

CenterPage

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Seniority System Trumps ADA

The United States Supreme Court ruled on Monday, April 29, 2002 that the Americans with Disabilities Act of 1990 (ADA) does not normally require a company to give job assignments to disabled workers over non-disabled workers with more seniority.

The ADA prohibits employers from discriminating against an individual with a disability if that employee can perform the essential duties and responsibilities of his or her job with reasonable accommodations. The ADA requires employers to make "reasonable accommodations" to employees with disabilities unless the employer can show the accommodations would impose an "undue hardship" on its business.

Although the conflict between the ADA and seniority systems may be a factor in the private sector, in the federal sector, reassignment as an accommodation is contingent upon the availability of a vacant funded position for which a person is qualified.

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Congress Gives Green Light To No FEAR Act

On April 23, 2002, the Notification and Federal Employee Antidiscrimination and Retaliation Act Of 2002, HR 169, also known as the No FEAR Act, passed in the Senate by unanimous consent. Congress recently sent the bill to President Bush for signature.

The No FEAR Act would require that Federal agencies that lose judgments or make settlements in discrimination and whistleblower cases in court, pay any financial penalty out of its own budget, rather than out of a general Federal judgment fund.

The No FEAR Act would also require Federal agencies to notify their employees about any applicable discrimination and whistleblower protection laws; post quarterly on its public web site

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Women's History Month Program



Left to right: Eda Teague, Tom Kickham, Dorothy Davis, Charlene Brown, Myrtle Watkins, Ramon Suris Fernandez and Agnes Sweeney.

On March 13, 2002, CMS held its annual Women's History Month program under the theme, "Women Sustaining the American Spirit." This year's program featured army nurses of World War II.

Ramon Suris-Fernandez, Director, Office of Equal Opportunity and Civil Rights opened the program

with a welcomed to staff and guests and introduced Charlene Brown, Deputy Director, Center for Medicaid and State Operations, Tom Kickham, Director, Office of Research, Development, and Information; and five extraordinary army nurses: Dorothy Davis, Helen Blotzer, Agnes Sweeney, Eda Teague and Myrtle Watson.

Ms. Brown and Mr. Kickham gave a presentation on three lesser known, but significant women in history: Grace O'Malley, the "Pirate Queen," Victoria Claflin Woodhull, "Lost Suffragette" and Mary Edwards, "Surgeon in the American Spirit."

Each of the invited guests talked about their personal experiences during the war. Myrtle Watson, who was stationed at Scofield Barracks when Pearl Harbor was bombed, described what it was like being the only one on duty at the hospital on the morning of December 7, 1941. She said that they heard the planes fly over but no one knew they were enemy planes until they saw the Rising Sun on the bellies of the planes. She said to this day she will never forget the faces of the wounded young men who were brought to the hospital.

Agnes Sweeney served on a hospital ship in Italy. She said she was very fortunate to have gotten out of the war alive. She served on one of two hospital ships that were "lit up like Christmas trees floating around Naples Bay." From Italy she was sent to serve at the Battle of the Bulge where they fought the cold and frostbite.

Eda Teague was stationed in the Philippines where she said tropical diseases caused four times more casualties as battle wounds.

Dorothy Davis recalled that when her hospital was attacked at the Battle of Bulge she was lined up for lunch, her mess kit in hand. "I heard a horrible noise. All of us raced back to see if our patients were all right," Davis said. "And I kept thinking what if we should lose this war? We had such a flood of patients, we knew it wasn't going well."

At the end of the program, a video clip was shown of Dorothy Davis being interviewed about the Battle of the Bulge by CNN anchor, Paula Zahn.

Mediating Disability Disputes



In a recent article for the Ohio State Law Journal, Equal Employment Opportunity Commission, Commissioner Paul Steven Miller looks at Mediation and the Americans with Disabilities Act (ADA)¹. Commissioner Miller notes that there needs to be an

alternative to the long, drawn-out, expensive, and frustrating process that often ensues from an employment discrimination dispute involving the ADA. He goes on to say that certainly, litigation in federal court is a critical component to implementing this civil rights statute, and mediation is not appropriate for every kind of disability case. However, mediation is not second-class justice either, and in many instances, with procedural safeguards to ensure fairness, mediation can provide better justice than a lawsuit.

