Federal Employment Law Training Group

Teaching the Law of the Federal Workplace

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How Did You Spend Presidents Day This Year?

Presidents Day was originally established in 1879 to celebrate George Washington's birthday (Feb. 22, 1732). It has since evolved to celebrate all of our country's presidents.

With how polarized our politics have become, it's hard to imagine all Americans coming together to celebrate all United States presidents and their service to the American people. Did you find a way to celebrate this year?

And, is there anything government-related that's not polarizing? Yes, in fact: The need to stay on top of the latest in Federal employment law. From revisiting existing accommodations to conducting effective workplace investigations, we've got dozens of classes on the schedule to keep you compliant.

Speaking of revisiting reasonable accommodations, we cover the topic in this month's newsletter, along with articles on progressive discipline, medical documentation, and preventing workplace violence.

Take care,

Deb

Deborah J. Hopkins, FELTG President

UPCOMING FELTG VIRTUAL TRAINING

The FELTG Virtual Training Institute provides live, interactive, instructor-led sessions on the most challenging and complex areas of Federal employment law, all accessible from where you work, whether at home, in the office or somewhere else.

Here are some of our upcoming virtual training sessions:

Drawing the Line: Union Representation or Misconduct
February 22

Workplace Investigations Week
March 4-8

Successfully Leading a Multi-generational Team
March 12

Red Light, Green Light: Revisiting Existing Accommodations
March 14

EEOC Law Week
March 18-22

Handling Teleworker Performance and Conduct Challenges
March 20

A Step-by-Step Guide to Arbitration Success
March 26

Managing High-Conflict Personalities in the Federal Workplace
March 27

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.

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Agency's Effective Use of Progressive Discipline is a Textbook Example
By Deborah J. Hopkins

As I make my way through dozens of new nonprecedential (NP) MSPB cases, some grab more of my attention than others. And while NP cases don't really tell us anything new about the law (See 5 C.F.R. § 1201.117(c)), sometimes they're still worth discussing because of the case facts.

Along those lines, the MSPB upheld a recent National Park Service removal, in large part because of the appellant's track record of receiving previous discipline: *Stancil v. DOI*, DC-0752-17-0153-I-1 (Jan. 30, 2024) (NP). On Nov. 21, 2016, the agency removed the appellant for failure to follow her supervisor's instructions, citing three specifications:

a) The appellant failed to attend a meeting scheduled for her return from a 14-day suspension on June 20, 2016.
b) The appellant failed to attend a standing biweekly update meeting on June 21, 2016.
c) The appellant failed to attend a webinar meeting on June 30, 2016, as ordered by her supervisor.

In justifying the removal, the agency relied on the fact that, among other factors, it had disciplined the appellant twice previously for the same type of misconduct:

1. On Nov. 20, 2015, the appellant received a letter of reprimand for four instances of failing to follow her supervisor's directions to attend meetings; and
2. On June 5-18, 2016, the appellant served a 14-day suspension for five instances of failing to follow her supervisor's instructions to attend meetings.

The appellant raised multiple affirmative defenses including whistleblower reprisal, however, the Board held the agency supplied clear and convincing evidence it would have removed the appellant even absent her protected activity. According to the Board:

> We find that the deciding official's principal motivation for removing the appellant was her unwillingness to change her behavior despite receiving progressive discipline. In particular, the deciding official testified that he had hoped the use of progressive discipline would change the appellant's behavior and cause her to recognize that she needed to follow her supervisor's directions to attend meetings. HT at 96 (testimony of the deciding official). He further testified that he thought that the appellant's continued failure to follow her supervisor's instructions was flagrant and that he felt there was no other choice but to remove her.

Id. at 16.

Progressive discipline is something we teach during MSPB Law Week (next held April 15-19) as a tool to (hopefully) correct an employee's misconduct. If it doesn't have its intended effect, it provides the agency with a solid basis to support a removal action.

Take a bow, NPS, for showing the FELTG world a textbook use of progressive discipline. Hopkins@FELTG.com

Handling Telework Conduct and Performance Challenges

Telework isn't for everyone. Join FELTG on March 20 for the 90-minute virtual training **Handling Telework Conduct and Performance Challenges**. You'll receive the tools for swiftly and effectively addressing these challenges regardless of where the employee is doing – or NOT doing – his work.

Register now.

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Good News: We Answer Your Questions About Medical Documentation
By Ann Boehm

I heard from some readers that last month's article with Q & As on medical inability to perform removals was timely. Yay! I also had some follow-up questions regarding medical documentation. No time like the present to address those issues.

If an agency is considering a removal for medical inability to perform, who may have access to medical documentation?

