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In Pro Per (Friend of the Court)

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UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JAMES C. LATHAM, et al.,	)	DOCKET NUMBER
	)	DA-0353-10-0408-I-1
Appellant,	)	
	)	AMICUS BRIEF
vs.	)	
	)	
UNITED STATES POSTAL SERVICE,	)	
	)	
Agency.	)	
	)	

COMES NOW MICHAEL HILLINGS as a friend of the Court in filing this Amicus Brief with regard to James C. Latham, et al. (see caption above).

I, MICHAEL HILLINGS, declare as follows:

1. I have worked for the UNITED STATES POSTAL SERVICE (hereinafter referred to as USPS) since approximately January 1994 (over 17 years) as a TTO Operator (Tractor/Trailer Operator). During these 17 years, I used only two (2) days of

sick time. My sick time total amounted to approximately 1,500 hours (about 188 days) I was also considered to be a good employee per my supervisors/managers.

2. On or about November 19, 2002, I had a work-incurred injury while working for the USPS in Pasadena, California. A brief description of the incident is as follows: I was pulling a mail container loaded with mail weighing approximately 700 pounds. While I was pulling said mail container, I felt something in my left hand and thumb pop. My left wrist was crushed between the truck trailer wall and the container. A co-worker of mine called my supervisor, and my supervisor drove me to Irwindale Clinic in Irwindale, California. I could not move my left hand and wrist, and I was in severe pain. A doctor at the clinic took x-rays, attempted to pop my wrist into place, but he was not successful. He then said that I must see an orthopedic specialist. Since I was in so much pain the next day, I called Dr. Brent Miller (Orthopedic Hand/Arm Specialist) in San Dimas, California. I was informed I had left a intra-articular distal radius fracture with open reduction and internal fixation of the left radial styloid fracture (surgery performed on November 27, 2002) and a left 1st MCP joint sprain.

3. On or about May 19, 2003, I was released to go back to work 4 hours/day (2 days per week) on light duty.

On or about July 2, 2003, my work activity increased to 4 hours/day (3 days per week) on light duty.

On or about December 2003, my work increased to 4 hours/day (5 days per week) on light duty.

On or about January 2004, my work increased to 5 hours/day (5 days per week) on light duty.

On or about March 17, 2004, my work increased to 6 hours/day (5 days per week) on light duty.

On or about December 22, 2004, my work increased to 8 hours/day (5 days per week) on light duty.

4. I worked (light duty) out of the Pasadena Center until approximately May 2007. The Pasadena USPS closed their Motor Vehicle Service (MVS) Center to USPS workers. The Pasadena office contracted this out to private industry. Accordingly, the USPS gave me some different USPS locations that I could be transferred to. I chose to be transferred to the USPS in the City of Industry, California. My title remained as a Tractor Trailer Operator even though I had many restrictions. I did not perform work as a Tractor Trailer Operation. Instead, the City of Industry gave me a modified assignment (limited duty).

5. My current doctor, Ralph N. Steiger, M.D. (Orthopaedic Surgery) in West Covina, California states that my work restrictions as of August 4, 2011 are as follows: "No gripping or grasping, no lifting, pushing, pulling, fine manipulation, or operation of machinery with LUE (left upper extremity). Allow breaks as needed to an increase of symptoms left hand and wrists. No heavy truck or standard (stick) vehicle driving."

My condition now has become post traumatic degenerative arthritis of the radioscaphoid joint, left wrist per Dr. Steiger as of August 4, 2011. This arthritis (bone on bone) is very painful, and Dr. Steiger states that this arthritis has developed as a result of my original work injury on November 19, 2002.

6. On or about April 16, 2009, my supervisor, Bob Fallon, and I were called into Linda Squire's office (NRP Coordinator). She said that due to the reassessment program, there is no work available for me with my work restrictions. She said I had 30 minutes to get my things and leave. She gave me a letter and stated that I should not report back for duty unless I was contacted that "operationally necessary work tasks have been identified for you within your medical restrictions, or you now elect to accept the most recently offered PS Form 2499." However, I was NOT given any job offer.

On or about May 30, 2009, I was sent the same letter as I was given on April 16, 2009. Again, no job offer was given.

On or about July 16, 2009, I was given a letter by USPS stating that no work was available, but I was NOT advised what kind of positions these were.

7. I used my sick leave pay from approximately April 16, 2009 up to February 20, 2010. Other than this, as stated in No. 1 of this brief, I used only two (2) sick days during my 17 years of employment with the USPS. (See No. above.)

8. I was on Workers' Compensation from February 22, 2010 until December 22, 2010.

9. On or about October 2010, Workers' Compensation sent me to take a test regarding vocational training at Ergo Links with Michelle Smith. I had a lot of trouble

completing the testing due to my severe pain level. After the test, I talked with Ms. Smith while she was loading her equipment in her vehicle. I asked her how I did on the test. She said that there were inconsistencies with my test, but it was understandable since she recognized my severe pain.

10. On or about December 2010, Workers' Compensation sent me for a second test regarding vocational training at Ergo Links with Lisa Fitzpatrick. I was sent for this second test since they said I performed the first test with sub-maximum effort. Ms. Fitzpatrick was very inconsiderate of my pain level. I sent a letter to Workers' Compensation reporting her unprofessional behavior with me. She kept insisting that I perform when my severe pain prevented me from completing the test. She threatened me by saying I had to try harder in performing the test or she would have me cut off of Workers' Compensation benefits. She was extremely unprofessional and very threatening.

