

ISSUES OF MERIT

Fall 2017

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Sexual Harassment Trends in the Federal Workplace

Soon after the Civil Service Reform Act of 1978 established the U.S. Merit Systems Protection Board (MSPB) and gave it the authority to conduct merit systems studies, a U.S. House of Representatives subcommittee requested that MSPB examine sexual harassment in the Federal workplace. MSPB conducted a study, including a survey of Federal employees, and the results were published in the Board's first official report, *Sexual Harassment in the Federal Workplace: Is It a Problem?*, released in March 1981.

MSPB repeated several of the sexual harassment questions on later surveys to track employee perceptions over time. The results were reported in studies published in 1988 and 1995. As shown in our 1995 report *Sexual Harassment in the Federal Workplace: Trends, Progress, Continuing Challenges*, despite increased efforts to eradicate sexual harassment in Federal agencies, employee perceptions regarding the frequency of these behaviors had remained unchanged. MSPB attributed this, in part, to greater employee awareness of behaviors that could constitute sexual harassment.

Since then, Federal directives, laws, and court decisions have further clarified and reinforced what is—and is not—appropriate behavior in the workplace. Accordingly, some long-time Federal employees may believe that every employee's work environment has become more professional. Conversely, in light of recent allegations of sexual harassment and misconduct in several Federal agencies, a casual observer might think that many or all Federal workplaces are unprofessional and unwelcoming, especially for women.

MSPB's 2016 Merit Principles Survey (MPS) provides generalizable data on the prevalence of sexual harassment behaviors and how employees view Federal agency efforts to prevent and address sexual harassment. Consistent with a contemporary understanding of sexual harassment, the 2016 MPS asked employees about a wide range of experiences and behaviors, from "quid pro quo" and open coercion to a hostile work environment, while maintaining continuity with previous surveys.

In advance of an upcoming report that provides a full analysis of our research findings, here are a few highlights that compare Federal employees' responses between 1994

"Quid pro quo"
literally means "this for that." In other words, the harasser offers work-related benefits (e.g., career advancement) or avoidance of negative consequences (e.g., removal from the job under false pretenses) in exchange for sexual favors.

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The MSPB Office of Policy and Evaluation conducts studies to assess the health of Federal merit systems and to ensure they are free from prohibited personnel practices.

Issues of Merit

We offer insights and analyses on topics related to Federal human capital management, particularly findings and recommendations from our independent research.

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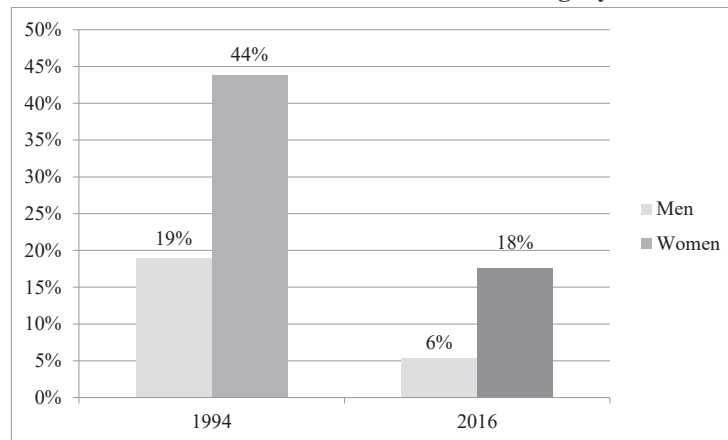
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Sexual Harassment Trends

(continued)

and 2016. As illustrated in the chart, Federal employees viewed sexual harassment behaviors as occurring less frequently in 2016 compared to 1994. However, sexual harassment is still occurring, with women more than three times as likely as men to say that they have experienced one or more sexual harassment behaviors in the past 2 years.

Percent of Employees Indicating They Experienced At Least One Occasion of Sexual Harassment in Preceding 2 years



More specifically, eight types of sexual harassment behaviors were included on the 1994 and 2016 surveys, enabling a direct comparison of these items. As the table shows, for each item, the percentage of men and women who said they experienced the type of sexual harassment behavior decreased between 1994 and 2016.

