

DoD HR 2002



*HR Worldwide –
Leading the Charge*

Litigation Update

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ENVIRONMENTAL DIFFERENTIAL PAY (EDP)



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- Asbestos

- Naturally Occurring
- 3000 Industrial Applications
- Friable vs. Non-Friable
- Carcinogen
- OSHA PEL (0.1 f/cc over 8-hour weighted average over a lifetime)



- Pay Issue vs. Safety Issue
- WG Employees Facing Severe/Hazardous Conditions
- 8% Asbestos EDP Authorized Since 1975:

Where airborne concentrations of asbestos fibers *may expose employees to potential illness or injury* and protective devices or safety measures have not *practically eliminated* the potential for such personal injury or illness

- GS Employees Get HDP Above the OSHA PEL since 1993

FLRA EDP DECISIONS



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- Applicable to Federal Employees Represented by Labor Unions
- **Absent:**
 - Mandated quantitative level set by law
 - Government-wide regulation
 - Collective bargaining agreement (or other agreement between parties)
- **Arbitrator Resolves Back Pay Claims By Setting Local EDP Asbestos level**
 - Since 1993, 32 At PEL, 17 Below PEL
 - *(Non-Binding on Other Arbitrations)*

RECENT EDP ARBITRATION DECISIONS



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- **Kelly AFB:**

“The Arbitrator does not disagree with the wisdom of the Agency’s argument that it makes sense to apply one standard for all Federal employees. But for reasons known only to regulators in Washington D.C., that was not done. For reasons not apparent to the Arbitrator, the law of the land is that represented wage-grade employees entitlement to EDP should be determined locally.”

- **Corpus Christi Army Depot**

PENDING EDP CASES



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- Pearl Harbor Shipyard
- Puget Sound Shipyard
- Norfolk Shipyard
- Naval Air Station Corpus Christi

LITIGATION PROBLEMS



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- Employee Morale (Different Treatment)
- Union-Management Animosity
- Costs of Litigation
- Budget Implications - Potential Liabilities
- A-76 and Base Closure Studies



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POTENTIAL SOLUTIONS

- Collective Bargaining
- FPRAC Process
- Legislation
 - 2002 NDAA
 - 2003 NDAA

SUPREME COURT



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U.S. Airways

- Facts:** Cargo handler injures back
Requests accommodation to vacant mail room position
Employer has seniority system - 2 were senior
Employer chose seniority over accommodation
- Issue:** Must employer accommodate?
- Below:** Case-by-case intensive analysis required
- Held:** Employer's reason upheld, absent a showing of special circumstances
- Impact:** DoD policy? Union negotiations?

SUPREME COURT



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CHEVRON

- Facts:** Hiring physical disclosed liver damage
Damage would be aggravated by toxins at refinery
- Issue:** Does direct threat to health include one's own health
- Below:** ADA precludes EEOC Regulation
- Held:** Reversed
- Impact:** DoD policy intact! Workforce paternalism

SUPREME COURT



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USPS vs. GREGORY

- Facts:** Three disciplinary actions pending in the grievance process
Fourth Action = termination and MSPB appeal.
- Issue:** May MSPB consider prior actions which may be set aside?
(MSPB does independent review: in writing, matter of record, can be disputed)
- Below:** No
- Held:** Yes (note)
- Impact:** Importance of properly documenting prior misconduct

SUPREME COURT



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TOYOTA

Facts: Carpal Tunnel Syndrome prevented performance in assembly line position

Issue: What is an ADA qualifying disability requiring accommodation?

Below: Major life activity includes job related manual tasks

Held: Substantially limits major life activity = tasks central to most people's daily lives, e.g., household chores and hygiene, NOT job related tasks

Impact: Fewer disabled. More litigation. Policy issues.

SUPREME COURT



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AMTRAK vs. MORGAN

Facts: Allegation of racially hostile work environment (jokes, epithets, acts)

Allegation of retaliation (fired)

Some individual incidents outside the time limit

Issue: Application of filing deadlines

Held: Claims resulting from discrete acts must be timely filed (but, old acts can be used as background)

Claims arising from an unlawful practice - last incident must be timely

Impact: Unclear

OTHER CASES



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TINKER/DOVER

Tinker Facts: Employee files formal EEO complaint (not grievance)
OCI interviews bargaining unit witnesses
ULP filed

Dover Facts: Employee files formal EEO complaint (grievance not available)
Contract mediator conducts mediation
ULP filed

FLRA Holds: Formal discussion concerning a grievance—union has right to be present (despite Luke)

Status: At different Circuit Courts of Appeal (note March and I&I bargaining)

OTHER CASES



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CHARLESTOWN

- Facts:** Employee feedback session. Technical A&B
- Issue:** Robust discussion, or flagrant misconduct, or new standard
- FLRA Held:** Protected conduct
- Appealed:** Awaiting decision

OTHER CASES



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WATSON vs. NAVY (Fed. Cir.)

- Facts:** 13 former and current police officers seek LEO retirement credit
- AJ Held:** Old standard. Actual duties, including additional and occasional
- MSPB:** New standard! Consider reasons for creation and existence of the position:
- Primarily for investigation, apprehension or detention of criminals or suspects vs. protection of life and property.
 - Are duties physically demanding enough to warrant retirement at an early age.
- Appeals:** New standard upheld. Cert. Denied.

