

## EEO RESEARCH NOTES

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### **1. Larson Employment Discrimination - Chapter 164:**

FEDERAL GOVERNMENT DEPARTMENTS AND AGENCIES (§ 501)

— Scope —

(501) of the Rehabilitation Act mandates affirmative action within the federal executive branch to benefit qualified individuals with disabilities. This section provides the exclusive remedy for covered employees who suffer discrimination based upon a disability. Enforcement and monitoring authority under § 501 lies with the EEOC. Under EEOC regulations, federal agencies are required to undertake reasonable accommodation, including reassignment, of individuals with disabilities who can perform the essential functions of a given job. The rights, remedies, and procedures enjoyed by federal employees under Title VII apply to disability discrimination claims brought pursuant to § 501; the substantive standards of § 501 are borrowed from Title I of the Americans with Disabilities Act.

#### **§ 164.01 In General**

(501)(b) of the Rehabilitation Act requires each federal executive branch "department, agency, and instrumentality" to prepare an affirmative action plan for the hiring, placement, and advancement of individuals with disabilities. 1 The Equal Employment Opportunity Commission (EEOC) is designated as having a review function. Section 501(c) also directs the Commission to develop policies and procedures for referral to appropriate state agencies to encourage them to develop similar programs. 2 These functions were transferred to EEOC from the Civil Service Commission by Executive Order 12106, effective January 1, 1979. 3

Note that § 501(b) mandates the preparation of affirmative action plans but contains no express nondiscrimination provision. In 1978, Congress amended the Act to make it clear that a private cause of action exists under § 501(b) and that the remedies, procedures, and rights set forth in the federal employment sections of Title VII of the Civil Rights Act of 1964 apply to complaints of disability discrimination in Federal employment. 4 As for what constitutes a substantive violation of § 501, a 1992 amendment to the Rehabilitation Act incorporates the standards of proof developed under Title I and other employment-related sections of the Americans with Disabilities Act of 1990. 5

Executive Order 11478, as amended, includes disability as a protected class in federal employment, places the primary enforcement responsibility on the individual department or agency, and gives EEOC a directing and implementing role, with appropriate rulemaking authority. 6 EEOC has, since the 1978 Amendments, promulgated general regulations on equal employment opportunity in the federal government. 7 The regulations contain a general prohibition of discrimination against a qualified physically or mentally disabled person. 8 They require agencies and departments to make "reasonable accommodation" to the known limitations of a qualified individual with a disability, short of undue hardship on the agency. "Reasonable accommodation" may include making facilities accessible, job restructuring, modified work schedules, acquisition or modification of equipment, modification of examinations, provision of readers or interpreters, reassignment, or related actions. 9 There are restrictions on the use of employment tests and

selection criteria, 10 and pre-employment inquiries. 11 There are also requirements as to architectural accessibility. 12 Finally, agencies and departments must have procedures for the processing of complaints that meet certain criteria. 13

#### **Footnotes for § 164.01**

1 29 U.S.C. § 791(b) (1988).

2 *Id.* § 791(c).

3 44 Fed. Reg. 1053 (December 28, 1978).

4 The provision reads in full:

§ 794a. Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy. 29 U.S.C. § 794a(a)(1).

5 Pub. L. No. 102-569, § 503(b), 106 Stat. 4344 (codified at 29 U.S.C. § 791(g) (1992)). These substantive standards are discussed in detail in the relevant ADA chapters. See Chs. 153-156, this Vol. *supra*.

6 Codification of Presidential Proclamations and Executive Orders, at 73-75 (see *supra* Appendix 21, Vol. 4).

7 Regulations concerning discrimination in federal employment were originally found in 29 C.F.R. pt. 1613. On October 1, 1992, pt. 1613 was superseded by 29 C.F.R. pt. 1614. 57 Fed. Reg. 12,634 (Apr. 10, 1992). Part 1614 establishes the procedures for discrimination actions brought by federal employees under Title VII, the ADEA, the Equal Pay Act, and the Rehabilitation Act and is reprinted in Appendix 10, Vol. 5 *supra*, at A10-191 through A10-245. Issues uniquely of concern in Rehabilitation Act cases are addressed in 29 C.F.R. § 1614.203.

See *Gessner v. Runyon*, 1997 WL 6662 94, \*4 (E.D. Pa. 1997).

See also Vol. 3, Ch. 64 *supra*, for procedures to be followed in federal employment cases.