Percent of Employees Indicating Each Type of Sexual Harassment Behavior

	Men		Women	
	1994	2016	1994	2016
Unwelcome invasion of personal space	8%	3%	24%	12%
Unwelcome sexual teasing, jokes, comments, or questions	14%	3%	37%	9%
Unwelcome sexually suggestive looks or gestures	9%	1%	29%	9%
Unwelcome communications of a sexual nature	4%	1%	10%	6%
Pressure for dates	4%	1%	13%	3%
Stalking	2%	1%	7%	2%
Pressure for sexual favors	2%	1%	7%	1%
Actual or attempted rape or sexual assault	2%	1%	4%	1%

Although progress has clearly been made in reducing the frequency of sexual harassment, agencies need to continue working to educate employees about their rights and responsibilities in terms of their conduct in the workplace. In an upcoming report on sexual harassment, we will delve further into the types and frequency of sexual harassment behaviors, risk factors that appear to increase one’s likelihood for being exposed to harassment, as well as strategies for preventing and addressing sexual harassment. MSPB hopes that these ongoing efforts will further reduce the numbers of Federal employees who experience (or observe) sexual harassment. ❖

Stewardship, OMB M-17-22, and the Enduring Relevance of the Merit System Principles

OMB's directive demonstrates that not all civil service laws are outdated relics.

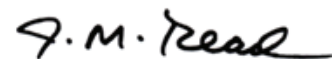
The merit system principles (MSPs) were codified by the Civil Service Reform Act (CSRA) of 1978 in 5 U.S.C. § 2301(b). They serve as the Federal Government's guidelines for how the workforce should be managed. Earlier this year the Office of Management and Budget (OMB) issued directive M-17-22, *Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce*, calling on agencies to formulate plans "aim[ed at] mak[ing the] government lean, accountable, and more efficient." Although M-17-22 does not expressly reference the MSPs, the directive in essence asks agencies to recommit to several of the key values that underlie them.

Take, for example, the sections "Restructure and Merge Activities" and "Improve Organizational Efficiency and Effectiveness." Here, OMB directs agencies to ensure that their organizational structures are aligned with their core missions and strategic plans; reduce duplication of activities or functions across different parts of their organizations; eliminate redundant levels of management or administrative support; and get rid of unnecessary steps that do not add value. The fifth MSP states that the Federal workforce "should be used efficiently and effectively." As MSPB explained in our 2013 report *Managing Public Employees in the Public Interest*, how well an agency is meeting the simple command of MSP 5 can be gauged by examining things like the extent to which it eliminates unnecessary functions and positions, makes good use of employees' skills and talents, and focuses employee attention and efforts on what is most important. The parallels between M-17-22 and MSP 5 are clear.

To take another example, the section "Workforce Management: Improve Performance, Increase Accountability, and Reduce Costs" directs agencies to ensure that managers have the tools and support they need to manage employee performance effectively; recognize high performers; help employees who are not meeting performance expectations; and remove poor performers if necessary. MSP 3 states that "appropriate incentives and recognition should be provided for excellence in performance." MSP 6 says that employees "should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards." Here too, the mandates of M-17-22 parallel the MSPs, and MSPB has explored how agencies can better carry out these actions. For example, our 2012 report *Federal Employee Engagement: The Motivating Potential of Job Characteristics and Rewards* discusses how to administer rewards to improve employee motivation in a workforce that tends to see weak relationships between performance and the rewards they receive. Furthermore, our 2015 report *What is Due Process in Federal Civil Service Employment?* provides a discussion of common misperceptions related to the rules around adverse actions.

In *Managing Public Employees in the Public Interest*, we observed that the MSPs encompass three themes: (1) Fairness in the treatment of Federal employees and applicants for Federal jobs; (2) Stewardship, the responsible management of Federal personnel and resources with the public interest in mind; and (3) Protection of employees from arbitrary or improper influences or actions. Our report found that many Federal employees perceive that their agencies fall short in the area of stewardship. M-17-22 overall implies as much and calls on agencies to do better. As noted in the directive, MSPB has a number of resources available on our website to help agencies do this, including *The Merit System Principles: Keys to Managing the Federal Workforce*, a booklet designed to help supervisors and managers understand the values and requirements of Federal merit systems.

Some claim that the civil service laws are outdated relics that get in the way of effectively managing the Federal workforce. Clearly this is not the case as far as the MSPs are concerned. Decades after the enactment of the CSRA, the legislative vision underlying the MSPs still matters. ❖



Director, Policy and Evaluation

Fitting the Pieces Together

Exploring the linkage between job fit, discretionary effort, and performance.

In its 2015 white paper *Engaging the Federal Workforce: How to Do It & Prove It*, the Office of Personnel Management (OPM) advanced job fit as an important component of engagement since it reflects the degree to which employees feel their personality and values align with their current job. While good job fit seems reasonable and desirable, OPM does not explore



how job fit drives engagement and ultimately job performance. Is it that employees who are a better fit enjoy their work more and hence perform better? Or perhaps better-fit employees are easier to manage, leading to higher appraisal ratings. Identifying *how* good job fit leads to engagement and job performance may inform performance improvement efforts.

