

Suing Your Boss: Westfall is Your Downfall

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I am in the midst of the greatest crisis of self-confidence I have had in my entire professional life. I, a former MSPB Administrative Judge and federal personnel lawyer extraordinaire, am being put to shame by a *hobbyist*. That's right, I cannot compete with a federal employee, who represents co-workers before EEOC, and *never* loses. Not only was he never an EEO Hearings Officer, as I was with the Civil Service Commission, but he isn't even a *lawyer*. Let me explain:

Subscribers to this newsletter may recall that a few emails back, I quoted from a portion of the transcript of the deposition of a VA EEO Manager who, for the life of him, could not figure out why being called a "bitch" might be offensive to a woman. I received many emails in response, one of which was from a current employee of the Interstate Commerce Commission (I am using the long defunct ICC to protect the identity of the employee). I thought this employee was an attorney specializing in representing federal employees. His email reads in pertinent part as follows:

This reminds me of a hearing where the Complainant was Black and the manager was Black. At the hearing I asked the manager, who had denied knowing the race of the Complainant in two different sworn affidavits, what the race was of the Complainant, who was seated at his right? The manager stated, "I don't know". I then asked him, "What is your race?" He responded, "Black". I asked him a second time to identify the race of the Complainant and he stated, "I guess he is Black." Obviously, the AJ found the person not to be credible.

In the case addressed below, it is obvious that the EEO Manager is not credible, and the EEO Program appears to be grossly tainted.

Good luck with your case, and best wishes,

"Awesome," I thought to myself. "Another brother in the small (and impoverished) fraternity of federal personnel lawyers with whom I can share war stories." And so I quickly shot off an email to "EEOC Employee Representative," a title he used in his email, asking him a slew of questions about sexual-harassment law and proving compensatory damages using the "per diem" argument. And then the shocking email came back:

This article provides no legal advice. If you need legal advice, get it from someone qualified to dispense it.

“EEOC Employee Representative” is not a lawyer at all. Oh yes, he “attended 1 1/2 years of an ABA law school,” but on purpose he “did not complete the degree requirements.” EEOC Employee Representative believes he is obliged to provide his co-workers with “competent representation [before EEOC] when they cannot afford it through an attorney or they cannot find an attorney within the small time frame provided by the CFR. The timeframes and the lack of attorneys practicing in this area of the law make my presence necessary.” I take only cash upfront for representing employees before EEOC, but the rewards for EEOC Employee Representative are far less tangible:

Being able to help less fortunate employees has been more of a spritual experience for me than a legal experience. This is bit more difficult to explain.

Difficult to explain? Impossible to explain to a shyster like me who is in it only for the money.

“But aren’t you worried about getting sued if you screw up a co-worker’s case?” I asked EEOC Employee Representative. (Please see my article “How to Practice Law without a License but with Impunity.”) Not to worry, EEOC Employee Representative wrote back:

By the way, as an employee, acting within the scope of my Office [sic], I am protected under a qualified immunity. I would have to act outside the scope of my Office [sic] to be personally liable.

Does that mean that the Interstate Commerce Commission (ICC) grants EEOC Employee Representative official time to play Johnnie Cochrane before EEOC? Yup. According to EEOC Employee Representative, “There is a great amount of case law on this subject [of official time], which I share with my superiors when there is a question.”

Even if EEOC Employee Representative was not acting within the scope of his employment, he does not have to sweat getting sued, because *he does not lose*:

To date, I have not lost a case where I have been the primary representative.

(Underscore in the original.)

Adjudicating federal employee and postal worker claims or litigating them are all I have done for nearly thirty years and I get paid and I lose my fair share of cases. By contrast, EEOC Employee Representative represents employees as a *hobby*, he does not get paid, and *he does not lose*.

I am a fakir; I am bogus; perhaps, I am even a fraud. Should I just turn in my NELA membership and take a job with ICC to try and kick EEOC Employee Representative’s ass at an EEOC hearing?

But enough with my problems; for you are no more interested in my existential angst as I am interested in your legal problems. Let's talk about suing your boss and how EEOC Employee Representative's "qualified immunity" prevents you from doing so nearly all of the time.

Sovereign Immunity, the Federal Tort Claims Act, and the Westfall Act.