8 29 C.F.R. § 1614.203(b).

See also *Marino v. Postal Serv.*, 3 AD Cases 446 (D. Mass. 1993), *aff'd*, 25 F.3d 1037, 3 AD Cases 704 (1st Cir. 1994). The plaintiff's handicap--anxiety neurosis--was not the sole reason for his discharge and therefore he could not establish a *prima facie* case; he was discharged for striking his supervisor during an alleged "black out."

9 29 C.F.R. § 1614.203(c)(2), (g).

See § 164.04 *infra* for further discussion of reasonable accommodation under § 501.

10 29 C.F.R. § 1614.203(d)(1).

11 29 C.F.R. § 1614.203(e).

12 29 C.F.R. § 1614.203(f).

13 29 C.F.R. §§ 1614.104-1614.110, 1614.204.

#### **§ 164.02 Coverage**

##### **[1] Section 501 as Written**

By its express terms, § 501 applies only to the executive branch and was originally held not to cover legislative branch employees, including Library of Congress staff. 1

##### **[2] The Congressional Accountability Act of 1995**

The Congressional Accountability Act of 1995, 2 broadened the scope of § 501's protections to include employees (as well as applicants and former employees) of the House of Representatives, the Senate, the Capitol Guide Service, the Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment. 3 In order to avoid the potential separation of powers problems implicit in executive branch

enforcement of this law, legislative branch employees seeking to vindicate their rights under § 501 are limited to the procedural and remedial schemes prescribed by the Congressional Accountability Act itself. 4 Coverage under the Congressional Accountability Act began on January 23, 1996, one year from the enactment date. 5

The Congressional Accountability Act also calls for studies and recommendations on the merits of bringing the General Accounting Office, Government Printing Office, Library of Congress, and judicial branch within its purview. 6 To date, however, employees in these areas remain uncovered.

### **[3] The Military**

Based on the corresponding Title VII exemption, it has been ruled that the United States military is exempt from § 501 as to uniformed personnel. 7 However, there is a split of authority on whether commissioned officers of the Public Health Service fall within the military exemption. 8 Moreover, civilian employees of the Department of Defense, including those employed by the armed forces, have been held covered by § 501. 9

### **Footnotes for § 164.02[1]**

1 Judd v. Billington, 863 F.2d 103, 48 FEP 904 (D.C. Cir. 1988) . Prior to the Congressional Accountability Act of 1995, the Rehabilitation Act did not apply to employees of the legislative branch, including employees of the Library of Congress. Judd claimed that he was discharged by the Library of Congress because of his alcoholism. As originally enacted, § 791 of the Rehabilitation Act, pertaining to federal employment, was clearly limited to employees of the executive branch. Judd contended that the 1978 amendment, which created a private right of action for federal employees, expanded the scope of the act to apply to employees of the Library of Congress. In the amendment, Congress had incorporated the remedial scheme of Title VII, which expressly includes employees of the Library of Congress. However, as the court noted, "the flaw in this reasoning is that ... [t]he rights that Congress incorporated are available only with respect to a complaint under section 791." 48 FEP at 906. Thus, the plaintiff was without a remedy under the Rehabilitation Act.

Note that Section 501's coverage was extended to the Smithsonian Institute by the Workforce Investment Act of 1998, Pub. L. No. 105-220, 112 Stat. 1092, 1202 (1998), codified at 29 U.S.C. § 791(a).

### **Footnotes for § 164.02[2]**

2 Pub. L. No. 104-1, 109 Stat. 37 (to be codified at 2 U.S.C. § 1301 et seq.).

3 2 U.S.C. § 1301(3)(A)-(I).

4 2 U.S.C. §§ 1311, 1361, 1401-08.

5 2 U.S.C. § 1311(d).

6 2 U.S.C. §§ 1381, 1434.

See discussion at Vol. I, § 5.04[5] supra.

### **Footnotes for § 164.02[3]**

7 Coffman v. State of Mich., 120 F.3d 57, 6 AD Cases 1820 (6th Cir. 1997). The ADA's statutory remedies are unavailable to uniformed members of the armed forces.

Doe v. Ball, 725 F. Supp. 1210, 51 FEP 860 (M.D. Fla. 1989), aff'd sub nom. Doe v. Garrett, 903 F.2d 1455, 53 FEP 335 (11th Cir. 1990), cert. denied, 499 U.S. 904 (1991) . The court noted that "members of the armed forces have no cause of action under Title VII," and therefore have no cause of action under the Rehabilitation Act, since the remedies and rights of that Act are controlled by Title VII.