At CMS, employees who engage the EEO process can elect mediation. Although mediation is available for complaints that are filed on any basis, we recognize that it can be particularly useful for complaints based on disability. In fact, the ADA explicitly encourages parties to utilize alternative dispute resolution (ADR) as a means of resolving ADA disputes.

Why do ADR and the ADA fit so well together? The statute largely looks at disability from a very individualized, contextual framework; i.e., when considering things such as coverage, reasonable accommodation, and undue hardship. The flexibility of the ADA is necessary in order to take into account the wide range of disabilities, the uniqueness of jobs, functions, and accommodations. Disabilities are manifested in different ways, and may require different accommodations depending on the degree of limitation and the job in question. It is precisely this lack of a simplistic “one size fits all” approach embodied in the ADA that makes mediation a particularly effective tool for these disputes.

Mediation is also effective in resolving disputes regarding requests for reasonable accommodation. Through mediation, the parties can collaboratively and creatively reach effective solutions while at the same time preserving the working relationship. Mediation cannot only help to resolve the problem, but it can also have a positive impact on the disabled employee’s success in the job.

As mentioned above, mediation programs must contain safeguards to ensure fairness. CMS’s, ADR Program for EEO Complaints, contains the core principles that EEOC recommends; voluntariness, neutrality, confidentiality, and enforceability. The parties can withdraw from/end the mediation at any time. CMS uses outside mediators to ensure neutrality and impartiality. The process is confidential; no information exchanged in mediation becomes part of the case file and statements made in mediation cannot be used against parties in a later proceeding. Finally, any written agreement reached in mediation is enforceable.

If you have additional questions about ADA or CMS’s ADR Program, please feel free to visit our website, or contact our office at 410-786-5110.

¹ Federal employees are covered under the Rehabilitation Act not the ADA. However, the standards of the ADA apply to the Rehabilitation Act.

Seniority System Trumps ADA

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The 5-4 decision ostensibly favors an employer’s right to maintain its seniority system. The decision also addressed the employee’s right to “show evidence of special circumstances” that would require an employer to circumvent an established seniority system in order to allow disabled employees preference in work assignments over non disabled employees.

The plaintiff, Robert Barnett, worked for U.S. Air as a cargo handler until he became injured on the job. Subsequently, he transferred to a less physically demanding position in the mailroom. Pursuant to U.S. Airways reassignment policy, employees with greater seniority could request reassignment to a currently filed position. Mr. Barnett was advised that two non-disabled employees with more seniority sought reassignment to his position in the mailroom. Invoking the ADA, Mr. Barnett requested that U.S. Air make an accommodation that would allow him to remain at his mailroom assignment. After U.S. Air considered Mr. Barnett’s request for five months, it eventually decided to deny his request. Because he was unable to perform more physically demanding job descriptions, he lost his job.

Mr. Barnett sued U.S. Air claiming that it violated ADA. He claimed that the employer discriminated against him by not making the accommodation of allowing him to remain at his position in the mailroom. U.S. Air claimed that giving preference to disabled employees, and bypassing the seniority system would pose an undue hardship on its business operations.

Green Light To No FEAR ACT

(Continued from page 1)

statistical data relating to Federal sector equal employment opportunity complaints filed with that agency; and send an annual report to Congress, the Equal Employment Opportunity Commission and the Attorney General.

The data to be posted by federal agencies would include: the number of complaints filed; the number on individuals filing those complaints (including as the agent of a class); the number of individuals who filed 2 or more of those complaints; the number of complaints in which each of the various bases of alleged discrimination is alleged; the number of complaints in which each of the various issues of alleged discrimination is alleged; the average length of time, for each step of the process, it is taking the agency to process complaints; and the total number of final agency actions rendered involving a finding of discrimination.

While collecting and reporting this data to the EEOC has been required for some time, this bill adds the requirement of posting on the web site and reporting to Congress and the Attorney General

The *No FEAR Act* is in response to a discrimination case against the Environment Protection Agency in August 2000 and similar class action suits against at least five other agencies.

The House of Representatives unanimously passed the bill October 2001, the Senate approved and the President is expected to sign the legislation soon.

You may visit the OEOCR web site to get updates on the *No FEAR Act* and similar EEO related information at:
<http://hcfanet.hcfa.gov/hpages/oecr/archive.htm>.

