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

FELTG Newsletter | Vol. XV, Issue 12 | December 6, 2023

Please Enjoy Our Holiday Edition

It's hard to believe we're just a few short weeks away from the end of the year – and what a year it's been. We have been busy with virtual training, but also back on the road quite a bit. Some of my favorite onsite trainings have been in locations including Yellowstone, Monterey, Coeur d'Alene (pictured here), Anchorage, and Walla Walla, just to name a few.

We already have a lot on the calendar in 2024, so check it out. Or, if you'd like one of our instructors to come to you, we can send you details on how to make that happen. Email us at Info@FELTG.com. Thanks for being such wonderful Federal employees, FELTG readers. We wouldn't be here without you.

For this last full newsletter of 2023, we are embracing a holiday theme with articles on bad behavior at parties, allegations of holiday decorations being discriminatory, gift-giving ethics, and settling grievances, along with a letter to Santa.

Have a happy holiday season,

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:

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

Misconduct Investigations: Get Them Right From the Start
January 17

Calling All Counselors: Initial 32-Hour Plus EEO Refresher Training
January 29-February 1

Feds Gone AWOL: What to Do When Employees Don't Show Up
February 1

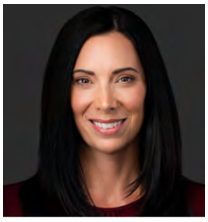
Everything You Need to Know About the Pregnant Workers Fairness Act
February 7

UnCivil Servant: Holding Employees Accountable for Performance and Conduct
February 14-15

Navigating Complex Hostile Work Environment Harassment Cases
February 20

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.

Nude Photos, Fake Feces, Party Rumors: A Few of MSPB's Holiday No-Nos
By Deborah J. Hopkins



As December rolls along, many of you will be attending or participating in holiday parties or gift exchanges. To kick off the holiday theme of this month's newsletter, I wanted to share three lessons about employee (mis)conduct related to the holidays.

Inappropriate use of a photo taken at a Christmas party was "abusive and offensive."

The appellant, an M-5 supervisor at the Tennessee Valley Authority, was suspended on multiple charges. One charge included showing a female subordinate employee an inappropriate photograph. The photograph was taken of the subordinate, without her knowledge, during a Christmas party. That was only part of the problem. The appellant then took the subordinate's head from the photo and attached it to a centerfold picture of the body of a naked woman, and showed the photo to the appellant, who testified that she was humiliated and embarrassed by the incident. MSPB held that this incident, along with others discussed in the case, amounted to "a course of abusive and offensive behavior which, if directed in large part to female employees, is discriminatory." *Hayes v. TVA*, 4 MSPR 411, 414 (Dec. 16, 1980).

A Christmas gag gift can amount to disrespectful conduct.

The appellant, a WG-9 painter at the Department of Veterans Affairs, brought a red Huggies box to work and placed it on his supervisor's workstation. The box contained what appeared to be a soiled diaper. The agency drafted the following charge:

> On January 5, 2012, three individuals saw you put a red Huggies diaper box on the desk of Supervisor Mark Treadway. The box contained a baby diaper that looked like it had feces in it. According to the witnesses, you made the following statements, "Do you think this would make Mark mad" and "I hope it does."

The "feces" was actually a candy bar that had been made to look like feces. The appellant testified it was a Christmas gag gift he had received from his mother and his sister, although witnesses did not corroborate that statement.

The supervisor was troubled with what he found at his workstation. He thought the feces was real. He called the agency's Infectious Disease team to dispose of the box. The Administrative Judge found the appellant's behavior amounted to disrespectful conduct. *Franklin v. VA*, AT-0752-12-0454-I-1 (Jul. 23, 2012)(ID).

The Whistleblower Protection Act does not protect disclosures based on rumors of events at holiday parties.