Smith v. U.S. Navy, 573 F. Supp. 1361, 38 FEP 540 (S.D. Fla. 1983), aff'd sub nom. Smith v. Christian, 763 F.2d 1322, 38 FEP 545 (11th Cir. 1985) . While the provisions of the Rehabilitation Act apply to the hiring of civilian employees of the Defense Department, they do not apply to the armed services' procurement of military personnel. Therefore, the plaintiff, who had been rejected as a medical officer for the Navy because he was missing an index finger, could not bring an action under the Rehabilitation Act. Cf. Taylor v. Secretary of the Navy, 852 F. Supp. 343, 3 AD Cases 497 (E.D. Pa. 1994), aff'd, 61 F.3d 896 (3d Cir. 1995) . The Navy argued that the plaintiff's claim for disability discrimination under § 501 was barred by a provision of the Federal Employees Compensation Act that gave the Secretary unreviewable

authority to determine light-duty assignments. The court disagreed, finding that section 8128 of that Act applied only to decisions regarding benefits, not assignments.

8 *Milbert v. Koop*, 830 F.2d 354, 44 FEP 1694 (D.C. Cir. 1987) . Courts have fashioned a judicial exception to Title VII coverage for members of the armed services. However, in an action brought under § 501 of the Rehabilitation Act, the court held that material differences between commissioned officers of the Public Health Service and members of the armed forces made the rationale for the Title VII military exception inapplicable to the PHS. Accordingly, PHS officers are not excluded from the protection of either Title VII or § 501. Those differences include the fact that the PHS is not statutorily defined as one of the "armed forces"; that its primary task is improving public health, not aiding the military; that unlike most members of the armed forces, a commissioned PHS officer may unilaterally terminate his employment; and that the PHS is not a "Military Service" nor is it subject to the Code of Military Justice, unless the President so declares.

Contra *Salazar v. Heckler*, 787 F.2d 527, 40 FEP 721 (10th Cir. 1986) . The military exception to Title VII coverage is applicable to commissioned PHS officers.

9 See *Walders v. Garrett*, 765 F. Supp. 303, 56 FEP 265 (E.D. Va. 1991), *aff'd*, 956 F.2d 1163, 58 FEP 336 (4th Cir. 1992) .

## 2. Duty to accommodate

In general, a federal employing agency must make reasonable accommodation to the known physical and mental limitations of an otherwise qualified individual with a disability, unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. §1630.0. The employee must show a nexus between the disabling condition and the requested accommodation. *Wiggins v. USPS*, EEOC Docket No. 01953715 (04/22/97).

See EEOC website for the following documents: "Procedures for Providing Reasonable Accommodation for Individuals with Disabilities" (February 9, 2001), "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act" (March 1, 1999).

## 3. Aggravation claim and workers' compensation bar

email from [Brian East](#) - 05:43pm Sep 8, 2002

In a recent post under the heading "ADA case," Leslie Johnson asked whether a plaintiff can recover damages for his physical pain and suffering/injuries under the ADA, despite the workers' compensation bar, and whether anyone has a draft complaint dealing with the ADA, failure to accommodate, and physical injuries as a result.

Leslie,

Around the end of June 2001, Thomas Buscaglia posted a similar question here. He wrote:

" ... eventually my client had serious physical problems and complained that he was suffering due to the lack of accommodation... His doctors determined that as a result of the failure to accommodate the arm not affected by the stroke (his good arm) is now

permanently injured. Is this injury compensable as consequential damages under the ADA? And is his pending workers comp claim a bar to recovery under the ADA?"

Here is a replay of what I posted:

As to injuries for failure to accommodate, my guess is that these are recoverable under the ADA, or should be, since I think these facts clearly fit within the statute. For support, you might look at *Malone v. Specialty Prods. & Insulation Co.*, 85 F. Supp. 2d 503, 506-507 (ED Pa 2000).

