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

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## What We Can Learn From the FEVS

Last week, OPM released preliminary numbers from its 2023 Federal Employee Viewpoint Survey (FEVS). The good news is employee engagement, morale, and DEIA (diversity, equity, inclusion & accessibility) all moved in a positive direction over 2022 numbers. In addition, over 6,000 more employees participated in the 2023 FEVS than in 2022, also a positive indicator of engagement. See inside this newsletter for some additional takeaways.

There's still work to do, of course, and individual agencies will be scrutinizing their numbers and making strategic plans to improve in areas where they want to see change. Did you know FELTG has a training class designed just for that? It's called **Engagement to Motivation – the FEVS and Beyond**, and if you'd like more information reach out to us at info@FELTG.com.

Beyond FEVS, this month's newsletter covers religious harassment cases, episodic disabilities, post-*Santos* PIPs, and generational differences in the workplace.

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:

**Advanced EEO: Navigating Complex Issues**
November 15-16

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

**Misconduct Investigations: Get Them Right From the Start**
January 17

**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

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

*FELTG is an SBA-Certified Woman Owned Small Business that is dedicated to improving the quality and efficiency of the federal government's accountability systems and promoting a diverse and inclusive civil service by providing high-quality and engaging training to the individuals who serve our country.*

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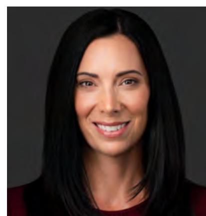
***The Israel-Hamas War and Religious Harassment in the Workplace***
**By Deborah J. Hopkins**



Religious persecution is on many people's minds today. With polarizing events happening around the world, most notably the Israel-Hamas war. It's important for Federal employees to remember this: While they may have strong feelings related to religious beliefs and practices, there are limits on workplace conduct that, if exceeded, could give rise to discrimination complaints on the basis of religion.

As a quick statutory overview, Title VII, 42 USC § 2000e-16, provides that in the Federal government, "all personnel actions affecting employees or applicants for employment … shall be made free from discrimination based on … religion ..." This statute was made applicable to Federal agencies by the Rehabilitation Act in 1972.

In addition, EEOC makes it clear that "Title VII defines 'religion' to include 'all aspects of religious observance and practice as well as belief.' Religion includes not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, and only subscribed to by a small number of people, or that seem illogical or unreasonable to others. . ." *EEOC Compliance Manual* Section 12-I, A-1.

A browse through EEOC case law shows us that discrimination based on religion has been implicated in every theory of discrimination. Today, we'll be focusing on cases involving hostile work environment harassment.

*Wicca wasn't welcome.*

The complainant, an electronic technician, filed a hostile environment complaint based in part on his religion (Wicca). According to the case, agency supervisors "restricted him from wearing his religious shirts, jewelry" and displaying "a small cauldron" even though similar restrictions were not placed on employees of other religions. In addition, an agency supervisor counseled the complainant that he should refrain from being so open about his religious beliefs.

The complainant's co-workers also openly chastised his religious expressions, referring to his religion as "going out East to frolic with the nymphs" and calling him "evil." EEOC found the agency liable for hostile environment harassment and remanded the case for a damages assessment. *Hurston v. USPS*, EEOC App. No. 01986458 (Jan. 19, 2001).

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

*Muslims were expected to behave in a certain way.*

The complainant, a housekeeping aide, alleged religious discrimination based on his Muslim faith when among other things:

- His supervisors made comments such as "Why don't you act like a Muslim?" and "Where is your beanie (kufee)?" [sic].
- His direct supervisor once handed him a computer disk labeled "get Osama."
- His co-workers brought in pictures of the President and the Statue of Liberty wearing disparaging Muslim garb.
- He received approximately 25-30 letters of warning.

When assessing the severity and pervasiveness of the conduct, EEOC noted that the harassment began on Sept. 12, 2001, and continued for several weeks thereafter. It found the agency liable for a hostile work environment. *Watson v.*

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*Department of Veterans Affairs*, EEOC Nos. 01A50731, 01A52680 (2006).