One clue comes from the private sector through the Corporate Leadership Council's (CLC) research. CLC's report *Building the High-Performance Workforce: A Quantitative Analysis of the Effectiveness of Performance Management Strategies* reported results from its 2002 Performance Management Survey, showing that matching employees with jobs they do best and creating opportunities for employees to capitalize on their strengths increased employees' discretionary effort by 29 percent and individual job performance by 25 percent. In other words, discretionary effort is a mechanism through which job fit improved job performance. Specifically, the better the match between an employee's interests/skills and the job, the more they were willing to "go the extra mile" and perform above and beyond requirements.

MSPB's analysis of the 2016 Merit Principles Survey explored whether CLC's findings carried over to the Federal sector. Analyzing data from over 14,000 Federal employees, MSPB combined responses to survey items such as "I look for ways to better apply my abilities" and "I take the initiative to collaborate with others" to form a single, multi-item measure of discretionary effort. We did the same using responses to items such as "My work is a good fit for who I am" and "My work is the kind of work that I want to do" to measure the degree of job fit for each respondent. Finally, we asked respondents to reveal the performance rating they had received and the rating they think they deserved, providing an estimate of individual job performance.

Consistent with CLC's research, we found that job fit is a key driver of discretionary effort, which in turn is a key driver of employees' performance ratings. Importantly, statistical analyses show that discretionary effort appears to be a causal mechanism that connects job fit to performance rating. This means that the better the fit between employees and the work they do, the more discretionary effort they will put forth which will in turn increase individual performance.

MSPB first identified the relationship between job fit, discretionary effort/employee engagement, and organizational performance in our 2008 report *The Power of Federal Employee Engagement*. Now we can demonstrate a statistical relationship between job fit, discretionary effort, and individual performance. What can organizations do to ensure that employees feel well-fit to their jobs? As we said in 2008, it all starts with good recruitment and assessment practices.

Realistic job previews (RJPs), as described in our September 2008 newsletter, are valuable tools in helping potential candidates decide if the job is a good fit for them before applying. RJPs can be as simple as including "This Job Is for You if..." statements in job opportunity announcements. Such statements ask the applicant to consider less measurable competencies (e.g., customer service orientation, emotional intelligence, decisiveness, flexibility, teamwork, and creative thinking) required by the job and offer the opportunity to self-evaluate whether the job is a good fit. For example, a customer service representative position announcement may say: This job is for you if you like (1) listening to customers' needs and concerns and (2) calming people down when they are frustrated.

At the assessment stage, organizations may use job simulations to improve fit. In our 2009 report *Job Simulations: Trying Out for a Federal Job*, we define job simulation as an assessment that presents applicants with realistic, job-related situations and documents their behaviors or responses to help determine their qualifications for the job. These simulations can also help applicants determine if the job is a good fit to their interests and abilities.

Job Fit

(continued)

Beyond good recruitment and assessment, jobs can often be made to better fit employees by using job redesign, enlargement, and enrichment. In our 2012 report *Federal Employee Engagement: The Motivating Potential of Job Characteristics and Rewards*, we show how (1) jobs can be expanded or enriched to include duties that better match the employee's competencies and interests and (2) employees can be rotated among jobs where competencies and interests are better matched.

Considering the research finding that well-fit employees are more likely to “go the extra mile” and perform better, there is much that organizations can do to more closely align people to work and work to people. ❖

“Obey Now, Grieve Later” Loses Some Ground

Employees cannot be expected to carry out an order that would violate a law, rule, or regulation.

There's an old adage in the Federal Government when it comes to following a supervisor's instructions: Obey now, grieve later. This can be a hard thing for employees to do when they feel the supervisor's order is incorrect, improper, or just a bad idea. However, if the employee doesn't comply with the instruction, then the supervisor could possibly take a disciplinary action against the person.

The one exception to this rule has been refusal to obey an order that would require the employee to violate a law. Taking a disciplinary action against an employee in this situation is considered a prohibited personnel practice (PPP), covered under 5 U.S.C. § 2302(b)(9)(D).