You might also look at *Worthington v. City of New Haven*, 1999 U.S. Dist. LEXIS 16104\*44-45 (D. Conn. 1999), in which the Court stated in part:

"In a prior ruling, the Court decided that *Worthington* could receive front pay for the loss of future earnings if she proved a causal relationship at trial between the defendant's failure to accommodate her disability and her inability to work as of February 1995. See *Worthington v. City of New Haven*, 994 F. Supp. 111, 114 (D. Conn. 1997). Other courts have held that plaintiffs can recover front pay under similar circumstances. See, e.g., *Langan v. Department of Health and Human Servs.*, 295 U.S. App. D.C. 49, 959 F.2d 1053, 1061-62 (D.C. Cir. 1992) (holding that "special damages" could be recovered if the defendant's denial of reasonable accommodations caused a deterioration in work performance that lead to the plaintiff's termination); *Lussier*, 50 F.3d at 1107-08; *Saulpaugh*, 4 F.3d at 145; *Shore v. Federal Express Corp.*, 777 F.2d 1155, 1158-60 (6th Cir. 1985)."

Note that the Court ultimately held that *Worthington* could not recover for the loss of her future earnings because she had not proven that the defendant's denial of reasonable accommodations was a substantial factor in causing her total disability and inability to work.

A similar claim MAY have been involved (although I am not sure) in several other cases, e.g., the successful claim (under state law) in *Failla v. City of Passaic*, 146 F.3d 149 (3d Cir. 1998), and in *Shott v. Rush-Presbyterian*, 2000 U.S. Dist. LEXIS 8014 (ND Ill 2000). A similar claim was also made in *Morabito v. General Motors Corp.*, 1999 WL 1212860 (N.D.Tex. 1999) (summary judgment denied), and in *Tovar v. County of Alameda*, 1998 US Dist LEXIS 5688\*41 (ND Cal 1998) (claim dismissed because of insufficient evidence of disability).

For a negative, but perhaps distinguishable, case, see *Smith v. Blue Cross Blue Shield of Kansas, Inc.*, 102 F.3d 1075 (10th Cir. 1996).

Reba Weiss in Seattle also posted the following in the same thread:

"In *Goodman v. Boeing*, 127 Wn. 2d 401 (1995), the Washington Supreme Court held that where the failure to accommodate resulted in the worsening of the employee's

medical condition, the worker comp claim does not bar recovery for damages for emotional and physical injuries which arose from the employer's discriminatory response to a workplace injury."

Also, for cases holding that the comp bar does not preempt ADA claims generally, you might also look at *Wood v. Alameda*, 875 F Supp 659, 665 (ND Cal 1995) (ADA); *Smith v. Lake City Nursing Home*, 771 F Supp 985, 986-987 (D Minn 1991) (Rehabilitation Act); and EEOC Enforcement Guidance: Workers' Compensation and the ADA (9/3/96), Question 30, and cases cited therein, online at <http://www.eeoc.gov/docs/workcomp.html>.

Note, too, that many states do not apply the "comp bar" to claims under their STATE antidiscrimination statutes. E.g., *Davis v. Dillmeier Enterprises, Inc.*, 956 SW2d 155 (Ark. 1997); *Moorpark v. Superior Court*, 18 Cal 4th 1143, 77 Cal Rptr 2d 445, 959 P2d 752 (1998); *Konstantopoulos v. Westvaco Corp.*, 690 A2d 936 (Del 1996); *Hardaway Management Co. v. Southerland*, 977 SW2d 910, 917 (Ky 1998); *King v. Bangor Federal Credit Union*, 568 A2d 507, 508-509 (Me 1989); *Byers v. Labor & Industry Review Commission*, 561 NW2d 678 (Wis. 1997).

Hope this helps.

Brian

#### **4. Discrimination alleged in the processing of an OWCP claim**

Robert S. Tucker v. United States Postal Service, EEOC Appeal No. 01A05003 (October 2, 2001)

"Complainant filed a timely appeal with this Commission from an agency's decision dated March 20, 2000 dismissing his complaint of unlawful employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. In his complaint, complainant alleged that he was subjected to discrimination on the basis of disability (back and neck injury) when:

"On August 8, 1999, the Department of Labor, Office of Workers' Compensation Programs (OWCP) and USPS conspired to reinstate complainant, for the sole purpose of terminating his OWCP benefits and inducing him to take straight disability;

"On December 3, 1999, an incomplete, unethical and tainted re-employment examination was administered to him;

"He was advised by an Injury Compensation Supervisor (ICS) before the results of his examination were known, that he would pass because the agency must take him back.

