



# **Litigation Update**

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# **SUPREME COURT**

## **Caesars Hotel & Casino**

### **Facts:**

- Female warehouse worker & heavy equipment operator
- Only female in job series
- Escalating disciplinary sanctions including suspension
- On job fight with male co-worker = removal
- Female presented evidence of:
  - Supervisor stalking
  - Less overtime than males
  - Supervisor tolerated sexual slurs

Jury awarded back pay, compensatory and punitive damages



# Caesars Hotel and Casino

**Issues:** Is circumstantial evidence sufficient for a mixed-motive case? Did she have to produce direct evidence that gender contributed to the removal decision?

**Instruction:** If you find that defendant's treatment of plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if plaintiff's gender had played no role in the employment decision.

**Held:** Circumstantial evidence enough

**Impact:** Could encourage EEO filings and persisting to Jury trials



# SUPREME COURT

## Toyota

**Facts:** Carpal Tunnel Syndrome prevented performance in assembly line position

**Issue:** What is 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.

Impairment  $\neq$  handicap

**Impact:** Potential for more litigation.



# **SUPREME COURT**

## **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, opportunity to dispute)

**Below:** No

**Held:** Yes

**Impact:** Importance of prior misconduct



# **SUPREME COURT**

## **Amtrak vs. Morgan**

- Facts:** Incidents of hostile work environment (jokes, slurs, etc)  
Removal  
Many individual incidents old - outside time limit
- Issue:** How to apply filing deadlines
- Held:** Claims resulting from discrete personnel acts occur on the day they happen and must be timely filed  
Claims arising from an unlawful practice - last incident must be timely (single act may not be actionable)
- Impact:** Lots of litigation. For hostile work environment, “smallest portion” of unlawful practice must be timely



# **SUPREME COURT**

## **Chevron**

- Facts:** Hiring Physical disclosed liver damage  
Toxins at refinery would aggravate damage  
Chevron relying on EEOC regulation  
refused to hire
- Issue:** Could EEOC define “direct threat” to health  
to include one’s own health
- Held:** Yes



# PROBATIONARY EMPLOYEES

## McCormick v. AF

- Facts:** Probationary period completed in 1991  
Hired into new career field, another agency  
in 1999  
Removed as probationary employee
- Issue:** Interpretation of probationary period in 5  
USC 7511
- Status:** Lost at Fed Cir (2-1). Denied rehearing en  
banc (2 dissenting). Cert?



# **UNION ACTIVITIES / DISCIPLINE**

## **Charleston**

**Facts:** Union President at Employee  
Feedback Session

Intimidating Posture; Technical A&B

**Issue:** “Robust Discussion” or “Flagrant  
Misconduct”

**FLRA Held:** Robust Discussion

**DC Cir Held:**Flagrant Misconduct



# **NON-UNION ACTIVITIES / DISCIPLINE**

## **Indian Health Service**

**Facts:** Two probationary nurses removed for failure to follow medical procedures

Both active in Union

**Issue:** Can FLRA compare punishments for disparate treatment?

**Held:** FLRA will ensure personnel action not pretext to retaliate for protected activity



# FORMAL DISCUSSION

## Tinker/Dover (Luke)

**Tinker Facts:** Employee files formal EEO complaint (not grievance)

OCI interviews bargaining unit witnesses

ULP (notice and right to be present)

**Dover Facts:** Employee files formal EEO complaint (MLB did not permit grievance). Contract mediator.

ULP (notice and right to be present)

**FLRA Holds:** Formal discussion concerning a grievance – Union has right to notice and to be present

**DC Cir:** Formal discussion



# FORMAL DISCUSSIONS

## Tinker/Dover (Luke)

### **Open Issues:**

EEO complainant objects?

Must union sign a confidentiality agreement?

Is OCI investigator an agency representative?

Can Union attend individual as well as joint sessions?

### **Potential resolutions:** Collective Bargaining

Legislation

EEO Regulation (vs. guidance)

NSPS



# “NATIONAL SECURITY”

## SSA v. AFGE (FLRA)

- Facts:** Physical Security Specialist & Electronics Technician (protect and work on and around main SSA computer)
- Issue:** Definition of National Security in 5 USC 7112(b)(6). Excludes from bargaining unit, “security work which affects national security”
- Legal Background:** Not defined in statute. Narrow definition in Oak Ridge (1980). Regular access to classified might not be enough. DoJ case expanded definition to all regular use and access and included non-military agencies.
- FLRA:** Requested amicus briefs



# “NATIONAL SECURITY”

## SSA (DoD, DoJ, etc)

**Position:** Includes critical infrastructure. Sensitive, but unclassified is enough.

### **Proposed Definition:**

“National Security” includes those activities of the government related to protecting and preserving against or from espionage, sabotage, subversions, foreign aggression, terrorism, or any other illegal act that would undermine: (1) the continuity of government, (2) the military, economic or productive strength of the United States, including the security of the government in domestic and foreign affairs, and (3) critical infrastructure (including, but not limited to, financial payment systems, telecommunications, and “cyber” infrastructures).