*Disparaging comments were made about Islam.*

The complainant, a center adjudication officer at the Federal Law Enforcement Training Center (FLETC), was attending a seven-week staff training course at FLETC's Glynco, Ga., campus. The class instructor made disparaging remarks about Muslims and Arabic people to the class and provided factually inaccurate information about the Islamic faith and Arabic people.

In addition, the instructor told the class, "The goal of a Muslim is to convert you and kill you." Another instructor told the class the complainant should be "investigated for possible ties to terrorist organizations." This was so troubling that other classmates who weren't Muslim or Arabic were uncomfortable and filed reports. EEOC agreed that this conduct created a hostile work environment. *Rana v. Department of Homeland Security*, EEOC App. No. 0720060056 (Jan. 5, 2007).

*One offensive comment constituted unlawful antisemitic harassment.*

The complainant, a workers' compensation claims examiner, received an email from her supervisor in which the supervisor referred to himself as working like "a Hebrew slave." The complainant filed a hostile environment harassment complaint.

The agency maintained the supervisor's comment was not severe enough to constitute a hostile work environment because he applied the term to himself. EEOC disagreed and found that, although it was a one-time comment, such language made light of the history of Jewish persecution and genocide and it reminded the complainant about her family's treatment during the Holocaust, where several of her family members had been killed. EEOC agreed with the AJ, who determined that this comment to a Jewish subordinate was "grossly insensitive, insulting and condescending," "profoundly inappropriate," and was severe enough to alter the terms, conditions, and privileges of employment. *Lashawna C. v. Department of Labor*, EEOC App. No. 0720160020 (Feb. 10, 2017).

*Newspaper photo with comments was not a hostile work environment.*

Not every case of unwelcome conduct based on religion will meet the bar to prove a hostile work environment. Take, for example, the recent case *Kenny M. v. Dep't of Justice (Bureau of Prisons)*, EEOC App. No. 2022000449 (Dec. 6, 2022). The complainant, a cook supervisor at a Federal penitentiary, alleged a hostile work environment on the basis of religion (Judaism).

From November 2018 through December 2019, a newspaper article containing a photo of the U.S. attorney general speaking with a man in a black hat was posted in the bathroom with the captions: "The AG and a Jew meet at a gay disco party" and "Who blows Who." The EEOC found the incident was not sufficiently severe or pervasive to alter the terms, conditions, or privileges of the complainant's employment. "The anti-discrimination statutes are not civility codes. Rather, they forbid 'only behavior so objectively offensive as to alter the conditions of the victim's employment.'" *Id, citing Oncale v. Sundowner Offshore Servs.,* 523 U.S. 75 (Mar. 4, 1998).

I'll write more about religious discrimination next month. Hopkins@FELTG.com

**Need Initial or Refresher EEO Training?**

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***The Good News: You Don't Have to Over-*****Santos Santos*!***
**By Ann Boehm**

Time, once again, to talk about *Santos v. NASA*, 990 F.3d 1355 (Fed. Cir. 2021) – the universally disliked Federal Circuit case that changed 40 years of MSPB case precedent. Because of *Santos*, agencies must provide substantial evidence of unacceptable performance before implementing a performance improvement plan (PIP).

Among the problems with *Santos* is the fact that the Federal Circuit did not say anything about *how* agencies are to show substantial evidence of unacceptable performance that occurred *before* the PIP began. Nothing. Nada. The MSPB has not really done much to help with this conundrum either.

FELTG founder Bill Wiley wrote a great [article](#) in April about how agencies should proceed post-*Santos*. Providing what he described as "admittedly legally conservative FELTG advice to Federal employment law practitioners," Bill provided these steps to follow:

1. Make sure the employee has been given performance standards (with critical elements identified) and has had at least a couple of months to get used to them.
2. Collect evidence of mistakes the employee has made recently that demonstrate he is performing unacceptably under at least one of his critical elements.
3. Incorporate reference to these mistakes in the PIP initiation memo. The supervisor should retain evidence of the mistakes but does not have to provide that evidence to the employee at this time. However, if you want to give this list to the employee, we recommend attaching it to the end of the PIP initiation so as not to start off on a negative and put the employee on the defensive.