“The agency dismissed the claim pursuant to EEOC Regulations at 29 C.F.R. § 1614.105 (1) and § 1614.107(a)(2) for failure to comply with the applicable 45 day time limit, and pursuant to 29 C.F.R. § 1614.107(a) for failure to state a claim under 29 C.F.R. § 1614.103 or § 1614.106(a). Specifically, the agency determined that complainant's claim is within the exclusive jurisdiction of the Department of Labor, and is outside the purview of the EEOC regulations.

“Complainant alleges that the Commission has jurisdiction over this complaint because the agency decided to re-employ him despite knowing that he would not be able to function in a work environment due to his disability, that his disability was likely to deteriorate, and that it would create an economic hardship for him. He contends that this action constitutes a direct and personal deprivation at the hands of his employer, the agency.

“The Commission has held that a complainant states a claim where he or she alleges that, motivated by discriminatory animus, the agency took specific steps to interfere with a workers' compensation claim. Bray v. United States Postal Service, EEOC Appeal No. 01944243 (February 6, 1995), req. to reopen den., EEOC Request No. 05950410 (February 1, 1996); Hogan v. Department of the Army, EEOC Request No. 05940407 (September 29, 1994); O'Neal v. United States Postal Service, EEOC Request No. 05900620 (August 30, 1990). These cases typically involve failure of the agency to provide information or signatures necessary to process the workers' compensation claim. See *id.* Here, complainant alleges that the agency conspired with OWCP to force him to return to work despite having a medical condition that makes him unemployable.

“To address this aspect of his complaint, the Commission would have to review the determinations of OWCP which led to the determination that complainant's disability did not preclude his re-employment. Review of OWCP determinations is within the jurisdiction of the agency's Employees' Compensation Appeals Board, not the Commission, and does not fall within the limited circumstances under which a complainant may appeal to the Commission. See Hogan, EEOC Request No. 05940407 (September 29, 1994); Gray v. Department of the Army, EEOC Appeal No. 01944944 (August 8, 1995). Accordingly, we AFFIRM the agency's dismissal of complainant's claim.”

EEOC complainant may not use the EEO process to launch a collateral attack on the workers' compensation process. Story v. USPS, EEOC request No. 05960314 (10/18/96).

Employing agency has the right to represent its position and interest in the OWCP forum, and the EEOC will not review decisions that would require it to judge the merits of the workers' compensation claim. Hogan v. Dept. of Army, EEOC request No. 05940407 (09/24/94).

Schultz v. Potter, EEOC Appeal No. 01993177 (06/13/01):

“With respect to allegations #5, 6, 7, and 8, the Commission finds that these allegations have previously been raised and addressed in prior proceedings or they constitute a collateral attack on decisions rendered by OWCP or OPM. The Commission has held that an employee cannot use the EEO complaint process to lodge a collateral attack on another proceeding. See Wills v. Department of Defense, EEOC Request No. 05970596 (July 30, 1998); Kleinman v. United States Postal Service, EEOC Request No. 05940585 (September 22, 1994); Lingad v. United States Postal Service, EEOC Request No. 05930106 (June 25, 1993). The Commission also finds that with respect to allegations #5 and #6, complainant suffered no harm by the agency's efforts to obtain or use medical reports. Consequently, complainant was not an aggrieved employee with respect to these allegations and the agency acted properly when it dismissed them for failure to state a claim. See Diaz v. Department of the Air Force, EEOC Request No. 05931049 (April 21, 1994). Moreover, the regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. Accordingly, the agency's final decision dismissing complainant's complaint is AFFIRMED.”

Allegation of false statements made by employing agency to OWCP cannot support a valid EEOC complaint. Lau v. D'Amours, EEOC request No. 05950037 (1996), Bonham v. Potter, EEOC 2093 (2002).

It is retaliation for an agency to make disparaging remarks about an employee's EEO activity in responding to an OWCP claim. Andel v. Postmaster General, EEOC No. 01975337 (1998). In such a case, a claim lies against both the employing agency and OWCP if the claim is denied.

Downey v. Henderson, EEOC request No. 05990475 ( May 1, 2001):

“We have previously held that claims which challenge the proceeding or decision of another forum constitute a collateral attack and fail to state a claim under EEOC Regulations. See Fisher v. Department of Defense, EEOC Request No. 05930106 (July 15, 1994). The Commission has also held that it is within OWCP's jurisdiction to determine whether a compensation claim with OWCP has merit, and OWCP claims are not appealable to the EEOC. See Hogan v. Department of the Army, EEOC Request No. 05940407 (Sept. 29, 1994).”

