodation, in upholding the trial court's ruling in the employee's favor, the District Court highlighted that:

(1) The employee testified that in the absence of her treatment, her mental state deteriorated to the point that she was unable to work.
(2) The employee testified that she believed the denial of her requests to attend her counseling sessions caused her to be unable to work and that, if she had been able to continue her treatment, her mental condition would have improved.

"Viewing this evidence in the light most favorable to [the employee,] a reasonable jury could have concluded that allowing [the employee] to take leave to attend counseling

sessions was an accommodation that would have enabled [the employee] to perform the essential functions of her job," the District Court wrote.

So, what can an agency learn from a case like this? It's no secret there has been a mental health crisis in workplaces across the country for a while and that since the pandemic, the numbers have shown it's not going away anytime soon.

Rather than end up in court or dealing with the EEOC, a better strategy might be to hone in on the tips FELTG Training Director Dan Gephart offered in the thick of the pandemic:

- Develop clear expectations and agreed upon solutions to meet the goals and expectations of the job.
- Communicate in a clear and concise manner, especially the policies and procedures that may impact their performance.
- Provide respectful, but direct feedback. Also, ask the employee how they prefer to receive the feedback.
- Avoid judgments or assumptions.
- Avoid using language that promotes stigma.

Also, as this case illustrates, just because the employee can get a job done "adequately" doesn't end the story.

The employee's condition deteriorated without the accommodation, something that most employers would be sensitive to regarding a visible, physical impairment.

It sounds basic, but it's worth remembering that the law doesn't make a difference between physical or mental disabilities when it comes to employers' accommodation duties.

If an employee needs time off to attend mental health counseling sessions, there's a good case that it will be a request for reasonable accommodation under the Rehabilitation Act, and an agency would make a smart bet to treat it as such. Info@FELTG.com

New FELTG Class Alert!

Advanced MSPB Law

Do you want to take your knowledge and understanding of MSPB law to a new level? Have you let your skills languish while the Board sat empty and quorum-less for several years? Want to confidently address the knotty Federal employment law issues that challenge even the most experienced advisors?

FELTG's three-day **Advanced MSPB Law: Navigating Complex Issues** is an interactive virtual training event – led by our top team of MSPB practitioners and topic authors –will not only meet those needs, but help you reach the top of your game.

Join us for one, two, or all three days of training. Class will run from 1-4:30 pm each day.

Tuesday, October 31

Discipline Issues: Understanding the nexus requirement; progressive discipline; alternative discipline; comparator employees; and more.

Wednesday, November 1

Performance and Probationary Challenges: Writing effective performance standards; managing up-and-down performance; understanding and utilizing employee probationary periods, and more.

Thursday November 2

Mixed Cases; Reasonable Accommodation: Reasonable accommodation and the intersection with performance and conduct; mixed cases; and more.

Be ready for a deep dive into high-level MSPB discussions!