

The CHECKOFF

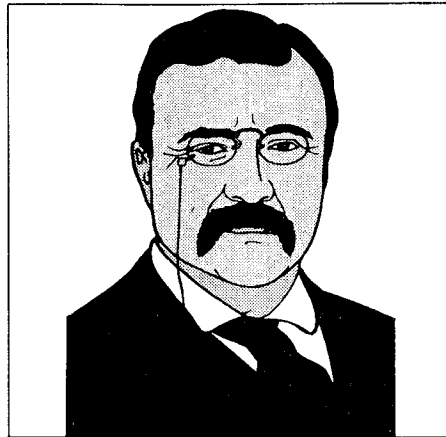
Teddy Roosevelt's Legacy

by Alan Orantes Forst

One of the lesser known Federal agencies concerned with labor and/or employment issues is the U.S. Merit Systems Protection Board. The Board, like nearly every Federal agency, is oft-times referred to by its initials or acronym, the MSPB. This small agency (less than 300 employees) was created in 1978, although an earlier manifestation existed as part of the Civil Service Commission (which is today the Office of Personnel Management (OPM)). The MSPB describes itself as "an independent, quasi-judicial agency in the Executive Branch that serves as the guardian of Federal merit systems." As such, it is a child of Teddy Roosevelt's turn-of-the-century crusade against a Federal bureaucracy ripe with cronyism and nepotism.

There are three Board members, each of whom is nominated by the President and confirmed by the Senate, to relatively long terms (seven years). The Board is bipartisan in composition; currently, two members are Democrats (including Chairman Ben Erdreich, a former Congressman). The lone Republican, Antonio Amador, recently completed his term (he was appointed by President Bush) and returned to California.

Federal Government employees who are subjected to adverse personnel actions may appeal these actions to the Board. Generally, the Board will only hear appeals of removals,



suspensions, denial of restoration to duty or reemployment rights (veteran discrimination) or suspensions of more than 14 days. However, the Board also has jurisdiction to adjudicate appeals regarding retirement benefits, and can also entertain appeals of minor personnel actions (performance appraisals, short suspensions, reassignment) if the appeal includes allegations of whistleblower reprisal. Board appeals may include an affirmative defense of prohibited discrimination (i.e., I wouldn't have been fired but for my race, sex, disability, etc.). Individuals who filed such "mixed cases" can appeal the Board's determination with respect to their discrimination claim to the EEOC or directly to the appropriate U.S. district court. Otherwise, judi-

cial review of final Board decisions lies in the U.S. Court of Appeals for the Federal Circuit. In the most recent fiscal year, the Board and its field offices issued over 10,000 opinions (the majority of the opinions dismissed the appeals for lack of jurisdiction or as settled). Only 411 cases resulted in a reversal or mitigation of the agency's action (although many other cases were settled, to the benefit of the appellant). The Federal Circuit affirms the Board in roughly 95% of the appeals from Board decisions.

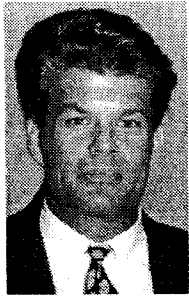
The Board describes its mission as guardian of Federal merit systems as ensuring that Federal employees are protected against abuses by agency management, that Executive Branch agencies make employment decisions in accordance with the merit

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Chair's Message



Initially, let me thank Debbie Crumbley on behalf of the entire Section, for her good work as last year's Section Chair. Congratulations on a job well done.

Secondly, as we look forward, this year bodes well for the Section. Rob Sniffen, as incoming CLE Chair, has already begun planning this year's seminars and it appears the Section will continue its tradition of providing exception continuing legal education Section members. Walter Aye has continued his good work in assisting the Section in establishing a web page. If anyone has any suggestions, fee free to contact Walter.

We have appointed our Committee Section Chairs and they are listed at right.

The Employee Benefits Committee is a new committee and we look forward to its inaugural year. We will make committee assignments based upon member interest in the next few weeks.

The issue of whether to institute certification within the Section has arisen again and we are awaiting report on this matter from Stuart Rosenfeldt who chairs this special committee. The committee is presently preparing materials regarding certification to be shared with all Section members.