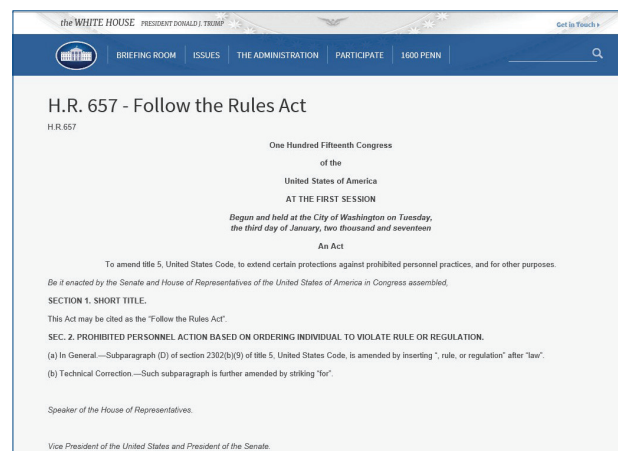
But what if the supervisor told the employee to do something that would violate a rule or regulation? Most employees would feel pretty uncomfortable violating a well-known human resources or procurement regulation, for example. Even so, until recently, they would have had to comply or potentially be subject to discipline because the PPPs did not include protections for refusing to carry out an order that violates a rule or regulation.

However, there's a new law on the books that changes that. The “Follow the Rules Act,” signed by the President in June 2017, amended the PPPs—specifically 2302(b)(9)(D)—to protect employees from being subject to personnel actions “for refusing to obey an order that would require the individual to violate a law, rule, or regulation.”

The history of this modification to section 2302 began with the case *Rainey v. Department of State*. Timothy Rainey was a Federal employee who performed contracting officer's representative (COR) duties at State. He alleged that he had been stripped of his COR duties and received a sub-par performance appraisal in retaliation for refusing to obey an order that would have violated the Federal Acquisition Regulations (FAR) and agency training.

Rainey appealed the personnel actions to MSPB, but the appeal was dismissed for lack of jurisdiction. Under Supreme Court precedent, the term “prohibited by law” in section 2302 does not automatically include rules and regulations (*Department of Homeland Security v. MacLean*). According to the Court, if Congress wanted 5 U.S.C. § 2302 to address rules and regulations, then it needed to explicitly state that in the statute. The Board's decision was upheld by the U.S. Court of Appeals for the Federal Circuit, and that Court also noted that “Congress is free to alter the scope of the statute. But we are not so free.”

That is just what Congress chose to do in passing the “Follow the Rules Act.” As with any change in statutory language, MSPB and its reviewing courts will have to wait for cases to come before them to determine how the change fits into the larger body of civil service laws. For now, it is important for employees and supervisors to know that the rules have changed and that “obey now, grieve later” has lost some of its power. ❖



Federal HR Offices: Up to the Task?

MPS data provides an early look at supervisors' views of their HR staffs.

Reform Federal hiring. Close skills gaps. Maximize employee performance. Increase employee engagement. Federal agencies and leaders have a daunting to-do list and will be looking to Chief Human Capital Officers (CHCOs) and Human Resources (HR) staff for solutions and support. Are Federal HR offices up to the task? Preliminary analysis of data from MSPB's 2016 Merit Principles Survey, which we collected in support of an ongoing study of the Federal HR workforce, suggests that agencies should not assume that the answer is "Yes." The table below shows supervisors' views of the importance, knowledge, and effectiveness of their HR staff by functional area. Several patterns are noteworthy.

HR staff is...	HR Function	Agree	Neutral	Disagree
Essential to my success	Staffing	75%	17%	8%
	Classification	74%	18%	7%
	Performance management	82%	11%	8%
	Conduct management	75%	18%	7%
Knowledgeable about laws, rules, and regulations	Staffing	69%	17%	14%
	Classification	75%	16%	10%
	Performance management	83%	10%	7%
	Conduct management	85%	9%	6%
Effective in their role	Staffing	64%	21%	15%
	Classification	64%	20%	16%
	Performance management	72%	16%	12%
	Conduct management	73%	15%	12%

First, on a positive note, most Federal supervisors believe that HR staff are essential to their mission and organizational success. For every HR functional area included in our survey, 70 to 75 percent of supervisors agreed that HR support is "essential to the success or failure of my office." The debate over whether Federal HR is equipped for their roles should not overshadow the fact that HR offices and staff are essential in helping supervisors complete important organizational tasks.

Second, Federal supervisors view the *knowledge* of their HR staffs more positively than they view their *effectiveness*. This suggests that poor HR outcomes may, in some cases, be the product of knowledgeable people working with outdated processes or policies. If so, policy-focused reform initiatives should indeed be part of the solution. Furthermore, in every HR discipline, there is a small proportion of supervisors who believe their supporting HR staffs are neither knowledgeable nor effective. These minority views should not be ignored.

Finally, we note that there are differences across functions. For example, supervisors view the staffing function less positively than the employee relations function. Supervisors having a comparatively positive view of employee relations is good news when dealing with problem performers. However, hiring high-quality employees remains an important aspect of supervisors' jobs, and our December 2016 publication *Addressing Misconduct in the Federal Civil Service: Management Perspectives* shows that supervisors consider hiring qualified people to be a more difficult task than addressing problems with employees after they are on board.

