DSZ EEO Profile

WINTER 2006 www.dsz.com

SPECIAL PROBLEMS IN EEO INVESTIGATION: INTERVIEWS OF BARGAINING UNIT EMPLOYEES

by Elizabeth Lytle

In response to rulings by the Federal Labor Relations Authority, a number of federal EEO officers are informing the union of all interviews of bargaining unit employees conducted by EEO investigators. *The union is representing the union and the interests of its bargaining unit employees, not the individual bargaining unit employee being interviewed. The union, not the bargaining unit employee, decides whether the union will attend the interview.*

Concerns about the presence of a third party, whose role is not defined clearly, as well as potential privacy act violations, have been raised in connection with this procedure. However, the Federal Labor Relations Authority (FLRA) has found, explicitly, that the presence of the union in EEO investigative interviews does not conflict with EEOC regulations or Section 574 of the Alternative Dispute Resolution Act, which deals with circumstances under which certain communications made during dispute resolution proceedings may not be disclosed by the parties or by the neutral outside these proceedings.

The EEOC has not weighed in on the issue. It has limited its involvement to educating federal EEO officers about the FLRA requirement.[1] Additionally, the Department of Justice has indicated that it will not intervene unless the involved bargaining unit employee objects to the union's presence or the union attempts to assert itself in the pre-formal complaint process (the informal, counseling stage).

The FLRA rulings determined that federal EEO Officers committed unfair labor practices (ULPs) when the union was not provided an opportunity to be present at EEO investigative interviews of bargaining unit employees. The cases turned on the FLRA's interpretation of EEO investigative interviews as *formal* discussions between a representative of the agency and a bargaining unit employee with reference to a *grievance* or any personnel policy or practice or other general condition of employment. In determining whether the union has a right to be present and entitled to prior notice of the interview, the following conditions must be present:

1) There must be a discussion
2) Which is formal
3) Between one or more representatives of the agency and one or more bargaining unit employees
4) Concerning any grievance or personnel policy or practice or other general conditions of employment.

The FLRA determined that EEO investigative interviews of bargaining unit employees meet these criteria for the following reasons:

1) An EEO interview constitutes a discussion.
2) While the totality of circumstances is considered in determining whether a discussion is "formal," an interview at the post-EEO complaint stage, for which cooperation by the employee is mandatory and from which an affidavit is prepared, is going to be considered formal. The fact that an interview is conducted by telephone

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LETTER FROM THE EDITOR:

FROM THE DESK OF MICHAEL NORRIS

Learning your "learning style": Communal or Loner?

Last year I became a certified EEO Counselor through a training held at the EEOC in Washington, DC. The events of that week entailed hours of class lecture. However, a majority of the required 32 hours was spent in small groups working interactively—from conducting personal interviews, group brainstorming for line of questioning and small groups acting out Aggrieved/RMO resolution.

After a year of being certified, I looked forward to the MD-110 update training. However, this training would be under a bit diverse circumstances than my former training.

DSZ offered the update course as an interactive one-day course in Arlington, Virginia. For those that could not attend this class, DSZ offered an on-line training to complete. Your choice: independent learning or classroom style learning. Fearing a misunderstanding of articles and devising a resolution to some complex hypothetical case studies, I know that the in-person course would better suit my learning capability. This would be a perfect pairing from the learning experience that I received from EEOC. I would be able to learn via open discussions, group work, as well as lectures. I prefer to learn in a more aggressive interactive style not behind a multi-layered book or a 35 page thesis. Rather, to be able to articulate in a group session about real studies and to be able to hear the responses of my peers to these studies. What is your learning style?

DSZ understood the balance between interactive learning and independent learning. Unfortunately, the timing of things did not make it possible for me to attend the training course. With about three articles and five case studies to read, if I only knew then! For now I will pick up the preverbal pen (my laptop) and start to dig my way through understanding direct threat in accommodation and revisiting reprisal standards. Next year, I'm going to be at the in-person training!

DSZ CONTRACTORS COMPLETE MD-110 UPDATE TRAINING

by Ellen Delany, J.D.