It looks like we will have a busy and substantive year as regarding Continuing Legal Education. The following seminars are scheduled:

Effective Use of Experts in Employment Cases Seminar

Friday, September 26, 1997
8:15 a.m. – 5:30 p.m.
Omni Rosen Hotel – Orlando

Public Employment Labor Relations Forum

Thursday, October 16, 1997
12:00 p.m. – 5:00 p.m.
and
Friday, October 17, 1997
8:00 a.m. – 5:00 p.m.

Marriott Westshore – Tampa

Discrimination Seminar

Friday, February 20, 1998
8:00 a.m. – 5:00 p.m.
Hyatt Regency Downtown – Miami

1998 Advanced Labor Topics

Thursday, April 30 and
Friday, May 1, 1998
8:00 a.m. – 12:00 noon
Don CeSar Hotel – St. Petersburg

The Trial Skills program at Stetson University has recently concluded and we have received several positive comments from attending lawyers. Special thanks to Jan Majewski, Rob Sniffen, Bill and Karen Amlong and all faculty for their help in this regard.

The calendar of **Executive Council meetings** for the year is as follows:

Thursday, September 25, 1997
5:00 p.m. – 6:30 p.m.
Omni Rosen Hotel – Orlando

Thursday, October 16, 1997
5:00 p.m. – 6:30 p.m.
Marriott Westshore – Tampa

Thursday, February 19, 1998
5:00 p.m. – 6:30 p.m.
Hyatt Regency Downtown – Miami

Thursday, April 30, 1998
4:30 p.m. – 6:00 p.m.
Don CeSar Hotel – St. Petersburg

All member are welcome and encouraged to attend.

As is evident from the foregoing, we have a busy year and I look forward to working with you to make it a successful one.

David Linesch

1997-98 Labor and Employment Law Section Committee Chairs

Beth Johnson
Patrick Kokenge
Stanley Kiszkiel
Cary Singletary
Carlos Burruezo
Jeff Carnes
Deborah Crumbley
Rebecca H. Steele
Kathleen Phillips
Sue Dolin
Cathy M. Stutin
Frank Damon Kitchen
Cathy Beveridge
Donald T. Ryce, Jr.
Cary Singletary
Richard McCrea
Walter Aye
Courtney Wilson
Robert J. Sniffen
Stuart Rosenfeldt
Eric Holshouser
Neil Chonin

Fair Labor Standards Act Committee
EEOC Committee
EEOC Committee
Litigation/ADR Committee
Litigation/ADR Committee
Labor Relations Committee
Labor Relations Committee
Employee Benefits Committee
Employee Benefits Committee
Publications (*Check Off*) Committee
Publications (*Check Off*) Committee
Publications (*Florida Bar Journal*) Committee
Legislative Committee
Legislative Committee
Long Range Planning Committee
Long Range Planning Committee
Pro Bono/Special Products Committee
Pro Bono/Special Products Committee
Continuing Legal Education Committee
Certification Committee
Individual Employee Rights Committee
Individual Employee Rights Committee

Labor and Employment on the Internet

by William Carnes

When I first accepted my assignment from our past chair, Deborah Crumbley, I did so because it was the only way to educate myself on the Internet. Otherwise, the big stall would have overcome me like so many other ventures into the wonderful world of computers. My office was not equipped with the Internet, so this was the excuse needed to move into the millennium.

At first, fear of failure kept me from pushing the buttons, but that soon disappeared and frustration was the word to reckon with. There was no pattern to the madness nor a road map to follow. Eventually, things began to add up, but $2 + 2$ did not equal 4. On the Internet the number was millions upon millions of Internet sites.

Unfortunately, none of these millions of sites offer the magic bullet we all are looking for. These are free and open to the public. They have limitations. The primary limitation is lack of reliability, speed and legal citation. West and the other legal publishers still have control of the market place as far as pagination, legal citation and timeliness goes, but legal research can still be accomplished, if you are very patient and careful. Most of the specific labor sites provide little but a webpage full of useless information to a legal practitioner, but they are interesting, nonetheless. The online services and cd-rom, backed up by print media, still provide the best research tools for attorneys. If you want to hear the real music, you have to pay the piper.