+

Deference



# REPRESENTATION OF PERSONNELISTS

## Rock Island

**Facts:** Union seeks representation of classification and staffing specialists at CPOC.  
Duties normally do not include the CPOC bargaining unit

**Issues:** Does the statutory term “personnel work” refer to all personnel work, or personnel work involving the same bargaining unit.  
Should FLRA decision permitting OPM personnelists to be in a bargaining unit be reversed.

**FLRA Region:** Conflict of interest test

**FLRA:** Amicus briefs



# **NEGOTIABILITY ISSUES (ACT)**

## **Wichita Air Capitol Chapter**

**Issue:** Union proposal to refer to members on union business as Mr., Mrs., or Ms. instead of military rank.

**Status:** Won at FLRA. On appeal to Fed. Cir.

## **Wichita Air Capitol Chapter**

**Issue:** Performance of military training duties (rifle, chemical gear, etc.) during civilian employment hours

**Status:** Won at FLRA. On appeal to Fed. Cir.

## **Puerto Rico**

**Issue:** Expenses incurred due to cancelled leave. Negotiability of items, if no fiscal authority to pay (personal expenses).

**Status:** Won at FLRA. Remanded by Circuit Court. Won at FLRA.



# **ANTHRAX SHOTS**

## **Testan v. Navy**

**Facts:** Order to take shots given to civilians on ship headed for Korea (high biological warfare threat zone)

Refusal and removal

**Issues:** Legality of order

**Result:** MSPB upheld. Fed. Cir. Upheld.



# **ATTORNEY FEES**

## **Sacco v. Justice**

**Facts:** Agency rescinded adverse personnel action and completely restored everything complainant lost prior to AJ decision.

**Issue:** Statutory attorney fees to prevailing party

**Held:** Fed Cir – no attorney fees



# DISPARATE TREATMENT

## Spahn v. Justice

- Facts:** Eight agent trainees, 7 male and 1 female  
Same supervisor recommended removal for all  
Similar and comparable misconduct (some charged differently, some had additional, minor misconduct)  
Agency agreed to settle with males for less than removal
- Issue:** Can disparate treatment include offers to settle
- MSPB Held:** Yes (should involve, same work unit, same supervisor(s), similar and comparable misconduct)



# **LEO RETIREMENT CREDIT**

## **Watson v. Navy**

**Facts:** 13 police officers seek retirement credit

Old standard – actual duties including additional and occasional

**MSPB:** New standard – Primarily for investigation, apprehension or detention of criminals or suspects vs. protection of life and property, and duties physically demanding enough to warrant retirement at an early age.

**Appeals:** Upheld. Cert. Denied

**Luke vs. HHS (Fed Cir):** Frontline law enforcement work entailing unusual physical demands or hazards



# LAUTENBERG AMENDMENT

## White vs. DoJ

- Facts:** GS-7 Correctional Officer at BOP  
Misdemeanor conviction for simple assault  
(significant other)  
Charged as domestic assault and plea bargained  
Removed
- Issues:** Various factual and constitutional attacks on statute
- Result:** Fed Cir joins 5 other circuits in upholding statute –  
Use or attempted use of physical force, or threatened  
use of a deadly weapon
- Note:** Final OSD Policy Issued: Should be in job  
descriptions, extension overseas, extension to  
felonies, component may require self-certification  
with DoD Form



# GOVERNMENT CHARGE CARDS

**Discipline:**

Supervisors must investigate and take other appropriate action if:

Inconsistent with official purposes or applicable regulations, improper, fraudulent, abusive, negligent use. Fail to satisfy indebtedness or do so promptly.

**Security Clearance:** NOT discipline – separate and independent



# **ENVIRONMENTAL DIFFERENTIAL PAY (EDP)**

## **- Asbestos**

- Naturally Occurring

- 3000 Industrial Applications

- Friable vs. Non-Friable

- Carcinogen

- OSHA PEL (0.1 fiber per cubic centimeter, over 8-hour weighted average day over a lifetime)



# EDP

- 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



# PENDING EDP CASES

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



# LITIGATION PROBLEMS

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



# POTENTIAL SOLUTIONS

- Collective Bargaining
- FPRAC Process
- Legislation
  - 2002 NDAA
  - 2003 NDAA
  - 2004 NDAA
- NSPS
- DoDI



# **ANTIDISCRIMINATION LEGISLATION**

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

- Agency required to pay from their budgets for settlements and judgments against them in discrimination and whistleblower cases.
- Annual reporting requirements include: Number of complaints, disposition of each case, total monetary awards, number of agency employees disciplined for discrimination, retaliation or harassment.
- Also requires web-posting of statistical data about complaints under rules issued by the EEOC.



# SECTION 501

## 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



# PPP/RPL JURISDICTION

- 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

- 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



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