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

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Does Workplace Emoji Use Make You 😩?

I recently read an article in *The Atlantic* about emerging litigation over the increasing use of emoji (where I also learned the plural of emoji is "emoji") in the professional world. From allegations of emoji use leading to insider trading to contract disputes over emoji interpretations, lawsuits involving emoji are at an all-time high – and some involve BIG money.

I searched the annals of EEOC, MSPB and FLRA case law and found cases involving uses of emoji including 💩, 😘, 👋, 😜, 😉, 😳, 😡, ❤️💛🖤🤍, and more. Only two EEOC cases contain the word emoji, and about 20 MSPB decisions (all initial decisions) contain the word. Emoji have not yet made their way into FLRA cases, but they undoubtedly will.

The law evolves over time. A dozen years ago, the word emoji was not commonly used, let alone in litigation. As with all topics impacting the Federal workplace, FELTG stays on top of it so you'll be informed on the most important emerging issues. Stick with us!

This month's newsletter discusses the state of the civil service, medical inability to perform, the "severe or pervasive" standard in harassment cases, and workers' compensation overpayments.

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:

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

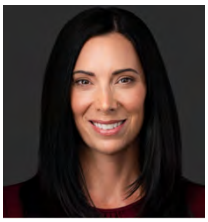
Navigating Complex Hostile Work Environment Harassment Cases
February 20

Drawing the Line: Union Representation or Misconduct
February 22

Workplace Investigations Week
March 4-8

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.

The State of the Civil Service: 2024 Edition
By Deborah J. Hopkins



With the start of another year, it's time for our annual update on what's happening in the Federal employment law agencies most relevant to FELTG readers. Let's get right to it.

Merit Systems Protection Board

Isn't it wonderful to have a functioning Board? Nearly every morning, I check to see what new cases have been issued. More often than not there's something new to read. According to recent case processing data, the Board issued 2,176 decisions between March 2022 (when the quorum was restored) and Dec. 31, 2023. Of those, over 2,000 were part of the original 3,793 in the case inventory (what we at FELTG have commonly referred to as the backlog) the Board inherited following 5-plus years without a quorum.

Despite losing its third Member Tristan Leavitt, whose term expired in February 2023, the Board has been able to function with only two Member positions filled.

As of Jan. 1, the Board had 1,788 cases in its inventory still to be adjudicated. We'll be covering the most relevant new cases during our upcoming MSPB Law Week in April.

As 2024 gets under way, we await a Senate vote on former Special Counsel Henry Kerner, who President Biden nominated last fall to be a Member. The Senate committee has a vote scheduled for January 17 (today!), so we should know more very soon.

The Board has also published interesting reports on topics including sexual harassment and employee perceptions of prohibited personnel practices in the workplace.

Equal Employment Opportunity Commission

The EEOC's focus this past year included the implementation of the long-awaited *Pregnant Workers Fairness Act*, which became law June 27, 2023. This law requires employers to accommodate the pregnancy- and childbirth-related physical and mental limitations of employees in much the same way agencies are required to accommodate disabilities. Regulations are due any day now, so it's a good time to register for Everything You need to Know About the Pregnant Workers Fairness Act on Feb. 7.

Another major case with EEO impact was the Supreme Court's *Groff v. Dejoy*, which raised the standard for an employer to show undue hardship when considering an employee's religious accommodation request. We wrote about that case here.

And finally, the EEOC's Office of Federal Operations (OFO) issued guidance on workplace accessibility. You should take a look to ensure your agency is in compliance.

Federal Labor Relations Authority

The FLRA, much like the MSPB, has a leadership panel, which consists of three political appointees. At the moment there are two Authority Members – Susan Tsui Grundmann and Colleen Duffy Kiko. Last September, Kiko was nominated for another term.

Last week, President Biden nominated Anne Wagner, currently the Associate Counsel at OSC, to the third seat. If her name is familiar to you, it may be because Wagner served as a Member of the MSPB for several years alongside Grundmann. Much like the MSPB, the Authority is able to operate with a two-person quorum, so Grundmann and Kiko are issuing decisions as normal.

The FLRA hasn't had a confirmed General Counsel in longer than I can recall off the top of my head, but there have intermittently

been civil servants who have filled the role in an acting capacity.