Listed below is my best effort at indexing labor and employment law Internet sites. This is **not** a complete list. The list changes faster than anyone can imagine. If you are an Internet junkie, you are probably light years ahead of this list. However, if you have not traded a few hundred billable hours for Internet experience, these are the Mega/sites that will get you practically anywhere. To include more would be redundant because most of the other Mega/sites are merely restating what is already catalogued some-

where else. Now log on and surf the labor and employment lawyers' net wave.

List of Internet Sites/Addresses

Legal Research Mega/Sites

These Internet sites offer substantially similar capabilities for legal research of areas of state and federal case law as well as statutes and administrative procedures. When you enter one of these sites, you have access to everything they have to offer. You can bookmark individual, more specific sites for quicker access and bypass the general site. While no one site may be objectively better than another, some are more complete. They are listed alphabetically, not in any ranking order. The Stetson webpage may be more complete as of this posting, but each site changes regularly.

FLORIDA STATE UNIVERSITY

Legal ResearchNet

<http://law.fsu.edu/lawtech/lawserch.html>

STETSON UNIVERSITY COLLEGE OF LAW

<http://www.law.stetson.edu/>

Labor/Employment Law Mega/Sites

These sites are oriented to labor and employment law, but sometimes offer little more than the general le-

gal mega/sites. While there are literally tens of thousands of these sites, most are of little or no value to a practitioner. Each attorney will adopt a site or two which particularly meet his/her needs.

BenefitsLink(tm) National Employee Benefits Website

<http://www.benefitslink.com/>

DISGRUNTLED (Both sides of the labor bar should check this out)

<http://www.disgruntled.com/dishome.html>

Employment and Benefits Law

http://zeta.is.tcu.edu/~yancey/emp_law.htm#unions

Focal Points-Employment and Labor Law/Emory University School of Law

<http://www.law.emory.edu/FOCAL/employ.html>

IGC: LaborNet

<http://www.igc.org/igc/labornet>

LaborLinks (Organizations and Other Links)

<http://www.homedirections.com/laborlin.html#F>

LABOR LINKS Trade Union Research Tools

<http://www.webcom.com/jamesd/>

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The Checkoff is prepared and published by the Labor and Employment Law Section of The Florida Bar.

David J. Linesch, Palm Harbour Chair
Kevin E. Hyde, Jacksonville Chair-elect
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Lynn M. Brady, Tallahassee Layout

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laborlinks.html

National Employment Lawyer's Association Internet Resource Center (This is the public access site. NELA members have access to NELANET)

<http://www.nela.org/>

UC Berkeley Library Web Internet Labor Resources

<http://www.lib.berkeley.edu/IRLnet.html>

General Mega/Site

The mega/site of all mega/sites could be the HOTSHEET. It may not be the largest, but it must be close to it. Find it at www.hotsheet.com. What the HOTSHEET has omitted may not matter.

Supreme Court Strikes Down Religious Freedom Restoration Act

The United States Supreme Court struck down the Religious Freedom Restoration Act on June 25, 1997, holding that the statute was an unconstitutional attempt to rewrite the substance of the First Amendment without amending the Constitution itself. Congress passed the RFRA in 1993, in response to the Supreme Court's decision in *Employment Div., Dep't. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In that case, the Court held that the First Amendment does not require the government to prove a compelling state interest in order to enforce an across-the-board criminal prohibition, even where the prohibition interferes with an individual's sincerely held religious belief. The RFRA effectively nullified *Smith* by imposing a "compelling justification" requirement for any governmental conduct that substantially burdens religious exercise. Justice Kennedy, writing for the majority, concluded that the RFRA was invalid because it unconstitutionally intruded on the power of the federal courts, as well as the States' traditional power to regulate for the health and welfare of their citizens. In a dissenting opinion, Justice O'Connor urged the Court to reconsider and reverse *Oregon v. Smith*. Justices Souter and Breyer, who also dissented, would have declined to reach the constitutional issue.

