Federal Employment Law Training Group
Training By Professionals For Professionals

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**Introduction**

A couple of days ago I dropped by a weekend-only farmer's market to do some shopping. It was one of those San Francisco uppity-snuppity markets that prides itself on selling only "locally-sourced" produce, the kind that foodies start salivating over even before they get there. As I was heading out with my bag of fresh-picked veggies, I overheard a woman who was just walking in with her family say, "Remind me to pick up some bananas." As bananas are grown no more than 18 degrees of latitude from the equator, and as we sit at about the 37th degree of latitude here in San Francisco, I'd have to conclude that this lady does not have a complete grasp of the concept of "locally sourced." Lacking a complete grasp of some basic concepts also could be said for some of our legislators on Capitol Hill. One of the foundational aspects of a civil service is the protection of employees from unfair treatment by their supervisors, guaranteed through the strict application of due process and multiple levels of review and appeals. Yet today we have pending legislation that would so undermine this basic precept as to make it almost meaningless. But maybe its time for a change. Who says that a civil servant should be protected from managerial mistreatment? Maybe I've been at this too long, and it's actually these young whipper-snappers who are running for President who know the better way. See what you think after you read our article below that summarizes a bill introduced this spring by Senator Marco Rubio. And while you're doing that, I'm going out to see if I can find some banana seeds.

Wm B Wiley

William B. Wiley,
FELTG President

## UPCOMING WASHINGTON, DC SEMINARS

***Employee Relations Week***
July 27-31

***MSPB Law Week***
September 14-18

***EEOC Law Week***
September 21-25

***Absence & Medical Issues Week***
September 28 - October 2

## WEBINARS ON THE DOCKET

**The Truth About Charges: Drafting Appeal-Tight Disciplinary Documents**
July 23

**Current Trends in Reasonable Accommodation: What to Emulate and What to Avoid**
August 27

**Gender Stereotyping: Keeping it Out of Your Agency**
September 17

**Handling Within-Grade Increases: Eligibility, Denials and Appeals**
October 22

***We've "Gotcha" Now – Discipline in the Public View***

**By Barbara Haga**

Since the last column was published four weeks ago just how many articles have there been about firing the Director of OPM because of the hack of personally identifiable information from the OPM system(s)? I googled "OPM Director should be fired" and found pages of titles that included "Lawmakers demand OPM's chief's resignation" in the Federal Times to "Oversight chair wants officials fired over hack" from www.thehill.com to "U.S. Senator to Cavuto: I Was Hacked, OPM Head Must Be Fired" on Fox News Insider. Even Harvard got in on the act picking up a blog posting titled "Should the director of OPM be fired over its massive data breach?"

It's one thing to call for dismissal of a political appointee, which, sure enough occurred just the other day. But, how does discipline work for an employee who has Title 5 due process rights when there is a hue and cry from the public and/or Congress being shared through the media demanding that an employee be removed? Here's an example.

**Poor Judgment at the VA**

The news reports that made me start thinking about this series of columns came from the VA, an agency whose employees must certainly feel that their every action is scrutinized to the "nth" degree. The first articles that I recall started showing up in March of this year recounting that a manager at a VA clinic had sent an e-mail to multiple employees in her unit containing pictures of a toy elf mocking veterans. http://www.indystar.com/story/news/politics/2015/03/08/va-managers-email-mocks-veteran-suicides/24602495/ The e-mail is posted here: https://www.documentcloud.org/documents/1682699-va-email.html. There are four pictures, two of which were said to mock veterans' mental issues. One is a veteran purportedly self-medicating because he is out of Xanax and the other shows the elf attempting to hang himself with Christmas lights. The last picture shows that the case worker saved the elf, but that picture wasn't mentioned in any of the articles that I read.

The manager in question was Robin Paul who worked at the Roudebush Veteran Affairs Medical Center in Indianapolis. She was a licensed social worker who managed the hospital's Seamless Transition Integrated Care Clinic which provided returning veterans with transition assistance, including mental health and readjustment services. Her salary was listed in the article as $79,916, so apparently she was a GS-12, step 5. The e-mail was apparently distributed on December 18 after a Christmas party. I am referring to her as an employee in the past tense because she is not there now.

The e-mail was inappropriate in every way. It was sent by a supervisor to her staff. It made fun of the very people that their unit was there to help. It made light of suicide at a time where veterans are taking their own lives at alarming rates. However, I am having trouble with accepting that what came after that e-mail was sent accomplished what discipline is supposed to accomplish.