If you find yourself fulminating excessively about suing your supervisor, you should immediately purchase two twenty-five pound dumbbells of sovereign immunity and do curls with them until your biceps burst. The aim is to develop big and strong sovereign immunity muscles so that when you stupidly begin to think that you can sue your supervisor, your sovereign immunity muscles instantly suppress those thoughts. *For the first rule about suing the government is that you can't. You can't unless the government says you can.*

In its simplest form, sovereign immunity means that governments are generally immune from civil actions taken by private citizens; this immunity may be waived, however, with the consent of the governmental body. The U.S., for instance, has specific exceptions to allow for claims against federal and state governments.ⁱ The Federal Tort Claims Act (FTCA)ⁱⁱ is an exception to sovereign immunity, and tort claims against United States are exclusively cognizable under FTCA.ⁱⁱⁱ And not all torts are actionable against the U.S. under FTCA; but only those torts that the FTCA expressly recognizes.^{iv} And if the tort is not listed in the FTCA don't bother looking anywhere else; for the FTCA is exclusive remedy for nonconstitutional torts by government employee acting within scope of employment.^v

I know that this will come as big a shock to you as it came to me but EEOC Employee Representative was just a tad bit wrong; he enjoys more than just "qualified immunity," he enjoys absolute immunity if in fact he botches a co-worker's case before EEOC, provided of course that representing co-workers before EEOC is within the scope of his employment. The Westfall Act^{vi} grants to federal employees absolute immunity from common law tort actions by substituting the United States as the sole defendant in actions against federal employees if the Attorney General certifies that the employee was acting within the scope of employment at the time of the incident which gave rise to the action.^{vii} There is a debate, however, among the circuit courts as to whether the Attorney General's certification is conclusive. For example, in *Wood v United States*^{viii} the court held invalid a certification by the United States Attorney, in a case of alleged sexual harassment by an Army major of his secretary that the major was acting within the scope of his employment because the alleged incidents had not occurred. For a thorough discussion on whether the certification is subject to judicial review, the scope of judicial review, the evidentiary value of a certification, the right to an evidentiary hearing to resolve a challenge to a certification, the validity of a certification which denies that a tort occurred and under what circumstances a remand to state court after a certification is appropriate, please see *Construction and application of Westfall Act provision providing federal employee immunity from ordinary tort suits if attorney general certifies that*

employee was acting within scope of office or employment at time of incident out of which claim arose (28 U.S.C.A. § 2679(d)), 120 A.L.R. Fed. 95.

If you are an ICC employee and if EEOC Employee Representative botches your case (however slim a possibility that may be) do you really care if the United States of America substitutes for him as the defendant in your malpractice case? After all, who has deeper pockets? The government or EEOC Employee Representative? If the FTCA covers property loss for legal malpractice---and I don't know that it does---then the Westfall Act is a good thing, but if it does not, then you have been victimized by sovereign immunity and your suit will be dismissed.

But you started to read this article not to learn how to sue a lawyer-don't-wannabe (EEOC Employee Representative expressly denies having had any "intention of practicing law as an attorney, or in any other capacity for that matter.") You want to sue your supervisor for mental anguish, emotional turmoil, and in general for screwing up your life.

So let's assume you're a rural letter carrier and your postmaster is hounding you incessantly about being out on the route too long; for casing the mail too long; and, on some days, for not delivering your route. You take Wellbutrin to get you going in the morning and also Xanax at the same time to keep you from flying off the handle. You tell the postmaster to get off your back, but he belittles you, he follows you on the route, and he writes you up for the slightest infraction. You are at your wits end and so you call your Aunt Esther's nephew, Schmul, the real estate lawyer, who files a civil action against the postmaster in state court. The U.S. Attorney files a Westfall certification averring that all of the acts complained of were perpetrated by the postmaster within the scope of his employment and substitutes the United States for the postmaster as the defendant. He then removes the case to federal district court and moves to dismiss the case because the Federal Employees Compensation Act^{ix} is the exclusive remedy for your alleged injuries.^x The court grants his motion.^{xi}

"A lousy comp case, Schmul," you explode. "All I have is a lousy comp case?" Schmul takes his RESPA forms and heads off to close on a condo, leaving you high and dry to fill out the CA-1 yourself.^{xii}

I am restive; something EEOC Employee Representative said is still bothering me.

Why in God's name would ICC grant him official time to represent a co-worker before EEOC? You know if you read "How to Practice Law ...etc" that unions don't have to represent an employee before EEOC as part of its duty of fair representation. But does the agency have to grant a union shop steward official time if he/she chooses to represent the employee? How can that be? What if the union steward had twenty-five cases going on at the same time? She/he would have no time left to schlep the mail if she/he were a letter carrier. I wrote to my friend AJ, an APWU VP, and he told me that the postal service does not grant him official time to represent bargaining unit members on discrimination complaints.

Now I am even more restive. Exactly which cases comprise the “case law” to which EEOC Employee Representative adverted? If these cases hold that an agency must grant official time to an employee representing a co-worker before EEOC are there any limits on how much time the agency must grant? Can the agency restrict granting official time only to employees who spent 1.5 years in an ABA approved law school and who excelled in civil procedure (as EEOC Employee Representative) or must they also grant it to Battery Mechanics, Food Service Workers, or even lowly MSPB Administrative Judges? So onto Westlaw I go, and I am deflated at first.