Eleventh Circuit Establishes Three-Part Test for Mandatory Arbitration of Federal Discrimination Claims under Collective Bargaining Agreement

In *Brisentine v. Stone & Webster Engineering Corp.*, Case No. 96-6866 (11th Cir. July 21, 1997), the Eleventh Circuit held that a discrimination claim under the Americans With Disabilities Act was not subject to dismissal based on the employee's failure to exhaust his remedies under a collective bargaining agreement that required grievance and arbitration of alleged violations of an antidiscrimination clause in the contract. Relying on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the court held that the union could not collectively waive employees' statutory rights under federal civil rights statutes. The court declined to read the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which upheld mandatory arbitration of an employee's age discrimination claim under a broadly-worded arbitration clause in his securities registration appli-

cation, as overruling *Alexander v. Gardner-Denver*. Instead, the Eleventh Circuit sought to reconcile the two cases. It concluded that three basic requirements must be met to create an enforceable agreement to arbitrate federal employment discrimination claims: 1) the employee must have agreed individually to the contract containing the arbitration clause; 2) the agreement must authorize the arbitrator to resolve federal statutory claims; and 3) the agreement must give the employee the right to insist on arbitration if he or she is not satisfied with the resolution of the grievance.

The Eleventh Circuit joins the Seventh, Eighth and Tenth Circuits in holding that *Alexander v. Gardner-Denver* remains good law and that a union cannot consent to arbitration of individual statutory rights on behalf of an employee through a collective bargaining agreement. See *Pryner v. Tractor*

Supply Co., 109 F.3d 354 (7th Cir. 1997), *petition for cert. filed*, 65 U.S.L.W. 3783 (U.S. May 16, 1997); *Varnier v. National Super Markets, Inc.*, 94 F.3d 1209 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 946 (1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997). The Fourth Circuit reached a contrary result in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996). In a recently issued policy statement, the Equal Employment Opportunity Commission detailed its opposition to any agreement that mandates binding arbitration of federal discrimination claims as a condition of employment. See EEOC Policy Statement on Mandatory Arbitration, No. 915.002, July 10, 1997. Resolution of *Gilmer's* impact on arbitration clauses in collective bargaining agreements awaits further review by the Supreme Court.

Section Bulletin Board

Meeting Notices and Seminars Schedule

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5:00 p.m. - 6:30 p.m.
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Don CeSar Hotel — St. Petersburg

1998 Advanced Labor Topics
Thursday, April 30 and
Friday, May 1, 1998
8:00 a.m. - 12:00 noon
Don Cesar Hotel — St. Petersburg

**Executive Council Meeting
and Section Annual Meeting**
Thursday, June 18, 1998
2:30 p.m. - 5:30 p.m.
Buena Vista Palace — Orlando

CLE Audiocassettes Available

Audiocassettes are available for the following CLE Section programs:

- **"Employment Law for the General Practitioner"**
(Course No. 7601R) — expires 9/20/97 CLER 5.0 hours Maximum
- **"Jury Trial Litigation of Employment Cases"**
(Course No. 7790R) — expires 3/20/98 CLER 8.0 hours Maximum
- **"Employee Benefits for Beginners: What Every Labor and Employment Lawyer Needs to Know"**
(Course No. 7884R) — expires 8/20/98 CLER 4.0 hours Maximum
- **"See Ya in Court, Boss!"**
(Course No. 7791R) — expires 8/21/98 CLER 8.5 hours Maximum

To order please make a copy of this form and mail to: The Florida Bar, CLE Programs, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 with a check in the appropriate amount payable to The Florida Bar.

Name _____ Florida Bar # _____

Cannot be processed without this number.

Address _____

City/State/Zip _____

Audiocassettes (includes course materials)

Cost: \$85.00 plus tax (section member) \$ _____

\$90.00 plus tax (non-section member) \$ _____

Name of Course: _____

Course No. _____

Name of Course: _____

Course No. _____

Total Enclosed \$ _____



Ethics Questions?

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ETHICS HOTLINE

1/800/235-8619