The local newspaper obtained a copy of the email and contacted Ms Paul. Shortly thereafter the hospital's public affairs department issued a statement on her behalf which said, "I would like to sincerely apologize for the email message and I take full responsibility for this poor judgment. I have put my heart and soul into my work with Veterans for many years. I hold all Veterans and military personnel in the highest regard and am deeply remorseful for any hurt this may have caused." The hospital stated that the incident had been administratively addressed with providing any specifics about what that action was, of course.

The uproar that followed was predictable. The Indiana Department of the American Legion called for firing of the sender of the message and all of those who received the e-mail and said nothing. According to the Washington Post (3/9/15) Rep. Jackie Walorski (R-Ind.), a member of the House Veterans' Affairs Committee, released a statement

saying “In what is becoming all too common, the VA continues to turn a blind eye to negligence and inexcusable behavior by their employees. Ms. Paul should be ashamed of her actions and embarrassed for the veterans and the families she shamelessly mocked. What’s more concerning is she apparently is still employed by the VA. I don’t understand how keeping this individual on VA’s payroll will bring accountability to a department mired in scandal and negligence….”

Ms Paul agreed to a 90-day suspension of her clinical social work license with the Indiana attorney general in March 2015. She was on administrative leave for a while from the VA while they investigated. She submitted her resignation on April 7 with this statement, "Even though I have had an excellent work history with the VA, my career with the VA is effectively over as a result of this incident and the resulting public and political pressure.” She went on to report that she and her family had received death threats, her minor child had been harassed, and the family had to seek police protection. At the end of her statement she said, “I seek the public's forgiveness, and I respectfully request that the public refrain from directing further hatred and hostility toward me, my family or the VA.” http://www.indystar.com/story/news/politics/2015/04/10/va-supervisor-resigns-email-controversy/25594803/

There is no excuse for such bad judgment but is this what most of us who work in this arena would have expected when this story broke? One thing that troubles me about this case is that many of us could have been in this same boat. How many of us haven’t made some kind of ugly remark or joke about an employee who was the subject of some kind of case we were working? Of course, most of us don’t write it in an e-mail so or take pictures of our attempts at sick humor there’s no record of it to be forwarded to the local newspaper. I doubt if it is that unusual that folks in other government agencies sometimes talk badly about the people they are there to serve; I would guess that a number of agencies that provide direct service to clients might have had some experience with this.

Interestingly, one of the articles I read about Ms Paul quoted a father of a veteran who had committed suicide as saying that the e-mail was inappropriate but he didn’t think anyone should be terminated but should be “taken out to the woodshed.” He said while the humor was inappropriate, he thought that that it was a coping mechanism. He viewed it as their “making light of something awful because it's so awful” in order to deal with it every day.

If I were predicting in March I would have expected a significant suspension would have been affected against Ms Paul to ensure that this would never be repeated, but the VA didn’t even finish the investigation before her resignation was submitted. A good employee who from all accounts had many years of productive service walked away because of harassment of her family and death threats. Removal was the penalty desired by the Congresswoman and the veterans’ group, but this employee didn’t get due process. I think we could view this as discipline administered by the public, the media, and by Congress; management didn’t get to make this call. I think this is scary. Haga@FELTG.com

### *Hearing Practices: Filing Dispositive Motions*
**By Deryn Sumner**

So you’ve gotten your discovery responses, and you’ve responded to the other side’s discovery responses, and you’ve taken care of depositions. Now what? Well, if the evidence is pointing toward your side losing, might I suggest settlement? If not, you are likely thinking about filing a motion for summary judgment if you are representing the agency before EEOC (and in some cases, the complainant), or you will be preparing to respond in opposition to such a motion. This month, let’s talk about drafting and submitting motions for summary judgment.

First, check all the orders issued by the EEOC administrative judge in the case for any requirements. Make sure you know in advance if there are any page limitations, service restrictions,

formatting requirements, or other quirks before you start drafting.