In this case, the appellant, a GS-12 correctional program specialist/special investigative agent at the Federal Bureau of Prisons, asserted he heard a rumor from other employees that there had been a fight during the institution's holiday party, which he had not attended. He reported the rumor, which included an allegation that the associate warden had been involved in the altercation, to the agency's executive staff. When he was disciplined for conducting an unauthorized investigation, misuse of position, and lack of candor, he claimed whistleblower reprisal, but the MSPB found the disclosure was not protected because "when the appellant made the disclosure, it was based on mere rumors, and he did not even know who allegedly had been involved." *Johnson v. DOJ*, 2007 MSPB 42, P14 (Feb. 6, 2007).

Have a wonderful holiday season, FELTG readers, and let's all remember to make good decisions out there. Hopkins@FELTG.com

The Good News: A Letter to Santa 2023
By Ann Boehm

Dear Santa:

I hope you've had a wonderful 2023. Are the elves pushing for a hybrid environment? I hope the reindeer are not working remotely! Especially not on December 24, because that would be a real problem!

My year has gone well. I have done more in-person training this year, which is fun. Remote still works too.

I have been behaving. But Congress – not so much. More on that in a second.

I am working hard on writing efficiently and effectively, so I am going to put my requested Christmas items in order of importance.

1. A pony.

I really feel like it's only a matter of time until a pony appears at my house on Christmas!

2. A budget from Congress.

Actually, several budgets are needed in 2024. Some need to pass in January. Some need to pass in February. And, oh yeah, how about a budget by September 30 for a change? (I realize this one may be tougher than the pony.) Please don't let the naughty behavior of the Members of Congress hurt the good Federal employees who are tired of budget deadline drama.

3. Revision of all collective bargaining agreements (CBAs) that have Performance Improvement Plans (PIPs) lasting more than 30 days. (I am really asking for a lot this year. I know that!)

I feel sad when I see a CBA with a 90-day PIP. If 30 days works for the Merit Systems Protection Board, why should CBAs ever require more than 30-day PIPs? Help the unions understand this, please!

4. *Hatch Act* compliance by all Federal employees.

It's a big election year. And it's going to be ugly. Federal employees need to remember that the *Hatch Act* prevents certain political activities, because they work in a *merit* system. The Office of Special Counsel will send out lots of guidance. Read it! For the good of the public, Federal employees need to abide by the *Hatch Act*'s requirements.

5. Effective communication in the workplace.

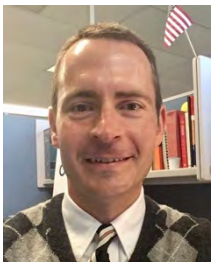
Please help managers communicate effectively with employees, and employees voice appropriate concerns to managers. Also, help managers be aware they need to inform advisors about problem employees as soon as they sense a problem. And advisors need to listen to the managers' concerns and do their best to help – not just provide a knee-jerk "no, we can't do that" reaction.

Santa, I said that my list was in order of importance, but then I realized what I really want for Christmas. Please help the candidates for President, members of Congress, the media, and the public appreciate the hard work and truly public service provided by Federal employees. There are so many amazing people working in many different capacities in our Federal agencies. With the exception of a few bad eggs (that we at FELTG try to help managers and advisors handle appropriately), we have an amazing Federal workforce! And you know what Santa – that's Good News.

Merry Christmas! Happy New Year!
Boehm@FELTG.com

Join Ann Boehm on Jan. 17 at 1 pm for **Misconduct Investigations: Get Them Right From the Start**, a two-hour virtual training event. Register now.

Spread Cheer Wisely and Avoid Discrimination by Decoration
By Frank Ferreri



It's that time of year again. Office workers across the world, including the Federal government, will soon bring merriment to their cubicles, quads, and corridors with lights, snowpersons, trees, and other indicia of "the season."

While some Yuletide cheer is appropriate, welcome, and legally acceptable around the holidays, getting too zealous in workplace decorations can earn more than a lump of Title VII coal from the EEOC or a court.

In terms of what the law requires, whether harassment on the basis of religion is sufficiently severe to trigger a violation of Title VII must be determined by looking at all the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *See Harris v. Forklift Systems*, 510 U.S. 17 (1993).

To establish a case of hostile environment harassment on the basis of religion, as detailed in *Humphrey v. USPS*, EEOC App. No. 01965238 (Oct. 16, 1998), a complainant must show all of the following:

1. She was a member of a statutorily protected class (here, religion).
2. She was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class.
3. The harassment complained of was based on the statutorily protected class.
4. The harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment.