Simple enough, right? So why am I revisiting the *Santos* requirement just a few months later? Because agencies are overcomplicating things! During a recent training event, a frustrated supervisor explained that agency counsel wanted to conduct a pre-PIP before instituting a PIP, because counsel was afraid of *Santos*. Arghhh.

Please do not overcomplicate things, my friends! Stick with logic. Stick to simple. There's no case law from the MSPB or Federal Circuit indicating a pre-PIP is necessary to satisfy *Santos*.

Even with *Santos*, I still believe that the performance removal process can be the easiest way to remove a problem employee. But not if agencies go to illogical extremes because of risk aversion.

With *Santos*, you just have to provide some evidence of poor performance before you initiate the PIP. And only *substantial* evidence of that poor performance. Try Bill's "admittedly legally conservative" way. It's what we teach here at FELTG.

And if you believe us, here's the Good News – you don't have to over-*Santos Santos*!
Boehm@FELTG.com


### Discovery Done Right

**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](#).


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***Use Tried and True Principles to Meet Needs of Episodic Impairments***
**By Frank Ferreri**

When the *Americans with Disabilities Act Amendments* Act and its implementing regulations, which apply to Federal employers via Section 504 of the *Rehabilitation Act*, took effect in the late '00s and early '10s, a big piece of the new legislation was its explicit extension to cover intermittent, episodic impairments.

29 CFR 1630.2(j)(1)(vii) directs that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."

Yet, as in the case of *Dovie W. v. Department of the Army*, EEOC App. No. 2022001188 (Sept. 7, 2023) shows, while it's not always clear to employers what is required to accommodate an employee whose impairment is subject to flare-ups, the process doesn't differ much from other reasonable accommodation requests.

**Facts of the Case**

In *Dovie W.* the complainant, a Material Handler for the Army had on-and-off "gastrointestinal issues" and migraines, for which she sought the accommodations of:

1. Use of a chair
2. Lifting restrictions
3. Permanent reassignment to the Defense Reutilization and Marketing Office

When the complainant got a migraine during work, she would take additional breaks, inject medication, and sit down for 30 minutes while the medication took effect. The GI flare-ups occurred several times per day, and symptoms included dizziness and nausea. The complainant's conditions could be triggered or exacerbated by stress.

After investigating, the agency provided the complainant with a copy of the report of the investigation and notice of her right to request a Final Agency Decision (FAD) or a hearing before an EEOC Administrative Judge (AJ). She eventually opted for a FAD, which the agency issued, finding that she failed to establish discrimination.

The complainant appealed, and the EEOC vacated the FAD, so the agency issued another FAD that also concluded the complainant failed to establish discrimination, prompting another appeal to the EEOC, the subject of the case at issue here.

**EEOC's Analysis**

Under 29 CFR 1630.2(o) and 29 CFR 1630.2(p), an agency must make reasonable accommodations for the known physical and mental limitations of a qualified individual with a disability unless it can show that an accommodation would cause an undue hardship. As defined in a 2002 EEOC enforcement guidance, a "reasonable accommodation" is an adjustment at work for a reason related to a medical condition. The commission addressed the complainant's three requests separately, as follows:

**Use of a chair**: The complainant asked for a chair and was provided with a barstool. EEOC determined that she received a reasonable accommodation in the eyes of the law, even if it wasn't her accommodation of choice.

"Complainant was not denied a reasonable accommodation," as even her appellate brief indicated that she "was requesting something to sit on as her accommodation and would have been fine with a barstool," the EEOC explained.

How did it end up being a stool instead of a chair, anyway?