There is a reason why EEOC Employee Representative never loses and sometimes I do; he knows more than me. This is straight out of an EEOC decision, “An agency employee is only entitled to official time if s/he is the complainant, a witness or a *representative* in a case. See 29 C.F.R. § 1614.605.” (Emphasis added).^{xiii} So EEOC Employee Representative is right. But wait; maybe I am not entirely wrong; for another Commission case held, “The Commission has held that the right to official time for a representative flows from complainant, and therefore, a denial of official time for a representative is properly raised by a complainant, and not the representative. *Lambert v. Social Security Administration*, EEOC Request No. 05970586 (October 8, 1998). Therefore, we find that where complainant acted as a representative on behalf of another individual, he does not have standing to raise the issue of being denied official time.”^{xiv}

Hey, I am feeling better and better. EEOC Employee Representative is not entitled to an unlimited amount of official time, but only a reasonable amount.^{xv} ICC moreover can deny him the use of its computers to prepare coworkers’ cases.^{xvi} In short, ICC can cut off his official time when his representational responsibilities cause an “undue interruption” of its operation.^{xvii}

Ladies and gentlemen, do you see where I am going with this? Let’s assume that I was an unscrupulous ICC official, instead of being just an unscrupulous lawyer. Let’s further assume that noble EEOC Employee Representative serves me with a designation of representative appointing him as the representative of co-worker Gil T. Assin in Gil’s EEOC hearing. I promptly deny EEOC Employee Representative any official time to represent Gil, asserting that he has way too much to do in his real job as a Bleeding Heart to play Johnnie Cochrane for Gil. We know under *Lambert, supra*, that Gil and not EEOC Employee Representative has standing to bring a reprisal complaint against me. But what do I care, since Gil will still have to represent himself without EEOC Employee Representative’s help? He’ll lose on the reprisal charge, too.

But let’s assume I am too wary to deny EEOC Employee Representative *all* of the official time he has requested. Surely I can spare him some time since he works for the ICC which has been defunct for some twenty years. So I decide to grant him official time only to represent Gil at the EEOC hearing. EEOC Employee Representative, needing a spiritual fix, eagerly agrees to prepare the case on his own time. But lo and behold, he screws up the preparation and loses the case.

His negligence occurred while he was off the clock. Is he still entitled to *Westfall* immunity?

About the author

Mitchell Kastner served as an Administrative Judge with the United States Merit Systems Protection Board and its predecessor, the United States Civil Service Commission, for ten years. During the last three years of his tenure, he was the Deputy Regional Director of the Board's New York Regional Office. As an Administrative Judge, he conducted hearings and wrote decisions on all of the appeals over which the Board's Regional Offices had jurisdiction, including adverse actions (removals, demotions, and suspensions for more than 14-days); reductions in force; denials of within-grade salary increases; disability retirement reconsideration decisions; legal retirement reconsideration decisions; performance-based removals or reductions in grade; OPM suitability determinations; denials of restoration of reemployment rights, and certain terminations of probationary employees.

Since returning to private practice in 1985, he has represented employees before the Board on all of these types of appeals and several others which were added after he left, most notably, representing whistleblowers in Independent Right of Action appeals under the Whistleblower Protection Act of 1989. He has also represented federal employees and postal workers before EEOC and in federal court on claims under all of the federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act. With the exception of the National Treasury Employees Union (which employs its own attorneys), he has represented bargaining unit members of every major federal employee and postal service worker union in arbitrations. He is featured with former MSPB Chairman Daniel Levinson on Dewey Publication's compact disc *MSPB LITIGATION TECHNIQUES*

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Endnotes

ⁱ Alexander Hamilton in The Federalist No. 81, described the sovereign immunity of the States in language suggesting principles associated with natural law: "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated [that States might be sued on their debts in federal court] must be merely ideal.... The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will." The Federalist No. 81, at 548-549. *Alden v. Maine* 527 U.S. 706, *773, 119 S.Ct. 2240, **2275 (U.S.Me.,1999)

ⁱⁱ 28 U.S.C.A. § 2679

ⁱⁱⁱ *DSI Corp. v. Secretary of Housing and Urban Development*, C.A.9 (Cal.) 1979, 594 F.2d 177.

^{iv} *Mullins v. First Nat. Exchange Bank of Va.*, W.D.Va.1967, 275 F.Supp. 712.