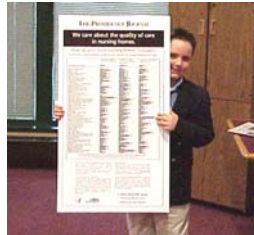
Our Children at CMS



Rob Sweezy welcomes children to CMS

On April 25, CMS hosted more than 150 children, ages 8 to 16, as part of the Agency's "Take Our Children To Work Day" program.

Rob Sweezy, Director of CMS's Public Affairs Office, kicked off the day's events with opening remarks to welcome the children and staff and explain the unique opportunity the day offered them to see what it is like to work at CMS. With assistance from his son Carson, who displayed an advertisement on the new nursing home quality initiative, Mr. Sweezy described the pilot program designed to provide more information about nursing homes to consumers. He used the initiative as an example of the important work that CMS performs for people all over the nation who rely and Medicare and Medicaid for their health care needs. At the same time, Administrator Tom Scully was at an event on the other side of Baltimore to promote the initiative's six states pilot rollout, which will expand to all fifty states in the fall.



Carson helps his dad by displaying nursing home poster

The "Take Your Children To Work Day" program, coordinated by the Office of Equal Opportunity and Civil Rights (OEOCR), consisted of guided tours of the Baltimore Headquarters, including the Office of the Administrator, the Division of Graphics Services, the Individual Learning & Support Center, the CMS Library, the TV Production Studio and the Health Unit. In addition, Brian Korzec (OICS/Learning Resources Group) conducted a special learning activity, adapted from the Myers-Briggs personality indicator, on unique personality traits that are "special gifts." According to parent, Mary Jones, (OICS/Acquisition & Grants Group), "...everyone at the various tour stops did a wonderful job presenting the information to the children..."



Ann Marie Chesney leads a discussion with Jennifer Hook

Children at the Baltimore Headquarters and several regional offices watched a short multimedia presentation in the Grand Auditorium. A powerful short story, directed and produced by Eric DeLisle, (OICS/Division of Graphics Services), detailed the "real life" experience of one Medicare beneficiary and illustrated how CMS helps those in need. Following the presentation, the children experienced, first-hand, CMS's high tech video conferencing capabilities in a conference call with other children from regional offices in Atlanta, Seattle, Chicago and Kansas City. Using a talk show format, Ann Marie Chesney (OICS/Learning Resources Group) facilitated an enthusiastic discussion of the children's impressions of CMS and some of the possible career choices available to them in the Federal Government.



Louvenia Anderson provides closing remarks.

Louvenia Anderson, Executive Assistant to the Deputy Administrator and Chief Operating Officer, Rubén King-Shaw, Jr., brought the "Take Your Children To Work Day" program to a close. She thanked the children for their participation, and encouraged them to reflect on their visit and to consider a career in public service.

Holocaust Memorial Observance

On Wednesday, April 23, 2002, CMS commemorated its annual Holocaust Memorial Program in the auditorium with live video to the regional offices. The theme of this year's program was, "Allied Liberation of Concentration Camps."

Patty Lamond, Deputy Director of the Office of Equal Opportunity and Civil Rights, opened the program with a welcome to the invited guest speakers, Mrs. Livia Shacter, a survivor of one of the largest death camps in Poland; retired Brigadier General Alvin D. Ungerleider, a member of the allied forces that helped to liberate survivors at a concentration camp in Germany; Rabbi Elan Adler of the Moses Montefiore Anshe Emunah Hebrew Congregation and the children's choir from Krieger Schechter Day School.



OEOCR Deputy Director, Patty Lamond

CMS Deputy Administrator and Chief Operating Officer, Ruben King-Shaw, Jr., also provided opening remarks and reminded staff why we commemorate and should never forget the holocaust. He emphasized the importance of remembering and embracing the triumph



CMS Deputy Administrator and Chief Operating Officer, Ruben J. King-Shaw, Jr.

of humanity.



Left to right: Rabbi Elan Adler, Mrs. Livia Shacter and Brigadier General Alvin D. Ungerleider.

Mrs. Shacter gave a very personal and pointed account of her experiences of being transported and confined at the Auschwitz-Birkenau death camp in Poland. Demonstrating a remarkable talent for storytelling, she shared her pain, despair and hope during a horrific

time in history.

Retired Brigadier General Alvin D. Ungerleider spoke about his experiences as well, but as a liberator. As a soldier in World War II, he helped free prisoners in the Nordhausen Concentration Camp in Germany.

The Rabbi Elan Adler helped set the tone for the day's program with remarks of the occasion and leading the audience in prayer.