Once you are ready to review the record and start drafting, think about starting with an outline (I'm an unabashed fan). The bulk of your time should be spent crafting the statement of facts. It needs to be (a) undisputed and (b) supported by the record. Don't include anything that is going to require the factfinder (here, the administrative judge) to draw an inference in your client's favor. That's a one way ticket to a hearing. Also, don't make conclusory statements. Every fact should include a citation to the Report of Investigation or other document in the case, such as discovery responses and deposition transcripts. Clearly label and attach a copy of any cited exhibits that are not already included in the Report of Investigation. If you are citing to discovery responses or discovery transcripts, only include the portion you are actually referencing, with enough other pages to provide context. Remember – you want the administrative judge to rule in your favor, so make it as easy as possible to reference your exhibits. (Tabs, or if the administrative judge accepts electronic submissions, electronic bookmarks, are your friend.)

In arguing that summary judgment is appropriate, cite to relevant and recent case law from the Commission and remember this mantra: material facts are not in genuine dispute and there are no credibility determinations at issue which require a hearing. Clearly provide the issues, the applicable legal standards, the undisputed statement of facts, and then apply those statement of facts to an argument section in support of the conclusion that the employee cannot meet his or her legal burden.

As you draft your motion, remember what our friend Ernie likes to say – stop with the legalese! The administrative judge doesn't need paragraphs filled with "hereinafter" and "by and through." Dispense with the formalities and start out strong in the first paragraph explaining what the case is about and why there's no need for a hearing. Use plain language as much as possible.

Rarely, although it can be appropriate, the complainant files for summary judgment. For example, summary judgment can be filed if the agency has not articulated a sufficiently detailed reason for its actions. It also may be appropriate if there are straightforward *per se* violations about how medical records were kept, or retaliatory comments made by a supervisor to the complainant. Cases with direct evidence (note to the agency, if the other side has such evidence, just settle already!) are also good candidates. However, cases that require a pretext showing are almost always going to require credibility determinations that, in turn, will require a hearing.

Overall, work to keep the motion for summary judgment as concise as possible. It's a hard sell to argue that the case is so straightforward that it doesn't need a hearing, while presenting dozens of pages of facts and argument. If it's too complicated, an administrative judge should (and note, I didn't say will) hold a hearing to avoid a reversal and remand from OFO down the road. Good luck! Next month, we'll talk about best strategies for opposing these motions.
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***The End is Near?***
**By William Wiley**


Some say that as a person nears the end of life, he sometimes sees visions of beloved relatives who have gone before, welcoming him into the afterlife. If that's true, I'm starting to think I might be related to Marco Rubio.

As every citizen should know by now, first term US Senator Marco Rubio is running for the Republican nomination to be our next President. In that endeavor, I wish him all the luck that he deserves. I have nothing but respect for anyone who would voluntarily submit to the unrewarding endeavor of being President of the United States. However, when it comes to proposing legislation directed at the federal civil service, I'm not so sure that I would put his bumper sticker on my Tesla.

According to S. 1082, a bill that he and only he sponsored, here's how a certain federal agency would be allowed to fire employees it has concluded are poor performers or who have engaged in misconduct:

- The agency head could remove anybody. Period. No procedures spelled out. Just fire them. The bill contains specific language that 5 USC Chapter 75 and 43 procedures do not apply.
- In justification of the removal, the agency head must notify the appropriate oversight committees in Congress within 30 days of taking the action. Guess they have nothing better to do up there on Capitol Hill other than decide whether five days of AWOL warrants a termination or instead the agency should have implemented a suspension.
- Employees so fired can appeal to MSPB (whew, due process at last) within seven days of being fired (OK, maybe not much due process). I've known of employees who didn't sober up for seven days after being fired. This provision makes no exceptions for drinkers, and I take personal offense at that.
- The Board's judge has to hear the case and issue a decision within 45 days. And that decision is final. No review by the Board members or the courts. As Bugs Bunny used to say, "That's all, folks!"
- If the judge fails to issue a decision within 45 days, the removal is final. However, the Board has to explain to the Congressional oversight committees within 14 days why it screwed up.

As we teach in the famous FELTG seminar *MSPB Law Week*, Congress loves The Whistleblower. The bill makes allowances for this unremitting affection by saying that if the employee prior to being fired files with the US Office of Special Counsel claiming whistleblower reprisal, the agency head cannot fire the employee without the approval of the Special Counsel herself. That little ditty creates the situation in which EVERY smart employee under the gun will file with OSC, and EVERY subsequent removal will require live testimony from the Special Counsel as to why she approved the firing. A fascinating turn of events for those of us enamored with complexity, irrationality, and dubious procedural quirks in the law of the civil service.