Agency employees, such as reasonable accommodation coordinators or health officers, are often reluctant to share medical documentation with supervisors or other decision-makers. Their instincts may be noble, but also incorrect.

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

A supervisor cannot make a decision about a medical inability to perform without, well, knowing about any medical issues and the impact of those issues on the employee's ability to perform the essential functions of the job. So, what can be shared?

Our friends at the EEOC have guidance on their website about the confidentiality of medical documentation and who can access that information.

This EEOC guidance explains "[t]he ADA requires employers to treat any medical information obtained from a disability-related inquiry or medical examination (including medical information from voluntary health or wellness programs), as well as any medical information voluntarily disclosed by an employee, as a confidential medical record. Employers may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA."

How is an agency supposed to store a confidential medical record?

It is very important for an agency to properly store confidential medical records. The ADA addresses this, and agencies can be liable for violating this statutory language: "information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms *and in separate medical files* and is treated as a confidential medical record." 42 USC 12112(d)(3)(B) (emphasis added).

Note the emphasis added here: Do not store confidential medical information in a disciplinary or other personnel file.

What about HIPAA – the Health Insurance Portability and Accountability Act of 1996? Does it apply?

Since everyone who has ever been to a medical professional is acutely aware of the privacy protections under HIPAA (forms, forms, and more forms), there's a belief that HIPAA applies to employers. But nope, that's not the case.

For this, we turn to our friends at the Department of Health and Human Services for assistance (they are the HIPAA people).

"The [HIPPA] Privacy Rule does not protect your employment records, even if the information in those records is health-related. In most cases, the Privacy Rule does not apply to the actions of an employer." But HIPAA does apply to health care providers. HHS explains, "if your employer asks your health care provider directly for information about you, your provider cannot give your employer the information without your authorization unless other laws require them to do so."

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Also remember this: You do not need the employee's entire medical file – just information related to the employee's medical inability to perform. Diagnosis, prognosis, and functional limitations should be the focus.

It's important to properly handle confidential medical information, but it's also important to have access to that information in a medical inability to perform case. There is a lot of solid guidance out there from the EEOC and HHS – and that's Good News.
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FELTG's Supervisory Webinar Series is Back!

Being a Federal supervisor is a demanding job. FELTG's annual supervisory webinar series aims to make the job a little less challenging, while providing you the guidance and tools to understand the changes in the law and the latest workplace developments.

Managing the Federal Workplace in 2024: Dos and Don'ts for Supervisors offers five unique fast-paced 60-minute sessions.

Join us for one or more.

April 9: Handling AWOL and Failure to Follow Leave Procedures

May 7: How to Use a PIP in 2024

June 4: Coaching for Individuals and Teams – Tips for Supervisors

July 17: Providing Effective Reasonable Accommodations in 2024

August 6: The Union Doesn't Get to Attend Every Meeting

The sessions are taught live by FELTG's experienced instructors AND you'll have the chance to get your questions answered in real time.

Register now for Early Bird pricing and group discounts.

Violence Prevention Measures Necessary in These Dangerous Times
By Dan Gephart

If it feels like a dangerous time for Feds, that's because it is. Attorney General Merrick Garland warned earlier this year about a "deeply disturbing spike" in threats against Federal workers.

A few weeks after Garland's announcement, the unimaginable happened. A 32-year-old man killed and decapitated his father in their Bucks County, Pa. home. The man then posted a 14-minute YouTube video in which he held up his father's decapitated head and called him a traitor. Why, according to the son, was the father a traitor? Because he was a Federal employee. The man then urged others to commit similarly violent acts against government officials. Police recovered a USB device that allegedly contained pictures of Federal buildings and instructions on how to make an explosive device.

Meanwhile, it's election season when the discourse about Federal employees often turns ugly. This year, the rancor is uglier. It's also quite dangerous. It was this election season, after all, when a major presidential candidate, who has since dropped out, promised, if elected, to "start slitting throats" in the Federal workplace.

We don't want to be alarmist, but we do want to ensure your agency is as prepared as possible if violence shows up at the office, whether it's caused by a current or former employee, a family member of an employee, a customer, or someone unknown to the agency.

FELTG instructor Shana Palmieri provides the following guidance (and much more) during her Assessing Risk and Taking Action: Threats and Violence in the Federal Workplace training (next held on April 3.)

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[**Editor's note:** To have Shana teach this class directly to your agency, contact Info@FELTG.com.]

You should have a set of policies and procedures in place, and they should be accessible to all employees. Those policies and procedures need to include:

- How the agency handles any incident of threatening or inappropriate behavior.
- The process for reporting the behavior (incident reporting).
- How the agency handles each type of violence.
- Training that will be provided to staff.
- The assessment protocol once an incident report has been submitted.
- Who is responsible for the assessment process.
- Who is responsible for the development of the management plan.
- How staff will be notified of the management plan if there is a potential risk.