DSZ held its annual MD-110 update training for Counselors and Investigators on December 9, 2005 in Arlington, VA. Despite the bad weather, we had a great turn out for the day! Ellen Delany, DSZ President, provided updates on developments in EEO with EEOC and the courts over the past year. This year, DSZ concentrated the training on the areas of affirmative defenses. Topics included affirmative defenses in harassment and accommodation cases and what constitutes a direct threat in disability cases. Also explored were cases dealing with the requirement to establish nexus to the prior protected activity in retaliation claims. Elizabeth Lytle and Sylvia Drummond, of DSZ's Arlington office, worked with Investigators and Counselors on case studies exemplifying these topic areas. The session concluded with Counselors and Investigators sharing strategies to improve document identification and collection and strategies for dealing with complex case issues. Participants uniformly praised the opportunity to problem solve with their colleagues and with DSZ. One participant later stated he "thought the training was really beneficial and [it was] good to hear from the other participants and their concerns."

In addition to our in-person training in Arlington, VA, we offered our training to counselors and investigators on line. Using the same topics and an opportunity to work through the same substantive issues, the on-line training was well received and participants described it as stimulating and well targeted to their interests and needs as EEO professionals. Megan Zorn was responsible for the posting of our investigator training and Elizabeth Lytle designed our web-based counselor training.

(left to right) William Taylor, Counselor, Warren Treisman and Justi Rae Miller, Counselors & Investigators

Pat Farrell, Investigator & Jeff Juster *(back)*, Counselor & Investigator

Ellen Delany, President of DSZ, Trainer

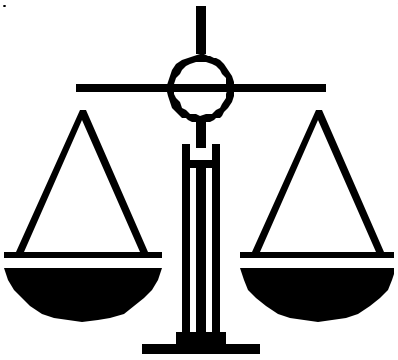
Elizabeth Lytle, Director of Counseling & Special Projects, instructing training room

VISITING OLDIES BUT GOODIES IN THE WORLD OF LEGAL PUZZLES: ANOTHER LOOK AT REPRISAL STANDARDS

by Tama Zorn, J.D.

In the last two profiles, we addressed continuing violation and non-sexual harassment/hostile environment claims. Our effort was to reconcile what the courts are holding when confronted with cases in these areas, starting with the Supreme Court, with what the EEOC is ruling. Our concern is that counselors, investigators and fad writers need a clear view of the relevant standard in order to conduct their business properly: ask the right questions, clarify the standard for the parties, write substantively defensible decisions.

We find reprisal presents similar challenges: the courts appear to be applying a narrower definition and more stringent standard to reprisal claims than is the Commission, managers invariably complain that looking cross-eyed at a complainant is sufficient to trigger a reprisal claim, while complainants point out that there are endless subtle and not so subtle ways to make an EEO complainant's life miserable at work, in retaliation for the legitimate pursuit of their rights to bring EEO claims. Add to this toxic mix the increased scrutiny of reprisal claims generated by the "No Fear Act" and the fact reprisal leads all bases as the source of complaints, and it becomes clear time spent in understanding reprisal claims is time well spent for EEO professionals.



We also can always tell when a standard is causing concern if we look at what the Supreme Court has accepted for review. **Burlington Northern and Santa Fe R. Co. v. White, 364 F.3d 789 (6th Cir. 2004):** The United States Supreme Court has granted certiorari from an en banc decision of the Court of Appeals for the Sixth Circuit holding that the suspension of a railroad employee without pay, followed thirty-seven days later by a reinstatement with back pay, was an "adverse employment action" for purposes of a Title VII retaliatory discrimination claim. **The grant of certiorari is limited to the first question, which asks whether an employer may be held liable for retaliatory discrimination under Title VII for any "materially adverse change in the terms of employment," such as a temporary suspension in the case at bar, for an action that was "reasonably likely to deter" the employee from engaging in protected activity, or only for an "ultimate employment decision." (**Emphasis added). Clearly, the question of what degree of action is adverse in support of a retaliation claim is a hot one! Next year, the Supreme Court may provide some guidance on this.