Differences across HR disciplines should not divert attention from the overriding need to ensure that every Federal HR specialist has the necessary knowledge, skills, and tools and that every Federal supervisor receives sound HR advice and support. Many policymakers and commentators believe that the Federal Government needs to update or completely rethink its HR policies and policies. For instance, House appropriators drafted a request that OPM develop a plan to reduce Federal employment barriers and reduce hiring delays. At some point, though, plans and policies must be put into practice. Although Federal CHCOs may be able to rest assured that the importance of HR is widely accepted, it appears that they should think long and hard about whether HR service and support are good enough—and be honest about what it might take to improve. ❖

Final “Ban-The-Box” Regulations

What agencies need to consider with OPM’s new regulations.



New Regulations. In December of 2016, OPM amended its regulations to prohibit agencies from inquiring about a job applicant’s criminal background until the agency has made a conditional offer of employment to the applicant. OPM stated that this change would better align its regulations with predominant agency practice as well as comply with the first merit principle that selection for employment be based solely on knowledge, skill, and ability. Efforts to move inquiries regarding a job candidate’s criminal history to later in the hiring process are typically known as “ban-the-box” strategies—referring to a theoretical box appearing on job applications that must be checked if applicants have a criminal background. The intended effect of OPM’s rule is to encourage more motivated, well-qualified individuals who have served their time to apply for Federal positions by making it clear that the Government provides a fair opportunity to compete for Federal employment to all segments of society.

A Little History. Policies related to job applicants’ criminal history are not new. In fact, the Equal Employment Opportunity Commission updated its guidance on the use of arrest or conviction records in employment decisions in 2012, and the National Employment Law Project’s 2017 report *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies* states that over 150 cities and counties and 28 states have ban-the-box policies. The Civil Service Reform Act tackled this issue as well through codification of the MSPs. In addition to MSP 1, MSP 10 protects employees from discrimination based on conduct that does not adversely affect job performance—though agencies can take convictions into account when determining suitability for the job. The Act’s Conference Report noted that a conviction that has no bearing on job duties or job performance may not be the basis for discrimination for or against anyone.

Not Everyone Agrees. Not everyone agrees that the ban-the-box approach provides better employment opportunities to formerly incarcerated individuals. In particular, some critics contend that ban-the-box policies may result in the hiring of fewer African American and Hispanic men. The Society for Human Resource Management’s (SHRM) March 2017 article *Ban the Box: Fix It or Start Over?* cited research that speculated that if information about the actual criminal histories of applicants is not available to employers, they may substitute other characteristics such as age, race, ethnicity, and education to weed out applicants who they guess might have criminal histories. SHRM also, however, cited a 2017 study of ban-the-box policies in the public sector that found that the employment of ex-offenders increased with no evidence of a harmful effect on minority applicants.

Waiver Requests. There may be legitimate reasons agencies may need to determine suitability at an earlier stage in the hiring process. In February 2017, OPM issued guidance that agencies can use to request an exception to the prohibition of inquiring about an applicant’s criminal background until the agency has made a conditional offer of employment to the applicant. OPM reasoned that an agency may need to ask applicants about their criminal background earlier in the process if they are recruiting for positions where, for example, the ability to testify as a witness is a requirement and thus a clean criminal history record would be essential to the ability to perform one of the duties of the position effectively. Another example of an exception that OPM cited was a position where the expense of completing the employment examination would make it appropriate to adjudicate suitability at the outset of the process.

Agency To Do List. To comply with the OPM regulations, agency human resources offices and Federal hiring managers should take the following actions:

- Make sure not to ask about applicants’ criminal background by inadvertently including the Optional Form 306 (Declaration for Federal Employment)—or a similar agency form—too early in the hiring process;
- To ensure hiring actions won’t be delayed, determine what position or group of positions may need a waiver as soon as possible and request the waiver prior to the need for hiring those positions;
- If a waiver from OPM is received, remember to note that criminal history will be reviewed as part of the qualification assessment in the vacancy announcement; and
- Consider not discharging other highly qualified job applicants until a favorable suitability determination has been made on the applicant selected for the position. ❖



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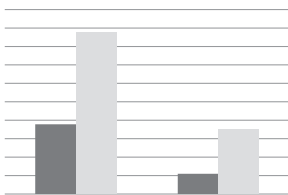
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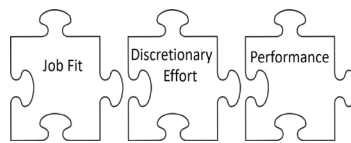
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