And while he had that legislating-writing pen-to-paper, Senator Rubio added a couple of last-page flourishes as a going away present:

- The new-hire probationary period would be extended from a year to 540 days minimum, with the agency head able to extend that period without limit. So THAT little ditty creates the situation in which EVERY smart agency head will extend the probationary period of EVERY employee so as not having to deal with those time-consuming reports to Congress or a six-week appeal to the Board. Why 540 days? No explanation. However, I note that "540" is the area code for Winchester, Virginia. Maybe somebody on the Senator's staff has a weekend retreat out there.
- The Comptroller General will have to conduct a cost-benefit analysis of the time and space used by union officials in the agency. Now aren't you glad you're not the Comptroller General? Or, a union official?

This bill, should it pass, will apply only to the Department of Veterans Affairs. So you're probably thinking that if you work somewhere else, you have just wasted four minutes by reading this article. But think about it. If you head up an agency other than DVA, and your lawyers tell you how sweet things are over there at DVA when it comes to firing employees, wouldn't you be pounding on the door of your own oversight committees looking for the same sort of deal?

If this bill becomes a law, and if eventually a new civil service reform act is passed that spreads these principles throughout our civil service, the end won't just be near; it will have arrived (probably on a banana boat). And when that happens, Deb, Deryn, Barbara and I will finally turn out the lights here at FELTG and move on to Plan B as you guys won't really need us in the field of federal employment law any more.

So what's our Plan B if this employment lawyering thing finally peters out? We're going to open a "practice dating" website! It would be a place where all you geeky dudes with no social skills and lots of

money can sign up to have one of our highly-trained professional daters accompany you on a date, then give you constructive feedback as to how you can improve your game; sort of like a PIP, but you don't get fired for failing it. You just get better - and thereby maybe even a goodnight kiss.

Senator, we're here if you need us.
Wiley@FELTG.com

***The Changing Definition of Marriage***
**By Deborah Hopkins**

The recent Supreme Court decision declaring same-sex marriage bans as unconstitutional will not only change the way marriage is defined in America, it will also forever change traditional perceptions of gender. In essence, the Supreme Court has declared that marriage is no longer between one man and one woman. While the past 50 or 60 years have seen a dramatic shift in gender roles, with more women choosing pursuit of a career over staying in the home to raise children, the concept of a marriage consisting of two men or two women has not been accepted as easily.

The impact of the Supreme Court decision on our little world of federal employment law also is significant. With the changed definition of gender roles, the expanse of gender stereotypes and potential agency liability has also increased. Here's a refresher on how gender stereotyping falls under the purview of Title VII as it relates to sex discrimination.

Federal employees are already protected from discrimination based on sex under Title VII of the 1964 Civil Rights Act. 42 USC § 2000e-2(a). While the 1964 Civil Rights Act did not originally apply to federal employees, in 1971 its protections were expanded to include employees of the federal government. 42 USC § 2000e-16. Last year President Obama signed an executive order expanding these employee protections administratively to include sexual orientation, a common root of gender stereotyping claims. "[T]he federal government already prohibits employment discrimination on the basis of sexual orientation. Once I sign this order, the same will be explicitly true for gender identity." Press Release, Office of the Press Secretary, The White House (Jul. 21, 2014).

In federal employment law decisions involving claims of gender stereotyping, the EEOC uses a gender stereotyping analysis based on *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). Hopkins was a senior manager at Price Waterhouse who was an outstanding professional, worked long hours and contributed significantly to the profit of the business, but was turned down for partnership because she did not comply with traditional female gender norms. Hopkins was criticized for being aggressive, for using profanity, and was accused of "overcompensating" because she was a woman. The partner who explained Price Waterhouse's decision not to promote her to partnership suggested if Hopkins wanted a chance at partner the next year, she should walk and talk more femininely, dress more femininely, wear makeup, wear jewelry and have her hair styled. Hopkins, after failing to be proposed for partnership the following year, resigned and filed a suit against Price Waterhouse for Title VII sex discrimination. The Supreme Court found Price Waterhouse discriminated against Hopkins because of her sex, and said in its decision:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that the matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes….An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

A 2011 EEOC decision paved the way for gender stereotyping claims based on sexual orientation: *Veretto v. USPS*, EEOC No. 0120110873 (2011). In *Veretto* (wasn't it nice when complainant's names were used in EEOC decisions?) the complainant alleged he was physically and verbally harassed after announcing his marriage to another male in a local newspaper. The Commission held this was an allegation of gender stereotyping, because the complainant alleged he was being harassed for failure to conform to traditional stereotype that males marry females.