These EEOC and court decisions provide guidance to ensure the holidays are merry, bright, and nondiscriminatory.

Decision: *Sturman v. FAA,* EEOC App. No. 0120072361 (Oct. 31, 2007).

Facts: An air traffic control specialist claimed he was discriminated against on the basis of religion (Jewish) when a facility manager allowed her staff to hang Christmas decorations during business hours but did not hang Chanukah decorations. Staff also downloaded Christmas songs to her computer during business hours. The specialist submitted pictures of a workplace with a Christmas tree, a Christmas wreath, garland, lights, and other Christmas holiday decorations.

Ruling/analysis: The specialist's case "failed" on the question of whether the atmosphere at work had the purpose or effect of unreasonably interfering with the work environment.

The EEOC noted the decorations -- a Christmas tree, wreath, icicle lights, garland, and Santa Claus -- were "predominantly secular" in nature. Although the tree "seemed to have had a number of ornaments which featured an angel," the overall display was not religious, since "there was not a nativity scene, nor was there any other decoration which was religious in nature."

The EEOC also noted that although Christmas trees are commonly associated with the Christian holiday of Christmas, "it has become a prevalent practice for many people and businesses to decorate evergreen trees, and feature lights and garland, as an expression of 'the winter holiday spirit' in a very secular sense."

* * *

Decision: *Garry H. v. FAA,* EEOC App. No. 0120181570 (Sept. 24, 2019).

Facts: In one of six sections of a control room, an air traffic control specialist's coworker put up a sign that read "Happy Hanukkah," a silver and blue garland along with stars of David on the lights; a sign that read "Happy Kwanza" [sic]; and a sign that said, "Santa is coming in [x number] of days," along with Christmas lights and wrapping paper.

The specialist claimed the agency discriminated against him on the basis of religion (Jewish) when all non-Christmas decorations were taken down while Christmas decorations throughout the facility stayed up.

Ruling/analysis: The specialist did not prove the agency subjected him to discrimination. The decorations the specialist complained about were secular decorations that were permitted throughout the Federal government and work environment.

"The record shows the holiday decorations … consisted of a sign that said, 'Santa Clause [sic] is coming in [x number] of days,' Christmas lights and wrapping paper," the EEOC wrote. "According to the U.S. Supreme Court, such holiday decorations amount to secular symbols rather than an expression of a religion and displaying them in the federal workplace does not violate the establishment clause of the First Amendment."

The EEOC also explained that Tile VII does not require a public or private employer to remove holiday decorations or add holiday decorations associated with other religions.

* * *

Decision: *Ian S. v. IRS*, EEOC App. No. 0120160622 (Apr. 27, 2018).

Facts: A senior individual taxpayer advisory specialist alleged that the agency discriminated against him on the basis of religion (Jehovah's Witness) when his manager would not allow him to eat at his desk so that he could avoid exposure to holiday decorations in the break room, where a tablecloth and two poinsettias offended his religious beliefs.

Ruling/analysis: The holiday decorations at issue amounted to secular symbols rather than an expression of a religion, and displaying them in the federal workplace did not violate the establishment clause of the First Amendment.

* * *

Decision: *Moore v. AAFES*, EEOC App. No. 01933575 (Mar. 16, 1994).

Facts: A warehouse worker alleged he was discriminated against on the basis of religion (non-Christian) when Christmas music was played over the public address system where he worked.

Ruling/analysis: Even if the worker could prove that there was a deliberate intent on the part of the agency to harass him by playing Christmas music, it still would not rise to the level necessary to prove discrimination. This was because the harassing music complained of was played only on two days and for relatively brief periods of time.

* * *

Decision: *Lurensky v. FERC*, 167 F. Supp. 3d 1 (D.D.C. 2016).

Facts: The employee, who was a Jewish woman in her 60s, alleged the agency subjected her to disability discrimination when it denied the employee's request to remove a Christmas garland off of a handrail in the lobby of the building where she worked.