##### **5. Coordination of pecuniary damage awards and OWCP benefits (partially from EEOC website)**

Under the Federal Employees Compensation Act (FECA), compensation from the Office of Workers' Compensation Programs (OWCP) is deductible from back pay if it is in the form of a wage-replacement benefit. This is to avoid double wage recovery. – EEOC website.



However, the portion of the OWCP award that is paid as reparation for physical injuries [i.e., “scheduled awards”] is not subject to deduction because such compensation is not related to wages earned. See *Sands v. Department of Defense*, EEOC Petition No. 04990001 (February 25, 2000). OWCP awards for physical injuries in this context are referred to as “scheduled awards”, and are paid for certain injuries resulting in permanent impairment to particular body parts. 5 U.S.C. §8107. – EEOC website.

Where there is a potential for overlap between a FECA claim and an EEO complaint, double recovery must be avoided. *Baker v. Runyon*, 922 F.Supp. 1300 (N.D. Ill. 1996). There is no potential for overlap regarding compensatory damages for emotional distress, but to the extent FECA provides wage loss compensation and Title VII provide a remedy of back pay, there is a potential for overlap. But FECA is not an exclusive remedy for the emotional harm caused by illegal discrimination. *Finlay v. Postmaster General*, EEOC No. 01942985 (1997).

In making an award for future pecuniary damages, allowance must be made for the continuation of FECA medical benefits, and the agency is entitled to deduct such benefits from the future pecuniary damage award. *Cook v. Postmaster General*, EEOC No. 01950027 (1998).

## **6. Reassignment as reasonable accommodation**

In 1992, Congress amended the Rehabilitation Act of 1973, incorporating the employment provisions of the Americans with Disabilities Act of 1990 (ADA) into the Rehabilitation Act, in order to promote consistent application of the two laws.<sup>(1)</sup> The EEOC has now published a final rule clarifying the application of the employment provisions of the ADA to federal government workers.<sup>(2)</sup> The rule incorporates by reference the EEOC's ADA regulations, found at 29 C.F.R. Part 1630, into the federal sector EEO complaint processing regulations, found at 29 C.F.R. Part 1614.

Among the most significant changes resulting from this final rule is the deletion of the regulatory limits on reassignment of federal employees with disabilities as a reasonable accommodation, formerly found at 29 C.F.R. Section 1614.203(g). For example, under the prior regulation, reassignment was not an available accommodation for a probationary employee. Under the revised regulations reassignment is a possible accommodation so long as the employee adequately performed the essential functions of the position, with or without accommodation, before the need for reassignment arose, regardless of the probationary status of the employee. The Commission points out in the preamble to the new rule, however, that if a probationary employee has never adequately performed the essential functions of the position, s/he is not entitled to reassignment because s/he was never "qualified" for the original position.

## **7. Early Retirement Offer Is Not Age Discrimination** *Johnson v. Runyon*, 137 F.3d 1081 (8th Cir., 1998).

Plaintiff was 52 years of age and a tour superintendent at the agency when the agency embarked on a major reorganization. All tour superintendent positions were abolished, but a higher-level position requiring additional skills was created. Plaintiff along with others was offered early retirement. An agency official later informed him that he did not intend to hire him for one of the new higher-level positions, on the grounds that he lacked the required skills. The official testified that he informed plaintiff because plaintiff had to make his early retirement decision. The official also testified that he told plaintiff that he would still have a job with the agency, and would not be reduced in pay.

Plaintiff accepted the early retirement offer, but testified that he had not intended to retire early. He filed suit, alleging age discrimination, after the agency selected persons for the higher-level position who ranged in age from 36 to 48. The district court entered judgment in favor of the agency. The district court found that plaintiff failed to make a prima facie showing; because he retired voluntarily, he did not suffer an adverse employment action.

The circuit court agreed. The court stated that where there was no adverse employment action, plaintiff could recover only if he could show that he was constructively discharged. The court noted that plaintiff chose to retire rather than to wait and see what positions would be available after the reorganization. No reasonable person would have found these working conditions so intolerable that they would force an employee to quit, ruled the circuit court.