Past attempts to amend Title VII to include sexual orientation as a basis for discrimination currently are stalled in Congress. *See Employment Nondiscrimination Act,* S. 815, H.R. 639 (June 24, 2014). Today, a federal employee may state a cause of action for discriminatory harassment based on sex, and may recover damages, if that employee can show he was the subject of derogatory comments and behaviors that include sex-based stereotypes. *Maziar v. Department of Transportation*, EEOC No. 0120071302 (June 22, 2007). These comments and behaviors, when based on the employee's gender, are prohibited in the federal workplace. *Harrell v. Secretary of Army*, EEOC No. 05940652 (May 24, 1995).

Webinar Spotlight:
***Gender Stereotyping: Keeping it Out of Your Agency***
September 17, 2015

Starting with *Macy*, in the past three years, we've changed the way we handle gender discrimination claims among federal employees. New legal decisions have further defined what qualifies as gender stereotyping and gender discrimination under Title VII.

FELTG's 90 minute webinar on the topic will explain how these recent decisions impact the world of federal employment discrimination claims related to gender stereotyping, and will provide you with tools to raise awareness in your workplace to help drastically reduce or even eliminate the gender discrimination claims that occur. Register today!

So, now that the Supreme Court has declared that states cannot discriminate against men who marry men, or women who marry women, federal agencies need to educate managers and employees on what exactly that means. In fact, this is so important we're holding a webinar on September 17, **Gender Stereotyping: Keeping it Out of Your Agency**, so we hope you'll join us for that. Hopkins@FELTG.com

***You Be the Citizen Victim***
**By William Wiley**

Let's say that someone steals your car. That's bad news. Then, let's say that a federal law enforcement agency recovers your stolen car. That's good news. Then, let's say that an agent of that federal law enforcement agency steals $900 worth of tires off of your car. What kind of news is that? And when discovered, the agent lied twice to hide what he did. Got to be worse news than the theft alone, don't you think? So if you are the citizen whose tires have been stolen by a government agent entrusted with protecting those very tires, what do you think should happen to the agent's job situation; nothing, reprimanding, suspending, or firing the guy?

Of course, we don't let citizens decide whether federal employees should be disciplined **[Editor's note: But see Barbara Haga's excellent article on this issue elsewhere in this month's FELTG Newsletter]**. We leave that up to the US Merit Systems Protection Board. And in this case, the Board held that the agency's selection of removal as the appropriate penalty should be set aside because the deciding official "failed to conscientiously consider all *Douglas* factors."

I wish that the Board didn't use such double-speak: failed to "conscientiously consider." The record shows that this deciding official did indeed consider all the relevant *Douglas* factors, and there's no evidence that his consideration was not careful and

attentive – the definition of conscientious consideration. Rather, what happened here is that the judge that mitigated the removal to a suspension simply did not agree with the conclusion reached when the deciding official did his considering. In other words, the deciding official did his job of considering the relevant *Douglas* factors, but the conclusion he reached is not the same conclusion that the judge reached. Therefore, by Board definition, the deciding official's consideration was not conscientious. It would be much more credible for the Board to admit that it has abandoned the primary principle of the *Douglas* decision, that it really does regard its responsibility to be "to displace management's responsibility" when it comes to selecting a penalty (the opposite of the *Douglas* principle), and that agencies need to convince the Board that its penalty selection is the right one, not just a decision within its responsibility to make. A subtle, but important distinction.

In mitigating the removal to a suspension, the judge concluded that the deciding official did not give enough weight to the following mitigating factors:

- A clean disciplinary record
- High performance ratings
- Twenty-two years of service
- The appellant's volunteering for service in Afghanistan
- The agency's acceptance of the appellant's offer to volunteer for Afghanistan service

In the mind of the judge, on balance these mitigating factors tipped the scales of justice away from a removal in consideration of the relevant aggravating factors:

- The false statements were made to both the supervisor as well as to a Task Force Officer.
- The employee manipulated agency purchasing documentation in an attempt to hide his misconduct.
- The employee is a law enforcement Special Agent.
- Special Agents are expected to demonstrate high levels of integrity because they are required to draft and swear to affidavits and search warrants, read rights to suspects, and testify in court.
- The employee may have been Giglio-impaired because of his misconduct.
- The employee had no rehabilitative potential
- The agency had lost trust and confidence in the appellant's trustworthiness.