A couple of weeks ago, Biden nominated Suzanne Elizabeth Summerlin for the third seat. Now, we await Senate action. The senate committee plans to vote on Summerlin today as well.

The FLRA is experiencing major issues with its annual budget, which is actually lower than it was in 2004, according to GovExec. Its workforce has also shrunk despite the increase in labor management activity in recent years.

While there's emphasis on resolving disputes without time-consuming litigation – check out Dan Gephart's two-part interview with FLRA's Collaboration and Alternative Dispute Resolution (CADRO) Director Michael Wolf here and here – we have to wonder how the agency can continue to serve its mission if its budget doesn't match its workload.

U.S. Office of Special Counsel

Just a few days ago, President Biden sent Hampton Y. Dellinger's nomination to the Senate, asking them to confirm Dellinger as the Special Counsel, and the Senate committee is scheduled to vote today.

Dellinger was nominated in October 2023. His background includes work at the U.S. Department of Justice as an assistant attorney general overseeing the Office of Legal Policy (OLP), and work for the state of North Carolina investigating and working on initiatives to reduce Medicaid fraud and fight political corruption.

According to its 2023 Performance Report, OSC received 4,611 new cases in FY 2023, which represents a 21 percent increase over the average of the previous three fiscal years, and achieved 418 "favorable actions" which is the second highest in the agency's history. "What's a favorable action?" you might ask. We'll tell you when you come to MSPB Law Week.

Also interesting since it's an election year (doesn't it always feel like an election year?), OSC resolved 277 *Hatch Act* cases and obtained three disciplinary actions against Federal employees who violated the *Hatch Act* in FY 2023.

That about does it for now. Keep reading our newsletters and we'll keep you posted as new events unfold. Happy New Year, FELTG readers! I hope it's your best one yet. Hopkins@FELTG.com

Good News: We Answer Your Questions on Medical Inability to Perform
By Ann Boehm

In the past year, I have seen an uptick in questions regarding how to remove an employee based upon medical inability to perform.

Removal based upon medical inability to perform is an effective, and probably underutilized, process. To help you good folks out there, I decided it would be an opportune time to answer some of these questions.

Is a medical inability to perform removal a 5 U.S.C. chapter 75 action?

Yes. A removal for medical inability to perform is an "adverse action," so removal must promote the efficiency of the service. The removal may be appealed to the Merit Systems Protection Board (Board).

Is a Douglas factor analysis required in a medical inability to perform removal?

No. Like a furlough, a removal for medical inability to perform is not disciplinary, so *Douglas* does not apply. *See Brown v. Dep't of the Interior*, 2014 MSPB 40 (*Douglas* analysis not required "because of the nondisciplinary nature of the agency's action.")

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

If Douglas does not apply, how does the agency prove removal is appropriate?

The Board explained in *Brown*, "the correct standard to be applied in determining the penalty for a removal based on [medical] inability to perform is whether the penalty of removal exceeded 'the tolerable limits of reasonableness.'" *Id.*

Um OK, so how do we show removal did not exceed "the tolerable limits of reasonableness"?

The first step is to "prove a nexus between the employee's medical condition and observed deficiencies in his performance or conduct, or a high probability, given the nature of the work involved, that his condition may result in injury to himself or others." *Clemens v. Department of the Army*, 2014 MSPB 14.

Huh?

The Board expected this follow-up question: "In other words, the agency must establish that the appellant's medical condition prevents him from being able to safely and efficiently perform the core duties of his position." *Id.*

What are the core duties of the position?

Clemens is instructive on this point. "The core duties of a position are synonymous with its essential functions, i.e., the fundamental job duties of the position, not including marginal functions." *Id.* The Board relies upon the EEOC's regulations regarding essential functions.

Factors to consider: "the reason the position exists is to perform that function, because of the limited number of employees available among whom the performance of that job function can be distributed, or because the function is highly specialized so that the incumbent is hired for his or her expertise or ability to perform the particular function." *Id.*

What evidence should the agency provide to show the essential functions of the job?

The Board, like the Equal Employment Opportunity Commission, will consider "the employer's judgment as to which functions are essential, written position descriptions, the amount of time spent performing the function, and the consequences of not

requiring the incumbent to perform the function." *Id.*

What are some examples of supporting evidence?

If you haven't figured this out, yet, *Clemens* is a great case to read if you are pondering a medical inability to perform removal. The employee was a supervisory public safety dispatcher who had a significant loss of speech ability after a stroke.