Ruling/analysis: "Though a Christmas garland may have annoyed or inconvenienced the plaintiff, this allegation … fails to state a claim for discrimination or retaliation because it does not amount to an adverse employment action," the court reasoned, since the garland did not affect the terms of employment and the decision to

leave it in place was "not sufficiently adverse to chill a complainant's exercise of her rights."

* * *

Decision: *Plotkin v. Shalala*, 88 F. Supp. 2d 1 (D.D.C. 2000).

Important facts: An HHS scientist, who was Jewish, complained about the display of "Christian Christmas decorations" in the workplace prior to being terminated.

Ruling/analysis: The employee's concession that she was dismissed because of her alleged conduct and that her employer's decision to terminate her employment was made before she voiced her concerns about the office Christmas decorations "effectively dispose[d] of" her claim of religious discrimination.

* * *

Decision: *Spohn v. DVA*, 2000 WL 1459981 (S.D.N.Y. 2000).

Important facts: A VA employee, who was Catholic, alleged the agency violated his rights by displaying symbols of the Jewish religion, but not the Christian religion, in public areas of the hospital during two December holiday seasons. It appeared that "menorahs were displayed along with toy soldiers, Christmas trees, and Santa Clauses," which the employee considered secular symbols, as well as "posters celebrating Kwanza" [sic] and "signs mentioning Muslim prayer services."

The employee sought to have the court order a nativity be added to the VA's decorations.

Ruling/analysis: Because the employee did not allege specific facts about the holiday displays, the claim was dismissed. However, along the way, the court noted that holiday displays including religious as well as secular symbols of the holiday season have been upheld but displays of religious symbols standing alone in locations associated with core governmental functions have been struck down.

The court also explained that while the agency could not be prohibited from displaying a creche in addition to a menorah in an "appropriate setting," there was no authority for the proposition that such a pairing was constitutionally required.

"This Court cannot order the Center to include a creche in its holiday display," the court pointed out. In addition, citing *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), the court highlighted that "Chanukah, like Christmas, is a cultural event as well as a religious holiday" in that "[j]ust as some Americans celebrate Christmas without regard to its religious significance, some nonreligious American Jews celebrate Chanukah as an expression of ethnic identity, and 'as a cultural or national event, rather than as a specifically religious event.'"

What's the takeaway from cases like these? A workplace that stays secular and celebrates the "American cultural" version of the holidays in its decorations will keep the season jolly and away from Title VII troubles. But for everyone's sake, leave Mariah Carey in the earbuds. Info@FELTG.com

Virtual Training on Discovery

Discovery Done Right: Avoiding Sanctions Before the MSPB and EEOC, a 3.5-hour virtual training event on Dec. 12, offers expert guidance on all forms of written discovery – interrogatories, document requests, depositions, and requests for admission.

Learn how to effectively request and respond to requests for written discovery, recognize actions that could lead to sanctions, and much more. **Register now.**

Ask FELTG: Are there restrictions on gift-giving between Feds who are friends?

This question came into the Ask FELTG mailbag: I know there are prohibitions on gift-giving when it involves Federal employees, but are there any restrictions on gift-giving if two people who are friends also happen to be Federal employees?

The source for all things gift-related is 5 CFR Part 2635, and Subpart C specifically relates to Gifts Between Employees. The main area of concern involves gift-giving when there's a supervisor-subordinate relationship, and/or a discrepancy in pay. According to § 2635.302, an employee may not -- directly or indirectly -- accept a gift from an employee receiving less pay than himself unless:

(1) The two employees are not in a subordinate-official superior relationship; and
(2) There is a personal relationship between the two employees that would justify the gift.

Unless the friends work for the same agency, and one was the superior of the other, there is probably not an ethical concern about gift-giving if there are no ulterior motives.

If the two of you work for the same agency and there's a superior-subordinate relationship, you'll probably want to check with your agency's Ethics office or Office of General Counsel if you have any concerns. Info@FELTG.com

Have a question? Ask FELTG.

The information presented is for informational purposes only and not for the purpose of providing legal advice. Contacting FELTG in any way/format does not create the existence of an attorney-client relationship. If you need legal advice, you should contact an attorney.