The Sixth Circuit also found that transferring the female railroad employee from her forklift operator job to a standard track laborer job was an "adverse employment action" for Title VII purposes. While the standard track laborer job paid the same as the forklift operator position, the employee's new position was more arduous and "dirtier," and the forklift operator position required more qualifications, which was an indication of prestige.

Start with the simple matters: reprisal is a basis raised in a disparate treatment claim and must be augmented by an issue. That is, a complainant must state a claim that includes the description of an adverse action, an assertion that other similarly situated employees were not similarly treated, and the attachment of that alleged different treatment to reprisal as a motivation (I was denied a training opportunity on November 5, 2005 as a result of reprisal for my participation in protected EEO activity: here, reprisal is the basis and the denial of a training opportunity is the issue and the investigation will follow disparate treatment standards in seeking either direct evidence of retaliatory behavior and/or comparative evidence that others similarly situated but who had not participated in protected activity received more favorable treatment).

As a basis, reprisal has threshold elements which must be established by complainants in order to claim the anti-reprisal protection of Title VII and the Rehabilitation Act. (For federal employees, the anti-retaliation provision of the Age Discrimination in Employment Act creates the need for a bit of legal gymnastics as there is some legal

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CONSIDERATIONS FOR CONDUCTING MANAGEMENT INQUIRIES

by Sonya Williams

Management inquiries may be conducted for any number of reasons from accidents to allegations of sexual harassment to incidents of misconduct. The purpose of an administrative inquiry is to gather facts and relevant evidence to provide the basis for management determining what, if any action to take. However, a management inquiry is not for the purpose of law enforcement or criminal prosecution.

Generally, the decision to order a management inquiry and the appropriate scope of the investigation, is a matter within the discretion of the agency. Before initiating a management inquiry into an incident or situation, a quick assessment must be completed to determine the nature and gravity of the event and the most appropriate type of management inquiry.

The following factors should be considered in determining whether to conduct a management inquiry:

- ✓ Impact of the matter on the office, department or agency;
- ✓ Risk of adverse consequences from recurrence;
- ✓ Need for objective, expert review and analysis of the matter;
- ✓ Seriousness of any suspected misconduct, neglect, etc;
- ✓ Degree to which the cause and essential facts of the matter are known, subject to dispute, or unknown, and the potential for an investigation to determine additional relevant information;
- ✓ Need for evidence to support corrective or disciplinary action or claims for or against the agency;
- ✓ Potential for adverse public, governmental, or media interest;
- ✓ Other investigations being conducted into the same or closely related subject matter.

Determining the scope of the management inquiry falls under whichever office is going to oversee the inquiry in conjunction with the General Counsel for the agency. The scope statement of the management inquiry provides the outer boundaries of the inquiry. A well-written statement of the scope gives both sufficient latitude to the management inquiry to pursue significant lines of questioning and sufficient guidance to deter expansion of the inquiry into unnecessary or inappropriate matters. Once you have outlined the scope of the management inquiry you can then choose the method of or type of inquiry you will conduct. Consideration should be given to sensitive issues such as:

- ➢ Will witnesses be under oath?
- ➢ Will testimony be confidential?
- ➢ To whom will the report be distributed?
- ➢ What approach will be taken to uncooperative witnesses?

Following the management inquiry, a report and recommendations should be prepared and submitted to the office requesting the inquiry. Before the requesting office can make any decisions, the requesting office should review the report to ensure it adequately addresses the issues outlined in the scope of the inquiry and that the evidence supports the findings and recommendations. Once the requesting office has determined the management inquiry is complete, a plan to support the implementation of agreed upon recommendations should be developed and tracked to ensure that matters identified for remedial action, including administrative action are followed to completion.

If you would like additional information about how to conduct management inquiries at your agency, please contact Sonya Williams at swilliams@dsz.com

INTRODUCING SYLVIA DRUMMOND

by Sylvia Drummond

I am proud to introduce myself as the newest member of DSZ's professional team. I hope to add my experience and expertise to DSZ's already quality professional team of EEO services providers. I am a federal retiree whose career spans nearly thirty years as a frontline Federal EEO manager and specialist at the Equal Employment Opportunity Commission, Resolution Trust Corporation, Federal Deposit Insurance Corporation, Department of Commerce, and Department of Defense. As a DSZ employee, I serve as a Senior Case Manager, managing and directing the course of EEO investigations and EEO counseling.