In the mind of the judge, the fact that the agency allowed the employee to continue to perform in an exceptional manner both in his regular position as well as on assignment to Afghanistan for over two and a half years after it became aware of the misconduct undermined the deciding official's statement that he had lost confidence in the employee's trustworthiness. As for rehabilitative potential, the judge found it worthy of weight because the employee admitted his misconduct after he was caught and cooperated with investigators. And finally, the tires were stolen not for personal gain, but for use on a government vehicle being used by the employee. On balance, the judge concluded that a suspension was the maximum reasonable penalty. *Solis v. DoJ*, DA-0725-14-0082-I-1 (SEP 30, 2014), affirmed May 21, 2015, in a non-precedential decision.

In my mind, if I had been the deciding official, I would have not fired this guy. His service in Afghanistan was as an undercover drug dealer. He put his life on the line for his country. And clearly the judge and Board would not have fired him. But you know what? We are not in the best place to make that determination because we are not in the business of supervising people who work in law enforcement. The deciding official is and whether we like his decision or not, it seems to me that it is his decision to make within the broadest of ranges. The judge and the Board have concluded that the deciding official acted unreasonably. Although I would have reached a different conclusion from the deciding official, I cannot say that the decision to remove was unreasonable.

And that's probably why they don't let me vote on things anymore. And neither should you, Citizen, with all due respect.

A couple of finger points before we leave this one:

**Agency**: If you have not taken two and a half years to fire this guy, you would have had a much stronger case

**Board**: In your decision, you say, "We are not convinced that the administrative judge erred in mitigating the removal to a suspension." Well, that's not the correct standard of review. The agency on PFR doesn't have to convince you of anything. Rather, you have to assess the agency's evidence and determine whether the penalty of removal is more likely than not within the range of reasonableness. Another subtle, but important distinction. Wiley@FELTG.com



***OFO Reverses Award of Punitive Damages Issued By Administrative Judge***
**By Deryn Sumner**

Once again, the Commission has affirmed the issuance of default judgment against an agency for failing to timely provide a complaint file, but this case comes with a bit of a twist. Last month, the Office of Federal Operations issued the decision affirming the sanction, but found the administrative judge improperly increased the award of compensatory damages to the complainant as a mechanism to punish the agency for its misconduct. The case is *Complainant v. Department of Air Force,* EEOC App. No. 0720090009 (June 5, 2015) and it has a long (and a bit strange) procedural history. The complainant first filed an EEO complaint alleging non-selection fifteen years ago, in 2000. After an administrative judge granted summary judgment in the agency's favor, the agency issued a final action rejecting the administrative judge's finding because it determined there were material facts in genuine dispute which made summary judgment improper. Yes, that happened, even though the judge found in the agency's favor. So the agency appealed the decision to the Commission and in 2003, the EEOC remanded the case for a hearing. It's hard to imagine how the Commission could have come out any other way.

After a hearing, the administrative judge found in the complainant's favor, and the agency accepted this decision, although the complainant subsequently had to file a petition to obtain full enforcement with the decision. The complainant subsequently filed another EEO complaint which the agency failed to even acknowledge or investigate and that yielded a default judgment that neither party appealed. The complainant also filed one other complaint which yielded a finding of no discrimination.

That brings us to this current EEO complaint. The complainant filed a complaint, made subsequent amendments, and filed a request for hearing after 180 days had passed since the last amendment. On April 15, 2005, the administrative judge ordered the agency to provide the complaint file, which the agency did on May 9, 2005. However, on May 5, 2015, the complainant filed for sanctions. The agency transmitted the complete ROI to the complainant by June 6, 2005.

However, it was too little too late. On July 8, 2005, the administrative judge granted default judgment in the complainant's favor based on the agency's failure to timely provide the complaint file and complete the investigation. In reaching this decision, the administrative judge noted that as the agency had previously been sanctioned for failing to timely complete an investigation in one of the complainant's prior cases, a lesser sanction would not serve to deter future conduct. After holding a damages hearing in 2006, the administrative judge took two years to issue a final decision and ordered the agency to pay attorneys' fees, past pecuniary damages, and $100,000 in non-pecuniary

damages. The administrative judge found that number appropriate, in part, to "take into account the severity and duration of the harm done to complainant by the agency's repeated discriminatory conduct and lack of good faith effort in the EEO process."