You should also have a prevention strategy that includes:

- An effective incident reporting process. This process should encourage employees to submit concerns.
- A relationship with local law enforcement. Does your agency receive reports from local law enforcement of potential risks within the community?
- Effective protection. Physical security alarm systems, security staff, building access, sign-in processes for the general public.
- An effective automated warning system.

Another key component of prevention strategy is take all threats of violence seriously. And take immediate action when those threats come from current employees. Remember, a threat of violence *is* misconduct. Work your way through the *Douglas* factors, of course, and determine whether the threats warrant a suspension or removal.

There are numerous cases where removal for threats have been upheld – even as a first offense. In *Robinson v. USPS,* 30 M.S.P.R. 678 (1986), the MSPB found an employee's verbal threat to a supervisor warranted removal despite the employee's lack of prior discipline and four years of service. Per the Board: Such behavior affects the agency's obligation to maintain a safe workplace for its employees, thus impinging upon the efficiency of the service.

The Federal Circuit echoed those thoughts in 2010 and reiterated them more recently in *Jolly v. Department of the Army*, No. 2017-1919 (Fed. Cir. Sept. 11, 2017):

"Where an employee makes 'threats ... against her supervisor [that are] unprofessional and inappropriate, and . . . they adversely affect the work atmosphere,' the penalty of removal is 'within the permissible range of reasonableness.'"
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Succeeding in Arbitration

A **Step-by-Step Guide to Arbitration Success** will take you through the various stages of arbitration and identify the key actions to a successful result. This two-hour virtual training event takes place on March 26. Attend and learn how to:

- Select the best arbitrator for your case.
- Improve your presentation throughout all phases of the arbitration process.
- Distinguish between litigation before an arbitrator and other administrative and court hearings.

Register now.

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When a New Supervisor Revokes Employee's Telework Accommodation
By Deborah J. Hopkins

When it comes to disability accommodation, there is no shortage of pitfalls to avoid. And there is one area we constantly hear about from FELTG readers, and that's the topic of revisiting – or revoking – an employee's existing reasonable accommodation, particularly when a new supervisor takes over.

One of the cases we discuss in detail in some of our trainings on revisiting existing accommodations (next offered as the 60-minute webinar Red Light, Green Light: Revisiting Existing Reasonable Accommodations on March 14) is *Sandra A. v. Navy*, EEOC App. No. 2021002131 (Sept. 16, 2021), *request for recon. denied*, EEOC Req. No. 2022000276 (Mar. 7, 2022).

In this case, the complainant, a technical editor, was granted an accommodation of full-time telework due to her irritable bowel syndrome (IBS). As a teleworker, she performed her job tasks successfully for several years. Working at home, according to the case, allowed the complainant to "have a low-stress environment with a consistent, regular schedule where [she] could have greater control over [her] IBS symptoms." *Id.* at 3.

In the spring of 2018, a new supervisor took over and revoked all telework agreements in the complainant's department. The complainant informed the new supervisor her telework was an accommodation for her disability and the telework revocation would require her to use leave to accommodate her medical restrictions.

The complainant renewed her formal request for telework and provided supporting medical documentation. She was denied. The agency instead granted the complainant "frequent and prolonged bathroom access as needed." *Id.* at 4.

The complainant then explained if frequent and prolonged bathroom breaks were permitted, she would only be able to work 20 to 30 hours a week onsite, while she would be able to put in a full 40-hour week if she were allowed to telework.

The complainant's medical documentation noted her condition often required an unpredictable and sudden need to use the restroom. Her "functional limitations have resulted in situations that are easy to take care of if working from home but can be difficult and misunderstood in a professional environment." *Id.* at 5.

The documentation also noted that if the complainant was required to work onsite, she needed use of a private restroom. The agency instead provided access to a shared restroom.

Because her telework was revoked and she was not provided with a private restroom, the complainant was not able to come to the worksite. Because of this, she resigned approximately nine months after her telework was revoked.

Upon review of the appeal, the EEOC found the agency failed to provide a reasonable accommodation because the shared restroom was not effective. In addition, while the agency claimed the complainant's position was not eligible for telework, the fact that the complainant had successfully worked from home for more than two years undermined the argument.

The EEOC also found the complainant's resignation amounted to a constructive discharge because "a reasonable person in Complainant's situation would have found the Agency's actions intolerable." *Id.* at 13.

Revisiting existing accommodations is sometimes necessary – but when an agency changes an accommodation that's been working, it almost never ends well for anyone. Hopkins@FELTG.com

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