I have a long history of collaboration with DSZ that began when I served as a federal EEO official and oversaw investigations contracted out to DSZ. Through the years, our mutual respect increased; I was always impressed with DSZ's expert understanding of EEO laws, legal precedents, regulations and the fact that DSZ provides its clients with professional, quality and timely EEO services.

Upon my retirement from the Federal government in 2001, I considered only a few options, the most compelling of which was to continue the work I have enjoyed throughout the years. After a brief respite, I looked to DSZ for contract assignments such as EEO investigations, counseling and special projects. I contacted Megan Zorn, DSZ's Director of Investigations, to offer my services. You can imagine my pleasure when she welcomed me to the team. I was thrilled to be able to continue my relationship with DSZ, albeit with a different role.

After working with DSZ as a contractor for about two years, in September 2005, Megan asked me to join the DSZ team as a full time employee. Of course I accepted; our relationship came full circle. This meant I could continue in a field that I enjoyed as well as working more closely with a group of people for whom I had the utmost respect.

During the period that I have worked with DSZ both as a contractor and an employee, I have come to more fully appreciate the professionalism of this organization. It is clear why DSZ is the leader in the EEO services field. DSZ has a staff of Case Managers who oversee investigations and EEO counseling, and a cadre of highly competent professional EEO contractors, many of whom are EEO attorneys and former federal EEO managers and senior specialists.

DSZ also has an infrastructure that fully supports its contractors. For example, there is a wealth of on-line resources available to contractors that include investigation and counseling manuals. These manuals ensure that contractors have at their fingertips the proper resources to assist in carrying out assignments. The DSZ counseling and investigations manuals refresh investigator/counselor skills and provide guidelines regarding the EEOC and DSZ standards. Also available on-line are the agency specific protocols for each DSZ client, that present clear guidelines regarding each agency's expectations and requirements for investigations and counseling. This wealth of DSZ on-line resources allows DSZ to ensure timely and quality EEO client service. Furthermore, any contractor who chooses may take advantage of DSZ's yearly update training (investigations and counseling) offered exclusively to DSZ contractors.

It does not surprise me that my position with DSZ has sparked the interest of a number of my former federal EEO colleagues, many of whom are about to retire and indicate a desire to follow in my footsteps as a DSZ contractor. Like me, they have set their sights on DSZ because, as federal EEO officials, they understand that DSZ stands for excellence.

RESEARCHING OLD ISSUES?
WANTING A FRESH PROSPECTIVE?
GIVE US IDEAS.
TELL US WHAT YOU THINK.
CLICK HERE TO GIVE YOUR OPINION OR POSE A QUESTION FOR THE NEXT EEO PROFILE.

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debate as to whether that provision provides protection to federal employees, a debate for another article!). These threshold elements include:

1. Establishing the complainant has participated in prior protected **EEO** activity (**not** union activity, not whistle-blowing, but specifically **EEO** activity) or has opposed employment practices made unlawful under the governing statutes (Title VII, the Rehabilitation Act). Specifically, the language offering protection against reprisal states a person may not be subject to discrimination "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

2. Establishing management was aware of the protected activity and committed adverse actions against the complainant subsequent to its awareness; and

3. Establishing some causal connection between the prior protected activity and the current alleged adverse action, either through close temporal proximity between the prior protected activity and the current events, or through some other causal connection (direct retaliatory statements, other testimony observing changes in behavior and treatment toward the complainant, for example).

The EEOC, in its Summer 2005 Digest of EEO Laws, provides a summary of cases in which each of these elements has been addressed. It is mandatory reading for EEO professionals, in order to thoroughly understand how the Commission is interpreting key reprisal concepts such as participation in protected EEO activity and evidence establishing causal connections between such activity and subsequent allegations of retaliatory adverse actions.