## **8. OWCP factual determinations not binding on other agencies or courts**

See NALC v. USPS, 272 F.3d 182, 187 (2001):

"While we have not addressed the issue, the Court of Appeals for the Federal Circuit and a district court have adopted the Postal Service's interpretation that [5 USC] section 8128(b) only precludes subsequent courts and tribunals from challenging or contradicting OWCP's factual or legal determinations with respect to granting or denying payments under FECA. See Minor v. Merit Sys. Prot. Bd., 819 F.2d 280 (Fed. Cir. 1987); United States v. Carpentieri, 23 F. Supp. 2d 433 (S.D.N.Y. 1988). Both of these courts held that in proceedings following OWCP determinations courts are bound only by the "Labor Department's decisions on the making or denying of compensation awards," and are not bound by the OWCP's factual conclusions. Minor, 819 F.2d at 283; see Carpentieri, 23 F. Supp. 2d at 438."

See, to similar effect, U. S. v. Sforza, 326 F.3d 107 (2002):

The jurisdictional bar in § 8128(b) seems to have been designed chiefly to ensure "[1] that the courts not be burdened by a flood of small claims challenging the merits of compensation decisions and [2] that the Secretary should be left free to make the policy choices associated with disability decisions." Rodrigues v. Donovan, 769 F.2d 1344, 1347-48 (9th Cir. 1985) (citations omitted) (holding that § 8128(b) did not preclude litigation of constitutional due process challenge to procedures used by OWCP in denying [\*115] benefits). Neither goal is disserved by allowing the government to pursue fraudulent claim-seekers under the FCA (at least so long as OWCP's decision awarding or denying benefits on the basis of the record before it is respected). See United States v. Carpentieri ("Carpentieri I"), 23 F. Supp. 2d 433, 438 (S.D.N.Y. 1998) (holding that § 8128(b) does not bar suit under the FCA because the government's FCA suit would not "entail a re-litigation of issues already presented to and resolved by the OWCP"). Our reading of § 8128(b) is consistent with decisions of other courts in analogous cases. Thus the Federal Circuit held in Minor v. Merit Systems Protection Board, 819 F.2d 280 (Fed. Cir. 1987), that §

[8128\(b\)](#) does not bar an action seeking the termination of a civil service employee based upon allegations of FECA fraud, notwithstanding a prior determination by OWCP that the employee was entitled to full benefits. See [id. at 283](#). The court relied on the different remedies at issue in the OWCP action and the civil service proceeding: "even though much the same facts and evidence may have been before the [arbitrator deciding whether the FECA beneficiary could be terminated,] and also before the [OWCP deciding whether benefits were warranted], it was the [arbitrator] that had power to decide [the employee's] fraudulent acts and to remove her on that ground." n4 Id. The Third Circuit, facing a similar issue, likewise rejected the claim that [§ 8128\(b\)](#) precluded re-litigation of all issues decided by OWCP. See [Nat'l Ass'n of Letter Carriers, AFL-CIO, v. United States Postal Serv., 272 F.3d 182, 188-89 \(3d Cir. 2001\)](#) (holding that arbitrator of employee's wrongful termination claim was not bound by factual determinations made by OWCP in granting employee FECA benefits). n5

n4 The Merit Systems Protection Board, which reviews the decisions of arbitrators such as those at issue in *Minor*, has similarly read [§ 8128\(b\)](#) to preclude relitigation of OWCP's decisions concerning the award or denial of FECA benefits but to not preclude judicial review of collateral issues such as whether an employee has defrauded the government. See [Miller v. U.S. Postal Serv., 26 M.S.P.R. 210, 213 \(1985\)](#); see also [Smith v. U.S. Postal Serv., 81 M.S.P.R. 92, 98 \(1999\)](#); [Daniels v. U.S. Postal Serv., 57 M.S.P.R. 272, 279 \(1993\)](#).

n5 In reaching its conclusion regarding the scope of [§ 8128\(b\)](#), the Third Circuit relied in part on the fact that OWCP proceedings are non-adversarial: It would be strange if a determination in a non adversarial proceeding had a preclusive effect in an adversarial proceeding as "the general rule [is] that issue preclusion attaches only 'when an issue of fact or law is actually litigated and determined by a valid and final judgment . . . .'" [Arizona v. California, 530 U.S. 392, 414, 147 L. Ed. 2d 374, 120 S. Ct. 2304\[\] \(2000\)](#). While we do not suggest that Congress could not make a ruling under [section 8128\(b\)](#) preclusive in the circumstances here, we hold that it did not do so. [Nat'l Ass'n of Letter Carriers, 272 F.3d at 189](#).

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