The agency rejected the issuance of default judgment and the remedies and filed an appeal in 2008. On appeal, the agency argued that default judgment was too harsh a sanction because the agency sent in the complaint file only one day late, that the administrative judge improperly relied upon the past issuance of default judgment and noted that the agency had taken "positive steps" to address its problems with case processing as a result of the first default judgment. The agency also argued that the increase in the award of non-pecuniary damages to $100,000 constituted punitive damages, which are not recoverable against the federal government.
When the Commission addressed the 2008 appeal last month, it found the issuance of default judgment to be appropriate, noting that the agency did not comply with the administrative judge's order to provide the complaint file in a timely manner, nor did it show good cause for its failure to do so. The Commission further found that default judgment was appropriate, given the agency's past conduct that resulted in the issuance of default judgment in the prior case.

However, turning to the remedies, the Commission found the administrative judge committed "a clear error of law" in increasing the amount of compensatory damages, stating, "The AJ cannot punish the Agency for its previous transgressions again by means of an increased award of compensatory damages in this case." The Commission found $25,000 to be appropriate given the evidence in support of an award of compensatory damages.

There's no explanation given for why the Commission took almost seven years to issue a decision. However, this case is yet another example of the Commission holding agencies accountable for failing to comply with the orders of its judges and the regulatory timeframes for case processing. Of course, one reason for enforcing such sanctions is to avoid delays to the complainant in the processing of complaints. The agency missed its deadline by one day and here, almost seven years later, the complainant ended up with a fourth of what the administrative judge awarded her years earlier, and this delay appears to be solely caused by the Commission. I hope that as the EEOC celebrates its 50th anniversary as an agency this month, these egregious backlogs can be resolved sometime before the 100th anniversary. **[Editor's Note: The Agency was late one day, and was sanctioned. The Commission was late seven years without even an apology. Ridiculous.]** Sumner@FELTG.com

***Learning Curves (Apparently) are for Weaklings***
**By William Wiley**

Here's a quote from a very recent (and beautiful) report issued by the Partnership for Public Service and Booz Allen Hamilton regarding the role and challenges that an agency Chief Operating Officer (COO) faces today:

> **Dealing with poor performers:** Executives noted that challenges dealing with poorly performing employees were damaging agency effectiveness and serving as a distraction from accomplishing the mission. The difficult and time-intensive process to remove or discipline an employee often prevents managers from taking appropriate actions. And those who pursue action must take time away from other priorities. "We spend a lot of time addressing the 1 percent that are awful as opposed to driving the 99 percent who are fantastic or otherwise show promise," said one COO. According to interviewees, the inability to deal with poor performers has a negative impact on an agency's mission because ineffective or misbehaving employees can remain in their positions for months or years. This dynamic can be very demoralizing to the employees who are performing well. – *Bridging Mission and Management: A Survey of Government Chief Operating Officers,* June 2015

If your COO believes this to be true, you should hang your head in shame. If this is the consensus belief within your supervisory team, or god forbid, your own office, you either have not been to our FELTG classes on accountability (too many to list) or you do not know the law. For the ten-thousandth time, here is ALL you have to do to remove a poor performer:

1. Write a list of the mistakes the employee has made recently that have led you to the conclusion that he is performing unacceptably on a critical element of his performance plan. The list might be a page in length, hardly ever more than two pages.
    - Most all government employees are automatically issued critical elements of performance annually, so these should already be in place.
2. Give the employee a memo that tells him what you want him to do next week. The assignments must be related to the critical element (or elements) you identified in step.
    - Formally, this memo is referred to as an "opportunity" letter or a "performance improvement plan." If the collective bargaining agreement that applies to the employee requires more steps than this, whoever bargained the agreement on behalf of management should have some explaining to do. It's on management if the CBA causes problems, not the law nor the union.
3. Meet with the employee once a week for a month to give feedback on the previous week's work and to give assignments for the next week.
    - A weekly follow-up email to the employee is helpful, but not essential. If the immediate supervisor finds weekly one-hour meetings to be too time consuming, the responsibility for the meetings can be delegated to someone else.
4. At the end of the month if the employee has performed unacceptably, give the employee a memo that lists all of his mistakes, proposes his removal, and places him on administrative suspension for the next 30 days while your boss decides whether he should be removed from the roles permanently. Then stick a fork in yourself because you are done.