Additional mandatory reading is the Supreme Court's decision in Clark County School Distr. V. Breeden, 532 U.S. 268 (2001) and a 20 year old decision out of the Massachusetts federal district court, affirmed by the 1st circuit and still routinely cited for the clarity of its statement on the reprisal standard, Hochstadt v. Worcester Foundation for Experimental Biology, 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F. 2d 222 (1st Cir. 1976). While there is no substitute for reading these two key cases, the Commission, in post-Clark decisions, routinely uses the following language and it is reasonable to conclude it represents the Commission's standard for reprisal. (see for example Lynch v. Potter (USPS), EEOC Appeal No. 01A24705, 2003 WL 21997622 (August 14, 2003) and Abordo v. Potter (USPS), EEOC Appeal No. 07A20066, 2003 WL 22763110 (November 6, 2003). The Commission states:

"Regarding complainant's **reprisal** claim, a complainant can establish a prima facie case of **reprisal** discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Social Security Administration, EEOC Request No 0596043 (Dec. 6, 1996) citing McDonnell Douglas v. Green, 411 U.S. 792 (1973) at 802). Specifically, in a reprisal claim, and in accordance with the burdens set forth in McDonnell Douglas and Hochstadt v. Worcester Foundation for Experimental Biology, 425 F. Supp. 318, 324 (D. Mass.) aff'd, 545 F. 2d 222 (1st Cir. 1976), ….a complainant establishes a prima facie case of reprisal by showing that: (1) he engaged in a protected activity; (2) the agency was aware of his protected activity; (3) subsequently he was subjected to adverse treatment by the agency, and (4) a nexus exists between the protected activity and the adverse treatment. ….. A party relying on temporal proximity to show the necessary causality for a prima facie case must show that the prior protected activity and the instant event occurred very closely in time. Clark County School District v. Breeden, 532 U.S. 268, 273-74 (2001)….."

Typically, "closely in time" is being interpreted as no more than six months between the earlier protected activity and the alleged adverse action. It is important for counselors to establish the date, content and connection between the alleged prior EEO activity and the current conflict brought to counseling. Similar clarity is essential

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in the investigative record. If there is no temporal proximity and no other apparent causal connection, the reprisal claim will fail.

The last area of controversy revolves around the question of what constitutes an adverse retaliatory action. The EEOC Compliance Manual section on Retaliation was written in 1998, three years before the Supreme Court's ruling in Clark. The manual states: "Although trivial annoyances are not actionable,more significant retaliatory treatment that is reasonably likely to deter protected activity is unlawful. There is no requirement that the adverse action materially affect the terms, conditions, privileges of employment." The Supreme Court, in a per curiam opinion in the Clark case, in 2001, held that a cause for retaliation was not shown in the allegation involving a single alleged adverse incident. "No reasonable person could have believed that the single incident recounted above violated Title VII's standard," declared the Court. Continuing, the opinion noted that the occurrence was "at worst an 'isolated incident' that cannot remotely be considered 'extremely serious,' as our cases require."

Other courts have also stated that the adverse action associated with a reprisal claim must affect a term, condition or privilege of employment, in conflict with the lesser standard stated in the Commission's Compliance manual. This controversy is likely to be at least somewhat resolved when the Commission up-dates its reprisal section to be more consistent with the post-Clark rulings of most federal courts. It must be resolved in the context of the court's standards but also with respect for the objective of the Commission's tougher definition: to assure that complainants are not subjected to punitive management behavior because they have utilized the legitimate EEO processes available to them. To allow such agency "behavior" to go unchecked would be to have a chilling effect on the EEO process itself. The struggle will be to appropriately define what "behavior" is truly designed to punish an employee for the legitimate act of availing him or herself of the protections of the EEO system and what "behavior" is merely the reflection of the normal stresses and strains of the work environment. The "No Fear Act" reporting provisions have made it more important than ever for EEO professionals to clarify and understand the elements of reprisal.

OPEN LETTER TO DSZ INDEPENDENT CONTRACTORS

We just presented, online and in person, DSZ's eight-hour update training for counselors and investigators. We understand the eight-hour annual EEO update training, a requirement since 1999, can feel like a burden. DSZ wants our training to be timely, stimulating and useful as well as low cost and accessible. Some years this is easier to ensure than others, specifically, when the Supreme Court decides cases that impact our work, or when EEOC provides new guidance. Other years, we try to focus on substantive topics we think affect our contractors' work and to offer this substance in an interesting learning forum.