His position description included essential functions of the position related to speech. This included providing "emergency police, fire and medical services to the public by answering emergency 911 calls and responding with appropriate personnel and equipment" and "Advanced Emergency Medical Dispatch Life Support through pre-arrival instruction to callers;" spending "25% of his time on duties related to caller interrogation, including 'crisis intervention with distraught emergency callers during high-risk situations' and 'dispatch[ing] a variety of emergency equipment.'" *Id.* Also, "a knowledge requirement for the position was 'the ability to communicate orally.'" *Id.*

Does the agency have to provide a reasonable accommodation before removing based upon medical inability to perform?

If the employee does not request a reasonable accommodation or desire to return to work, as in *Clemens*, the agency is not obligated to provide an accommodation. If the employee does request an accommodation, the Board would consider a reasonable accommodation, so long as one exists that "would enable the appellant to safely and efficiently perform those core duties." *Id.*

But, to simply prove the charge of medical inability to perform, "the agency is not required to show that it was unable to reasonably accommodate the appellant by assigning him to a vacant position for which he was qualified; whether it could do so goes to the affirmative defense of disability discrimination or the reasonableness of the penalty." *Id.*

What's the Good News here?

The Board has long held that "removal for physical inability to perform the essential functions of a position promotes the efficiency of the service." *Id.* (citing *D'Leo v. Department of the Navy*, 53 M.S.P.R. 44, 51 (1992)). If you have an employee with medical issues legitimately impacting on their ability to perform their core duties, this removal process is one you should contemplate using. Boehm@FELTG.com

Looking for Initial EEO Training or an 8-Hour Refresher Class?

Look no further.

FELTG presents **Calling All Counselors: Initial 32-Hour Plus EEO Refresher Training**, Jan. 29 - Feb. 1.

This engaging, useful, and timely class –is an excellent way to get your 32 hours of initial EEO training.

And three of the days provide opportunities to receive your annual refresher hours. Here's the agenda:

- Monday, January 29: Introduction and Role of the Counselor
- Tuesday, January 30: Theories of Discrimination (8 EEO refresher hours)
- Wednesday, January 31: Interview Skills (8 EEO refresher hours)
- Thursday, February 1: Avoiding Mistakes; Writing the Report (8 EEO refresher hours)

And like all FELTG training, you will receive the most up-to-date guidance and case law. **Register now**.

Determining Hostile Work Environment: Is it Severe? Or Pervasive? Or Neither?
By Dan Gephart

Over the last several years, agencies have paid more particular attention to harassment, including the non-EEO kind. This has led to a greater general awareness of hostile work environment. Unfortunately, while more people are aware of HWE, there are way too many who don't understand exactly what it is.

Much of the misunderstanding is on the part of employees who define the term "hostile" way too broadly, Ann Boehm wrote late last year. However, those who should know better are not immune to confusion when it comes to recognizing and addressing an actionable hostile work environment.

Most EEO and HR professionals can recognize verbal and physical behavior that is unwelcome, and most can discern if the conduct was based on the employee's protected status. But confusion rears it head when discussion turns to the third part of the elements of proof – determining if the conduct was sufficiently severe or pervasive to alter the terms, conditions, and privileges of employment.

There is no simple rule or guideline for determining hostile work environment, as it often depends on the unique circumstances of each case. Here are five points to help you make the appropriate determination.

1. Remember that it's severe *or* pervasive – not *and*.

2. This means a single incident, if severe enough, can create a hostile work environment.

- The EEOC found sufficient evidence to support a finding that a manager came up to the complainant while she was at her workstation, grabbed her around the waist, and kissed her on the neck. *Trina C. v. USPS*, App. No. 0120142617 (2016).
- A male coworker pushed the complainant's hair back and stuck his tongue in her ear. *Hayes v. USPS,* App. No. 01954703 (1999).

3. On the flip side, a single incident that is not severe would not be an HWE. Here's an example from a Supreme Court case:

An employee met with her male supervisor and another male employee to review the psychological evaluation reports of four job applicants. The report for one of the applicants disclosed that the applicant had once commented to a co-worker, "I hear making love to you is like making love to the Grand Canyon." The supervisor read the comment aloud, looked at the employee and stated, "I don't know what that means." The male employee then said, "Well, I'll tell you later," and both men chuckled. The Supreme Court ruled: "Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in employment terms and conditions." *Clark County School District v. Breeden*, 532 U.S. 268 (2001).