That's it: "Bill, here's a list of things I want you to do next week," "Bill, here's an email that tells you what you did wrong last week" (times three), and then "Bill, here's a list of things you did incorrectly last month along with my proposal that you be removed." How could this possibly be easier and still be fair? As a bonus, if you have to go to hearing to defend yourself, you have to satisfy only the "substantial" level of proof, below the "preponderance" level required for removals based on misconduct. As I once heard an MSPB judge say at a big secret legal conference years ago, "If the supervisor takes the stand and swears under oath that the employee failed the PIP, that's substantial proof." And friends, this has been the law for 35 years. That's why we as a profession should be embarrassed by statements like those in this report (and similar statements in a report issued earlier this year by GAO).

I'm going to be real straight with you. If this hurts, so be it. If you believe that it is a "difficult and time-intensive process" to remove a poor performer from employment with the federal government, you do not know your job. And if people in your organization believe this statement to be true, and you are a leader in that organization, then you are a poor leader. Several years ago, the current Chairman of MSPB estimated that about five percent of the federal workforce is not doing its job; *i.e.,* deserves to be PIPed. If that is not anywhere near the number of PIPs currently active in your agency, I would offer that you should reassess your job responsibilities and the options open to you.

Perhaps it's time for us to introduce public humiliation as a shaming punishment in our business. You know what I'm talking about; the guy who steals eating utensils from a restaurant who rather than going to jail has to stand in front of the restaurant that was the scene of the crime and

holds up a three by four foot sign that reads, "I steal forks from restaurants." But I'm not talking about shaming the poor performers. I'm talking about humiliation punishment for those in our profession that believe it's hard to remove employees who do bad work. Grab your signs, kids. Head for the sidewalk in front of your building. I'd say that two hours a day out there in the summer weather until you figure this stuff out ought to be adequate incentive for you to learn your job.

Man, is it going to be hard to walk the sidewalks in DC for a while. Wiley@FELTG.com

***EEOC Celebrates its Golden Anniversary***
**By Deryn Sumner**

This month marks the 50th Anniversary since the creation of the EEOC, as a result of the passage of the Civil Rights Act of 1964. It's important to note that although most of what we discuss here at FELTG concerns the federal sector, the Commission also has an important mission to investigate and prosecute charges of discrimination in the private sector.

Title VII of the Civil Rights Act prohibited employment discrimination based on race, sex, color, religion and national origin. Subsequent laws expanded this coverage to other protected classes. Protections for employees over the age of 40 were added as a result of the Age Discrimination in Employment Act of 1967. The Rehabilitation Act of 1973 prohibited the federal government from discriminating against employees with disabilities and 17 years later, the Americans With Disabilities Act of 1990 provided much broader protections for people with disabilities both in public accommodations and the private sector workplace. The ADA Amendments Act of 2009 served to address and ameliorate many limitations subsequently set by the Supreme Court to provide broader coverage to individuals with disabilities. The Civil Rights Act of 1991 allowed successful complainants to receive awards of compensatory damages. We haven't seen much litigation yet concerning the Genetic Information Nondiscrimination Act, which passed in 2008 and took effect in 2009, but that law also provides protections to employees from discrimination based on their genetic and associated medical information. In recent years, the Commission has aggressively pursued rights for individuals in the workplace because of transgender identification and sexual orientation, such as in *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 and *Complainant v. Dep't of the Army*, EEOC Appeal No. 0120133395.

According to the Commission, in 2014, the EEOC's federal sector program received 6,347 complaints and secured more than $74 million in relief for federal sector complainants. Of course there are still problems and plenty of room for improvement. As the case I discuss elsewhere in this newsletter demonstrates, egregious delays in processing cases both at the hearings and appeal level have persisted for years. Also, there can be disparities in the training and talent of the administrative judges of the Commission in the field and district offices scattered around the country. Although it does not happen on a regular basis, too often the Commission must vacate awards because an administrative judge has issued compensatory damages in an age discrimination case, or improperly issued summary judgment in the agency's favor when clear disputes of material facts remain. The Commission, as well as many civil rights offices in federal agencies, face budget cuts that prevent these offices from fulfilling their missions as completely as possible. However, there are hardworking and talented people representing the interests of agencies and employees working to eradicate workplace discrimination by providing training, settling those cases that should be settled, and working to winnow out the cases without merit so that resources can go towards addressing cases where discrimination did take place.

If you want to learn more about the history of the EEOC over the past 50 years, the Commission has put together a comprehensive website at http://www.eeoc.gov/eeoc/history/50th. Sumner@FELTG.com

www.feltg.com