Our efforts this year brought us to consider whether, for instance, in person training is more useful than online training. Whether the interaction between staff and contractors, an open forum in which to discuss different approaches and hear different experiences is more useful than online training which, in most years past, is all we have offered.

The only way for us to gauge the success of our training is through our contractors. So we want to hear from you because, no matter how we may wish it, the requirement for an annual update is not going away! Tell us what works, what doesn't, what you'd like to see more of and what you really wish to see less of. For those of you who attended in person, was the additional cost of in person training worth it? Would you do it again? For those of you who didn't, would you consider attending in person training though it would require you to travel?

For those of you who did the training on line, was it more than a necessary chore? Did you learn something useful? For those of you who attended training other than that offered by DSZ, what worked for you or didn't? We genuinely value your thoughts and feedback and would be grateful if you took the time to comment.

Sincerely,

Megan Zorn
Director of Investigative Services
DSZ

("BARGAINING UNIT" CONTINUED FROM PAGE 1*)*

does not diminish the formal nature of the discussion.

3) An EEO Investigator, whether a federal employee or a contractor, functions as a representative of the agency. The EEO officer of the agency authorizes the investigation and signs the notice to all employees of the EEO investigator's authority to conduct the investigation. The EEO officer also is involved in the hiring of a contractor.
4) A formal complaint of discrimination is a grievance within the definition of grievance under Section 7103 (a)(9) of the Federal Labor Relations Act, 5 U.S.C. §7101 *et.seq*.

EEO meetings occurring at the informal, pre-complaint counseling stage are *not* formal discussions within the meaning of the FLRA. This stage of the EEO complaint is informal. Additionally, the confidentiality provisions of the informal complaint stage facilitate informal resolution and encourage employees with discrimination complaints to pursue and explore their claims without fear of retribution.

Procedures adopted by EEO officers of federal agencies that provide notice to the union of investigative interviews of bargaining unit employees include:

- The EEO investigator provides the EEO office with advance notice of all interviews. The EEO office notifies the union, through the Labor Relations staff, of the interview dates and times for all bargaining unit employees. A minimum of 48-hours' notice is provided to the union of each such interview. The union can choose to be involved in the interview or not. The EEO investigator does not hold up the interview process for the union.
- "Talking points" (opening remarks) for EEO investigators of investigatory interviews when the union sends an institutional representative to the interview of a bargaining unit employee. These remarks might include information about the union's role in the interview and any prohibitions against disclosure of information provided (by either the Investigator or the bargaining unit employee) during the course of the interview.

DSZ is committed to ensuring that our EEO clients have the best possible information for ensuring that their agency's EEO programs meet all legal requirements. We encourage our clients to ask that EEOC's Office of Federal Operations provide guidance on this issue. Additional information on this subject can be found at:

- General Counsel's Guidance on Meetings under the FSLMRS Rights and Obligations and Strategies to Avoid Conflict (January 25, 2001); Guidance on Applying the Requirements of the Federal Service Labor-Management Regulations Statute to Processing Equal Employment Opportunity Complaints and Bargaining over Equal Employment Opportunity Matters (General Counsel's Memorandum of January 26, 1999). These can be found at www.flra.gov (the website of the Federal Labor Relations Authority).
- Broida, Peter, A Guide to Federal Labor Relations Authority Law & Practice (2004: Dewey Publications, Inc.). (See Chapter 8, Unfair Labor Practices, Section I, Management Violations.)
- Social Security Administration, Office of Hearing and Appeals, Boston Regional Office, Boston, Massachusetts (Respondent/Agency) and American Federation of Government Employees, Local 1164, AFL-CIO, Case Nos. BN-CA-02-0266, BN-CA-02-0434, 2004 FLRA Lexis 67; 59 FLRA No.160 (April 30, 2004).
- Federal Legal Corner: Union Right to Attend Investigative Interviews (FEDweek, Wednesday, November 24, 2004, found at www.fedweek.com).

(Footnotes)

[1] On April 19, 2005, the EEOC's Office of Legal Counsel gave a brief presentation on this history and implications of the recent FLRA decisions to Federal EEO Directors.