4. However, non-severe conduct could create a hostile work environment if it is frequent or pervasive. Some of the actions in *Gillespie v. McHugh*, App. No. 0120080758 (2012), are not severe alone, but when viewed together, it's another story. Over time, the supervisor:

- Told the complaint that she was not an expert on regulatory matters and that the districts didn't come to her for advice.
- Gave the complainant a lower performance rating than she had received previously, and one lower than all other attorneys in her group.
- Told the complainant she was not qualified to be on the Chief

Counsel's Management Partners' Group.
- Told the complainant she didn't know how to brief people.
- Sent an email to a Regulatory Appeals Officer apologizing for inadvertently sending out a draft for others to review, while blaming the complainant for the mistake.
- Chastised the complainant for not volunteering to work on a project.
- Acted in a hostile and demeaning manner towards the complainant during a meeting.
- Accused the complainant of being condescending, rude and in violation of her oversight responsibility.
- Intentionally refused to select the complainant to represent the Office of Counsel at weekly meetings.
  - Blocked an on-the-spot award that a district wanted to give the complainant.
- And much more.

On their own, some of the bullets above appear to be standard supervisory actions. And as we know from the numerous emails we've received (and the article Deb wrote last year), some overly sensitive employees are confusing basic supervisory functions with harassment.

In *Gillespie*, however, the pervasiveness of the evidence along with witness statements led to the EEOC overturning its administrative judge's ruling that sided with the agency.

"It was a very nasty tone," a co-worker testified about one of the meetings. "That's what made me feel sick … And since [the complainant] is a good coworker and team player and has always been helpful, I was thinking, well, how can I reiterate to [the supervisor] that [the complainant] did everything she was supposed to do for my team . . . and make sure [the supervisor] understood that."

In *Gillespie*, the EEOC not only overturned the AJ's decision, but it also found the agency liable. While it directed the agency to secure training for the supervisor, the EEOC also strongly recommended discipline.

5. When making determinations about a hostile work environment, always consider the following:

- Frequency and duration of conduct
- Vulnerability of the victim
- Makeup of the workforce
- Relative positions of the perpetrator and harassed employee

If you're looking for more guidance on hostile work environments, join us on Feb. 20 for the two-hour virtual training Navigating Complex Hostile Work Environment Harassment Cases. Gephart@FELTG.com

What You Need to Know NOW About the PWFA

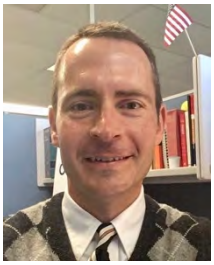
The Equal Employment Opportunity Commission has been accepting charges under the *Pregnant Workers Fairness Act* since mid-2023 and they are expected to release regulations any day now.

Now is the perfect time to get important training on this new law.

The two-hour virtual training event **Everything You Need to Know About the *Pregnant Workers Fairness Act*** will be held on Feb. 7 starting at 1 pm ET. Attend this two-hour class to learn how the EEOC analyzes charges regarding accommodations for employees affected by pregnancy, childbirth, or related medical conditions.

You'll leave the session with everything you need to know about the PWFA and reasonable accommodations for pregnant employees. **Register now**.

5 ECAB Decisions Reveal How Workers' Comp Overpayment Happens
By Frank Ferreri



For a variety of reasons, some benign and others more sinister, Federal employees may wind up on the receiving end of a workers' compensation overpayment. What happens when the Employees' Compensation Appeals Board decides that a Federal worker received a workers' compensation overpayment?

Under the Federal Employees' Compensation Act, and particularly Section 8129, when an overpayment has been made to a Federal employee receiving workers' compensation benefits, an adjustment is made by decreasing later payments to which the employee is entitled. If the worker dies before the adjustment is completed, an adjustment will be made by decreasing death benefits.

Recovery isn't always required. Section 8129 also provides that adjustment or recovery may not be made when both of the following are true:

1. Incorrect payment has been made to a worker "who is without fault"; and
2. Adjustment or recovery would defeat the purpose of FECA or would be against "equity and good conscience."

The following cases show the remedial steps ECAB takes in cases of overpayment.