^v *Castro v. U.S.*, C.A.2 (N.Y.) 1994, 34 F.3d 106

^{vi} The Supreme Court in *Westfall v Erwin* (1988) 484 US 292, 98 L Ed 619, 108 S Ct 580, 2 BNA IER Cas

1537, held that federal employees acting within the scope of their office or employment were immune from common law tort liability only if their actions were discretionary in nature. In response to this decision, Congress adopted the Federal Employees Liability Reform and Tort Compensation Act of 1988, Public Law 100-694, commonly referred to as the Westfall Act, which amended the provisions of the Federal Tort Claims Act (28 U.S.C.A. § 1346(b)), 2671-2680). The report of the House of Representatives Judiciary Committee concerning the Westfall Act stated that its goal was to remove the potential personal liability of federal employees for common law torts committed within the scope of their employment by providing that the exclusive remedy for such torts is an action against the United States under the Federal Torts Claims Act and that the functional effect of the Act was to return federal employees to the status they held prior to *Westfall v Erwin* (1988) 484 US 292, 98 L Ed 619, 108 S Ct 580, 2 BNA IER Cas 1537, so that federal employees would be immune from personal liability for actions taken in the course and scope of their employment, regardless of whether or not the actions were discretionary in nature.

^{vii} 28 U.S.C.A. § 2679(d) provides:

(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to limitations and exceptions applicable to those actions.

^{viii} (1993, CA1 Mass) 995 F2d 1122, 61 BNA FEP Cas 1074, corrected (CA1 Mass) 61 CCH EPD ¶ 42263, 120 ALR Fed 647,.

^{ix} The FECA provides compensation for personal injuries that federal employees "sustain[] while in the performance of his duty." 5 U.S.C. § 8102(a)

^x The FECA functions as a federal workers' compensation act and provides a substitute for, not supplement to, recovery. "In enacting [FECA], Congress adopted the principal compromise--the 'quid pro quo'--commonly associated with workers' compensation legislation: employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue the Government." *277*Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 194, 103 S.Ct. 1033, 74 L.Ed.2d 911 (1983). Courts have held that this remedy is exclusive of any other remedy including the FTCA. *See also Avasthi v. United States*, 608 F.2d 1059, 1060 (5th Cir.1979). Federal courts are divided on whether plaintiffs' claims of emotional distress are within the coverage of the FECA. The Fifth Circuit held that where a "substantial question" exists as to FECA coverage, a tort action is barred unless the Secretary of Labor determines that the FECA does not apply. *See Avasthi*, 608 F.2d at 1060.

^{xi} The United States is immune from suit in federal court except where Congress has explicitly consented to be sued. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). If the government has not waived its sovereign immunity, or if the conditions under which the government has agreed to waive that immunity have not been met, federal subject matter jurisdiction does not exist and a district court must dismiss the case. *See Dillard v. Runyon*, 928 F.Supp. 1316, 1322 (1996) (citing *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed. 1058 (1941)).

^{xii} OWCP's Form Title / Description. CA-1, Federal Notice of Traumatic Injury and Claim for Continuation of Pay/Compensation www.dol.gov/esa/regs/compliance/owcp/forms.htm

^{xiii} *GEORGE M. ROBERTSON, COMPLAINANT, JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (CAPITAL-METRO AREA), AGENCY.* 2005 WL 1275219, *1

^{xiv} *HOWARD EGERMAN, COMPLAINANT, v. JO ANNE B. BARNHART, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION, AGENCY.* 2005 WL 742406, *1. See also the reconsideration decision *DONALD J. MCGINN, COMPLAINANT, v. JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY.* 2005 WL 309334, *1 wherein the Commission held, "The Commission has previously stated that the right to bring a claim regarding the denial of official time to represent another individual lies with the complainant and not his or her representative, and, as such, a representative does not have standing with regard to those claims. See *Wildberger v. Small Business Admin.*, EEOC Request No. 05960761 (Oct. 8, 1998); see also *Sessoms, Jr. v. United States Postal Serv.*, EEOC Appeal Nos. 01973440, et al. (June 11, 1998) ("With respect to those allegations where appellant was merely the EEO representative, and not the complainant, we note that he did not have standing to raise the disputes ... because the right to raise such matters lies with the complainant, not his or her representative."), request for reconsideration denied, EEOC Request No. 05980973 (Oct. 31, 2000). Accordingly, the Commission finds that issue (2) was properly dismissed by the agency because complainant, as a representative, did not have standing to raise the issue of denial of official time."

^{xv} 29 C.F.R. §1614.605(b); *JAMES L. PUPPE, COMPLAINANT, v. ANTHONY J. PRINCIPI, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS, AGENCY.* 2004 WL 2924472, *3

^{xvi} The Commission notes in this regard that complainant's use of government property must be authorized by the agency and must not cause undue disruption of agency operations. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, 6-18 (November 9, 1999). *JAMES L. PUPPE, COMPLAINANT, v. ANTHONY J. PRINCIPI, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS, AGENCY.* 2004 WL 2924472, *3

^{xvii} . Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, 6-18 (November 9, 1999).