"Management and coworker testimony reflects that barstools were available at the

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workstations where Complainant was assigned, and that Complainant frequently sat on a barstool while she worked," the commission wrote.

**Lifting restriction:** The complainant ran into more difficulties on the issue of lifting restrictions. She said she could lift up to 45 pounds without assistance, but her FMLA paperwork said she topped out at 15 pounds. The crux of her failure-to-accommodate charge was that her supervisor denied her request by reassigning her to a role she didn't want.

The EEOC noted that the complainant's "difficulties lifting were obvious, as multiple witnesses [testified] that she regularly asked for assistance lifting items that were under 45 pounds," the EEOC wrote. "For example, Supervisor claimed that most of the things she requested help lifting 'weighed about as much as an average trash bag.'"

What ultimately halted the complainant's claim regarding lifting restrictions is that her needs on the job were met.

"Significantly, Complainant does not allege that once she was moved, she was denied assistance or that the coworkers assisting her at other lines did not provide an effective accommodation," the EEOC wrote.

**Permanent assignment to DRMO:** Although the complainant expressed displeasure at being reassigned from DRMO, she did not provide evidence that she notified management she wanted to remain in DRMO as a reasonable accommodation. Additionally, the EEOC noted the complainant did not make clear that she preferred the DRMO assignment due to her medical condition, since placement there was not "obvious or referenced" in her FMLA paperwork. Instead, the agency provided her with an accommodation consistent with the FMLA documents by permitting her to take breaks and sit down as needed.

"Complainant does not dispute that she was provided with a stool to sit on and assistance lifting at the three lines where she was reassigned, nor has she argued that these accommodations were not effective," the EEOC reasoned. Thus, the EEOC affirmed the agency's final decision dismissing the complaint. So, what's the lesson here?

The agency didn't get tripped up by the episodic nature of the impairment. Instead, it was able to show the EEOC:

1. It engaged in a good-faith interactive process by working with information the complainant provided the agency, to come up with accommodations.
2. It remembered an accommodation doesn't have to be what the employee prefers, to be effective.
3. It focused on essential functions. The EEOC did not expect the agency to change the essential functions of the complainant's job by reassigning her to a line she preferred.

The following are examples of common episodic impairments, but these aren't the only ones:

1. Epilepsy
2. Multiple sclerosis
3. Cancer
4. Hypertension
5. Diabetes
6. Asthma
7. Major depressive disorder
8. Bipolar disorder
9. Schizophrenia

It's also worth emphasizing that "episodic" can include large gaps of time between flare-ups. As anyone who has battled cancer or witnessed a loved one do so knows, that disease has a nasty habit of coming in and out of remission without regard to timelines or schedules, sometimes many years apart. info@FELTG.com

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***Talking 'Bout My (And Others') Generations in the Workplace***
**By Dan Gephart**

I used to be skeptical when people talked about generational differences in the workplace. I thought it was an over-generalization. I've since gained an appreciation for the data and how it can improve everything from performance feedback to workplace logistics.

The American workplace is going through a generational shift. Millennials (born 1980-1994) are now the largest generational workgroup, followed closely by Gen X (1965-1979) and Baby Boomers (1946-1964). In the Federal workplace, Gen X still holds an edge, but the percentage of Millennials continues to grow. Understanding the differences between these groups is as important as ever.

Oh, and look out: Gen Z (1995-2009) is expected to make up more than a quarter of the overall workplace within two years.

But that's not all. An understanding of generational differences is important to address the following workplace situations.

- Remember that "OK, Boomer" slam? Do you still joke about everybody-gets-a-trophy Millennials? Luckily, the rancor of a few years ago has died down. Unfortunately, a lot of inter-generational mistrust continues to exist in the workplace.
- Major workplace change (offices to cubicles, cubicles to open spaces, open spaces to remote work) has often been mired in generational conflict. Understanding generational needs will help your agency in its current transition to a permanent hybrid workforce.
- The Biden Administration continues to stress DEIA (diversity, equity, inclusion, and accessibility). Age and experience are key diversity factors.
- And, finally, there's the *performance* issue. As a group, Federal supervisors have gotten better at performance feedback. But too many supervisors still struggle.