OTHER CASES



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FOX vs. USPS (MSPB)

- **Explains burdens in USERRA cases**
 - Appellant must establish that military status was a motivating or substantial factor in the agency action.
 - Agency must establish it would have taken the action despite the protective status.

ANTIDISCRIMINATION LEGISLATION



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FEDERAL EMPLOYEES ANTIDISCRIMINATION AND RETALIATION ACT (“NO FEAR ACT”)

- Agency required to pay from their budgets for settlements and judgements against them in discrimination and whistle-blower cases. (vs. U.S. Judgement Fund)
- Annual reporting requirements include: Number of complaints, disposition of each case, total monetary awards, number of agency employees disciplined for discrimination, retaliation or harassment.
- Public web site postings.
- Impact: Fewer or more settlements? Fewer or more ADRs?

SECTION 501



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EEOC IMPLEMENTATION OF SECTION 501 OF THE REHABILITATION ACT

- Changes rules on accommodation by reassignment
 - Still requires interactive process
 - Still a last resort
 - No longer limited to local commuting area or same appointment authority
 - Now applies to probationary employees
- Impact: Must look agency-wide absent undue hardship



Reemployment Priority List (RPL)

- MSPB Has Jurisdiction (5 CFR 330.209)
- Entitlement to Register Begins (Sturdy and OPM)
(5 CFR 330.203(a)(3))
 - Notice of Separation (5 CFR 351.801(a)(1))
 - Certificate of Expected Separation
(5 CFR 351.807(a))



RPL Problem Areas

- Employees Erroneously Briefed Not To Register in RPL Until Separation
- Employees Misled About Relationship to the PPP
- ***Remedy:*** Reconstruction

PPP/RPL JURISDICTION



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- MSPB ASSERTS JURISDICTION OVER THE PPP
- DoD Position---*MSPB Never Has Jurisdiction Over The PPP*
- MSPB Decisions (*Stuck, Sturdy, Russo*) Offer Two Theories:
 - If the Employee is not in the RPL, then the “in lieu of” theory
 - If the Employee is in the RPL (including constructively), then the Enforcement of “greater rights” or the “in addition to” theory

PPP/RPL JURISDICTION



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- DoD STRATEGY AND TACTICS TO PROTECT PPP

- Administrative Hearing Level
 - Ensure DoD Position is Fully Set Forth, Both Factually and Legally
 - Testimony/Declarations
 - Regulations
 - Briefs
 - (Defend PPP Actions Only If Forced)

- Appeals
 - Need MSPB Final Decision
 - OPM and Reconsideration
 - Circuit Court

COLATERAL ATTACKS ON THE PPP



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Galvan

- Kelly AFB Closure RIF
- 19 Veterans on Behalf of a Class -- Argue That Veterans' Preference Applies to the PPP
- Placement at Tinker or With Contractor
- Statistically Veterans Were Selected for Positions Through PPP at a slightly higher rate than Non-Veterans
- DoL, Dist. Ct., Cir. Ct.

COLATERAL ATTACKS ON THE PPP



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Kelly

- Filed for Disability Retirement
- Employee Notified of RIF
- Not Put in PPP
- Local Position Filled Through PPP Which Would Have Accommodated Him
- Request for Exception
- ADA and Title VII Suit
- Dist. Ct.

COLATERAL ATTACKS ON THE PPP



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Lester

- Robbins AFB – DLA Loses Contract and Separates 360 Employees through RIF
- Class Action Title VII Suit Filed on behalf of African Americans
- Alleges that PPP Selections Were Discriminatory
- Named Class Representative
 - Mock RIF Places Lester in Residual Efficient Organization at Lower Grade With Retained Grade
 - 2 Months in PPP
 - VERA/VSIP Offered –Accepts VSIP And Takes Optional Early Retirement
- Dist. Ct., Cir. Ct.

COLATERAL ATTACKS ON THE PPP



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EEO Cases

- Case #1

- Position Filled Through PPP
- Alleges Failure to Fill Internally Was a Decision to Eliminate Those Over 40

- Case #2

- Non-Displaced Overseas Returnee Was in PPP
- Exercised Return Rights
- Alleges Another Was Selected Through PPP Based upon Race

PPP AND SETTLEMENTS



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- PPP is DoD Program
- Paragraph E.3., Subchapter 1800 CPM Withholds Exception Authority
- Requests For Exception (MSPB, EEO, Grievance)
- Registration and Placement Criteria (none since 1965)

POTENTIAL EXCEPTIONS



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- Erroneously Not in PPP (Reconstruct)
- Matching and Referral History Is Reconstructed
- Do Not Darken My Door!!!

PPP SETTLEMENT CLAUSES



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(Priority Placement Program): This provision does not waive objections of the DoD to MSPB jurisdiction over the PPP. If (employee) is involuntarily separated by RIF from his current position at (), and if he is required to participate in the DoD PPP, he agrees that any PPP registration will exclude the following Commands at any Geographical location. Namely (), (), and its subordinate echelons.



HYPOTHETICAL ISSUE

- Accepts TOF Assignment Out of Commuting Area
- Recants and Declines and Requests PPP for Local Area
- Called to Active Duty
- No Longer Available to Accept a Position
- Is PPP a Benefit?
- Can it be Time Shifted?