Gather Around the Festivus Pole and Settle Up Your Grievances
By Dan Gephart

There is one particular holiday taking place this month that seems especially apt for the current state of labor-management relations in the American workplace. Of course, I'm talking about Festivus, the holiday famously celebrated with the "airing of the grievances."

Yes, Festivus is a real holiday. It's been on this Earth as long as your venerable FELTG Training Director. It was created by writer/*Readers Digest* editor Daniel O'Keefe in the 1960s. Thirty years later, his sitcom-writing son Dan wrote the holiday into an episode of Seinfeld, and suddenly there was Festivus for the rest of us.

Back to those grievances. They are responsible for a lot of the work you do and, in turn, a lot of our training. Here's a little secret more people should know: Most disputes in the Federal workplace, whether they start out as grievances, EEO complaints, or disciplinary appeals, settle before they ever get to a hearing.

Settlement seems at odds with the nature of grievances, which immediately put individuals into separate camps (parties), as well as the nature of Festivus, where celebrants wrestle after complaining about how much they disappointed each other. Yet, settling makes sense. A lot of sense.

It allows the aggrieved to return to work in a positive manner, helping productivity, teamwork, and morale. The flip side is having a case drag on, leaving an unpleasant pallor over the work unit. And there's a financial benefit to settlement, too. Direct costs of formal complaints and litigation include investigation fees, deposition/copies, meeting rooms, travel expenses, damages, back pay, and attorney fees.

You can't control whether the other party wants to settle. But with all the benefits of settlement, there is little incentive to not try. Here are some things to consider, whether or not you celebrate December 23 around an unadorned aluminum pole.

- Suggesting settlement does not mean that there is a flaw in your case. The settlement has no direct tie to liability or admissions of wrongdoing. It's simply the most efficient and effective way to handle a dispute and allows you to get back to focusing on your agency's mission.
- When you're ready to discuss settlement, consider the physical environment, as Michael Wolf, director of the Federal Labor Relations Authority's CADRO Unit, told us earlier this year.
  - The location should be reasonably available and accessible.
  - Cost should not be a factor in whether a party is adequately represented.
  - The space should not create a perception of favoritism or bias.
  - The need to work outside of "normal" business hours might be a factor.
  - No party should feel unfairly disadvantaged by the physical environment, and it should be compatible with the mediator's style, methods, and skillset.
- Be open to ideas. In fact, brainstorm settlement ideas with the other party. Give yourself and the other party space to develop unique and different solutions, focusing on those that provide mutual gain.
- Be careful to avoid these barriers to settlement success:
  - **Solving their problem is *their* problem.** If you're concerned only about your own interest, you will not be successful in finding an effective settlement.
  - **Premature judgment.** Don't dismiss ideas out of hand. Explore and see where you can take them.
  - **Searching for a single answer.** Don't be afraid to widen the options for a solution.
  - **Assuming a "fixed pie."** You're looking for a solution that works for all parties. It isn't time to be measuring who gets more or less.
- Before you draft a settlement agreement, think through what you want to accomplish, by asking yourself these questions:
  - What are the basic "terms of the deal"?
  - How do I best ensure the performance of the terms?
  - How do I protect the agency if the other side fails in the performance of the terms?
- Remember: Clean record settlements are back on the table. Executive Order 14003 revoked a previous EO that banned clean record agreements. You don't have to do clean record settlements, but be aware that it is an option.
- If you're going to write a settlement agreement, remember that it must be enforceable – and signed by someone who has the authority to enforce it. For useful guidance, register for Drafting Enforceable and Legally Sufficient Settlement Agreements on April 10.

In you follow these considerations and end up with an effective settlement, you have every right to declare it a Festivus miracle. But like all Festivus miracles, it's easy to explain: You took the most direct and cost-efficient path to an effective and productive workplace. Settling a workplace dispute is a Festivus-worthy "feat of strength."

Regardless of which holidays you celebrate – or don't celebrate -- I hope you have a joyous and restful end to the year. Gephart@FELTG.com