There is no one way to provide employee feedback. It depends on the relationship between the employee and the rater, according to FELTG Instructor Susan Schneider. [**Editor's note:** Susan presents Successfully Leading a Multi-generational Team on March 12. Register now.] She offered this overview:

- "Generally, Gen Zs prefer feedback delivered in a variety of ways," Susan said. "Gen Zs, like Boomers, prefer direct and actionable feedback. Ideally, the feedback is tailored to their individual needs."
- Millennials prefer timely, specific, continuous feedback given in a collaborative and supportive way.
- Gen Xers prefer regular direct and honest feedback. "For both Gen Xers and Gen Zs, keeping their individual needs and goals in mind is the best approach," she said.
- Boomers are geared to formal feedback sessions like most Federal organizations' annual or half-yearly sessions. Specific and actionable feedback is ideal.

Those differences are well-researched, with the general conclusion that Millennials need "frequent, VERY frequent, feedback." Should supervisors really consider a person's generation before sharing feedback?

"Perhaps, as a start," Susan said. "Management starts with communication. Well, management IS communication. So,

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yes, communicate differently if personally and organizationally possible."

Susan has taken a particular interest in the fast-growing Gen Z.

"Gen Zs flourish in diverse workplaces," she said. "They are practical, and, of course, digitally fluent. Gen Zs want a culturally competent manager, stability, competitive wages, and mentorship. Their communication style is face-to-face and video chats with friends.

"When I think about our Gen Zs onboarding during COVID, I'm concerned. How can their co-workers, including managers, provide (or simulate) face-to-face communication? I have anecdotal evidence; a mentor/protégée pair told me they met in person outside during COVID."

Back to my original skepticism of the topic. I asked Susan how she'd respond to someone saying generational differences are over-generalizations or worse stereotypes.

"*Generation* is one way to understand peoples' life experiences and what makes each of us who we are," Susan told me. "Aspects of a person, such as life stage (such as becoming a parent) or military service, first-generation college, living abroad, first language learned, or where we grew up are all within us. Learn about people and accept that human beings are formed by many influences. Respect personal boundaries, and don't accept your first impression as fact."

"Diversity of thought is a huge asset for an organization." Gephart@FELTG.com

***Initial Takeaways from the 2023 FEVS***
**By Deborah J. Hopkins**

It's the time of year when initial Federal Employee Viewpoint Survey (FEVS) results are released. Like many of you, I found some interesting numbers in the 2023 report. One topic with very favorable scores involved items related to employee views of their immediate supervisors. Take a look at a few items with high scores:

- I am held accountable for the quality of work I produce: 86 percent.
- I know what my work unit's goals are: 84 percent.
- Supervisors in my unit support employee development: 78 percent.
- My supervisor supports my need to balance work and other life issues: 84 percent.
- My supervisor listens to what I have to say: 82 percent.
- My supervisor treats me with respect: 86 percent.
- My supervisor holds me accountable for achieving results: 87 percent.

Until the 2022 FEVS, an item that appeared on every FEVS for as long as I can remember was "In my work unit, steps are taken to deal with a poor performer who cannot or will not improve." That number usually wavered between 27 and 42 percent. The question hasn't been on the last two FEVS so it's hard to capture the difference between how employees feel about their supervisor holding them accountable, and their supervisor holding coworkers accountable.

One item we at FELTG found troubling:

- In my work unit, differences in performance are recognized in a meaningful way: 45 percent.

This item reminds me of what FELTG Instructor Ann Boehm says in her class on Boosting Employee Morale: 10 Dos and Don'ts for Federal Managers: "Take care of the good ones!"

We'll share more on the 2023 FEVS in upcoming articles and in our 2024 training classes, which are now open for registration. Hopkins@FELTG.com

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