A short video presentation entitled "Memories", produced by Diane Hall of the Division of Graphics, was shown during the program. Also, the children's choir of the Krieger Schechter Day School performed several musical selections. A video of the program is available at the CMS Library.

Diversity Day 2002

CMS will observe its 4th annual Diversity Day Celebration on Wednesday, June 5, 2002 at 10:00 a.m. on the back parking lot "H" behind the Central Building. This year's theme is "Working Together to Serve Millions."

This event provides employees the opportunity to reflect upon the contributions of many different cultures to our society, recognize the diverse beneficiary populations we serve and heighten the awareness of the issues and concerns of a diverse culture.

The Office of Equal Opportunity and Civil Rights will again host this event. There will be guest speakers, entertainment, diversity resource material and ethnic food samplings. The entertainment will include: the CMS Choir; Larry Pratt; the Marsha Meekins Project, a jazz, pop, blues, Latin band; Musical Expressions, a classical string quartet from Peabody Institute; and Flamenco dancers with authentic Spanish guitarist.

OEOCR Staff Changes

Joanne Davis is a new member to the Complaints Processing Team. She joins OEOCR after serving eight years with the Baltimore City Law Department and the Baltimore City Public School System. Ms. Davis is a graduate of the University of Baltimore Law School.

Richard E. Torres-Estrada is a new federal employee under the Federal Career Intern Program. Prior to CMS, Richard worked as an Attorney in the general practice of law, particularly in family law, contract law, and administrative law. He also acted as Hearing Officer in several disciplinary action hearings of municipal employees. He holds a B.A. in Psychology from University of Puerto Rico and a Juris Doctor from Inter-American University of Puerto Rico School of Law.

Job Fairs & Conferences

Federal Asian/Pacific American Council National Leadership Training Conference http://www.fapac.org/	Omni Shoreham Hotel Washington, D.C.
National Image, Inc. Training Conference and Convention http://www.nationalimage.org/	Bally's Park Place Hotel Las Vegas, NV
American Association Health Plans Managed Care Institute and Display Forum http://www.aahp.org/	San Diego Convention Center
73rd Annual League of United Latin American Citizens http://www.lulac.org/	Houston, Texas
Annual National Association for the Advancement of Colored People (NAACP) http://www.naacp.org/	George R. Brown Convention Center Houston, TX
National Council of La Raza Conference http://www.nclr.org/	Miami Beach, FL
Organization of Chinese Americans http://www.ocanatl.org/convention/index.html	Salt Lake City, UT
Blacks In Government National Training Conference http://www.bignet.org/	Atlanta, GA August 25-30

CMS's Reasonable Accommodations Function Transferred to OEOCR

In a recent message to all CMS email users, the Deputy Administrator and Chief Operating Officer, Rubén King-Shaw, Jr., announced that the Office of Equal Opportunity and Civil Rights will now be responsible for the Agency's Reasonable Accommodations function. As part of the Agency's overall commitment to Equal Employment Opportunity, Mr. King-Shaw, Jr., reaffirmed the Administrator and his full commitment to providing reasonable accommodations to qualified employees and applicants with disabilities in a prompt and fair manner to assure that individuals with disabilities enjoy full access to employment opportunities at CMS.

Bettie T. Spencer has been designated as the Agency's Reasonable Accommodations Coordinator, and may be reached on 410-786-0762 or at BSpencer@cms.hhs.gov. All reasonable accommodation requests must be brought to Ms. Spencer's attention.

Key Terms Reasonable Accommodations

Disabled Person is one who has a physical or mental impairment which substantially limits one or more of such person's major life activities.

Qualified Disabled Person, with respect to employment, is a Disabled person who with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others.

Reasonable Accommodation is a change in the work environment or in the way things are customarily done that would enable a **Qualified Disabled Person** to enjoy equal employment opportunities.

CALENDAR OF EVENTS

2002 ASIAN PACIFIC ISLANDER MONTH OBSERVANCE

CMS AUDITORIUM
THURSDAY, MAY 23, 1:30 PM

2002 DIVERSITY DAY CELEBRATION

BACK PARKING LOT
WEDNESDAY, JUNE 5, 10:00 AM

2002 WOMEN'S EQUALITY DAY PROGRAM

CMS AUDITORIUM
TUESDAY, AUGUST 23, 1:30 PM

CenterPage

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