J.B. and Department of the Army, Combat Developments Experimentation Center, No. 22-1027 ECAB (Nov. 16, 2023)

Alleged overpayment amount:
$169,429.15

How it happened: An operations research analyst received wage-loss compensation for permanent aggravation of major depression and prolonged depressive reaction. For roughly 22 years after being divorced, the worker claimed that he was married, that his spouse did not live with him, and that he made regular payments for her support, and thus, he received an augmented rate of compensation. The worker claimed that he was unaware that his marriage had been dissolved and that his signature on the document associated with the dissolution was a forgery.

ECAB decision: The worker received the overpayment because:

1. Under FECA, a former spouse does not come within the meaning of the term "wife."
2. There was no evidence of any dependent children at the time of the divorce.
3. The worker was not required to pay spousal support.

Thus, from Nov. 20, 1998, through April 25, 2020, the worker received $1,390,519.32 in FECA compensation benefits at the augmented rate but was entitled to only $1,221,090.17 at the basic rate.

Watkins and U.S. Postal Service, 28 ECAB 632 (1977)

Alleged overpayment amount:
$16,150.08

How it happened: A letter carrier who sustained an injury to his right knee received compensation for temporary total disability benefits and concurrently received retirement benefits from the Civil Service Commission. The worker didn't take steps to stop his receipt of dual benefits.

ECAB decision: The worker was given the chance to elect between workers' compensation and civil service retirement benefits for the period from Mar. 1, 1975, through Jan. 5, 1977. Were he to elect retirement benefits, the overpayment amount would be the amount that was paid in

workers' compensation, which was $16,150.08. If he decided on workers' compensation benefits, the overpayment would be the difference between the amount the worker was paid ($16,150.08) and the amount to which he would be determined to be entitled. In that scenario, the worker would also have received an overpayment under the retirement system that he would have to repay.

Smith and Department of Transportation, Federal Railroad Administration, 48 ECAB 132 (1996)

Alleged overpayment amount:
$216,105.25

How it happened: A Federal railroad worker received workers' compensation benefits for a right knee injury he later admitted did not occur as he described in his claim. Instead, the worker "just wanted to get a couple months off to work on [his] home." Following that admission, the worker argued that when he made the statement about just wanting some time off to fix up the house he was "mentally incompetent."

ECAB decision: The incompetence argument fell flat, and ECAB found that the worker knowingly made an incorrect statement that he had injured his knee at work, and accepted payments he knew were incorrect.

C.H. and Department of The Navy, Mare Island Naval Shipyard, No. 08-2426 (ECAB Aug. 14, 2009)

Alleged overpayment amount:
$8,882.61

How it happened: An employee sustained a right knee injury from getting in and out of tanks and walking up and down steps on a deck. In addition to FECA benefits, the carrier also received Social Security benefits as part of his Federal Employee Retirement System retirement package.

ECAB decision: Per FECA Bulletin No. 97-9, the portion of the Social Security benefit the worker earned as a Federal employee was part of the FERS retirement package, and the receipt of FECA benefits and Federal retirement concurrently was a prohibited dual benefit. ECAB ruled that repayment of the overpayment could be accomplished by withholding $550 per month from his continuing compensation.

Borquez and Department of the Air Force, Davis-Monthan Air Force Base, No. 03-1989 (June 10, 2004)

Alleged overpayment amount:
$85,950.76

How it happened: An Air Force employee pleaded guilty to mail fraud to obtain workers' compensation benefits. On that basis, ECAB determined that the worker received an overpayment.

ECAB decision: The overpayment amount was initially calculated at $104,367.25 before deductions of $9,181.07 for the amount of compensation the worker was owed but did not receive for a six-month period and $5,600, which was the amount the worker paid in court-ordered restitution. ECAB upheld the $85,950.76 calculation of the worker's overpayment of FECA benefits.

The lesson: Honesty is the best policy. If you received too much in workers' compensation benefits, report the overpayment. Anyone who tries to secure additional benefits by wrongdoing will eventually face the wrath of OWCP, ECAB, and, possibly, criminal law. Info@FELTG.com

AWOL Alert

Join us on Feb. 1 for **Feds Gone AWOL: What to Do When Employees Won't Show Up**. This 60-minute webinar will deconstruct the mystery behind AWOL, myths and give you effective strategies to use when employees fail to show for work. **Register now**.