11. Shortly after this test in December 2010, Ms. Fitzpatrick sent her report to Workers' Compensation, and I received a letter dated December 21, 2010 from the Department of Labor stating that they were cutting me off Workers' Compensation benefits due to a lack of effort on my part on the tests administered.

In the December 21, 2010 letter from the Department of Labor, Mr. T. Ling (Senior Claims Examiner), states, "Your failure to undergo and satisfactorily complete the essential preparatory effort of vocational testing does not permit this Office to determine what would have been your wage-earning capacity had you in fact undergone the testing and rehabilitation effort. Therefore, under the provisions of Section 10.519 of

the regulations, it is assumed, in the absence of evidence to the contrary, that the vocational rehabilitation effort would have resulted in your return to work at the same or higher wages than for the position you held when injured.

Under the provisions of 5 U.S.C. 8113(b) and 20 CFR 10.519, your compensation is hereby reduced to $0.00 as of 12/21/2010. This reduction will continue until you in good faith undergo the directed vocational testing, or show good cause for your not complying, at which time the reduction of your compensation will cease."

If I could have completed the tests, I would have done so. I am not a quitter. However, I have such severe pain, it prevented me from doing so. Everyone has a limit due to pain. Since treating with Dr. Steiger, he has diagnosed me with post-traumatic degenerative arthritis in my left wrist which is caused by the injury to my left wrist and that is the reason for so much severe pain

I have one year to file an appeal to this. An appeal will definitely be filed before December 2010.

12. I wrote a letter dated January 20, 2011 to my claims adjuster, Melissa Lee. I received a letter dated February 23, 2011 from Mr. T. Ling (Senior Claims Examiner at the Department of Labor). This letter confirmed a conference call on February 23, 2011. (Present for the conference call on February 23, 2011 were T. Ling (Senior Claims Examiner), M. Lee (Claims Examiner), Vicky Crane (Rehab Specialist) and me.) The purpose of the phone conference on February 23, 2011 was to discuss what was required for my compensation to be reinstated. The Memorandum of Conference from the Department of Labor stated: "It was explained that 1) compensation was reduced to zero

because prior test results from the FCE and vocational testing were deemed invalid because he game [sic] sub-maximal and inconsistent efforts, 2) in order for compensation to be reinstated, he must retake the required testing and give his best effort, and 3) compensation will not be reinstated until we receive valid test results."

During the conference call, I asked them to clarify what the word "valid" meant? No one answered the question. I then asked them if they are telling me to go beyond my restrictions and be in extreme pain so that I could get "valid" results? They only said all we ask is that you do better on the test.

13. I took a third vocational rehab test on or about March 8, 2011 with Foster Assessment Center. With advice from my workers' comp counselor, I took several Motrin medication before taking this test to help with my pain management. As a result, I did not need to take so many breaks. This test was ran 9:00 a.m. to approximately 3:30 p.m. By the afternoon, I began to experience greater pain since the Motrin was wearing off.

14. I was then scheduled for a "third" capacity test with Ergo Links on March 18, 2011. I also got approved to get a new doctor since my previous doctor moved to Texas. My appointment with the new doctor, Dr. Steiger, was on March 17, 2011. I told Dr. Steiger that I had tried the test with Ergo Links on two previous occasions. Dr. Steiger looked at the results of the two prior tests with Ergo Links (I presented him with copies of the reports). Dr. Steiger (in his report of March 17, 2011) stated "I have reviewed the Functional Capacity testing performed on October 26, 2010 and December 7, 2010. It should be noted that this patient has adhesions within the tendons which have

In a report from Dr. Steiger dated July 7, 2011, he states under CAUSATION, "In regards to the diagnosis of arthritis, the damage to the joints from the injury of November 19, 2002 has accelerated the rate of arthritis in the joints described so that it has appeared sooner than it would due to the natural aging process."

15. After my appointment with Dr. Steiger on March 17, 2011, I called Ms. Fitzpatrick at Ergo Links to advise her that I was canceling my testing appointment for March 18, 2011 due to Dr. Steiger's orders, who advised me not to take the test because I would have much difficulty performing repetitive tasks as noted above (See No. 14 above.)

16. I received a memo from the USPS dated July 21, 2011 with the subject line of "Notice of Proposed Separation." This letter stated that I was on "Leave Without Pay (LWOP) In Excess of 365 Days." There were several discrepancies in this memo. I wrote a letter dated July 27, 2011 in response to the USPS memo dated July 21, 2011. Said memo dated July 21, 2011 stated that I have been on LWOP status since February 22, 2009. This was incorrect. I have been on LWOP status since February 22, 2010, not 2009.

The memo stated "You have not indicated to us when you will be able to return to work." A Disability Status report dated April 14, 2011 from my doctor (Ralph N. Steiger, M.D.) with my diagnosis and work restrictions was attached to my letter to the USPS. I stated that I am ready and available to go back to work as soon as you provide me with a position that is within my work restrictions with my doctor's approval.

The memo of July 21, 2011 referred to "sub maximum effort." I asked them what that meant.

The memo of July 21, 2011 stated that on April 19, 2011, NRP Coordinator Daniel Jaloma attempted to contact me by phone and left a phone message to inform me that work was available for me and to report to work on April 20, 2011. The memo of July 21, 2011 from USPS stated that I did NOT report to work nor did I attempt to contact anyone.

I NEVER received a call and/or phone message from Daniel Jaloma on April 19, 2011 as the memo from USPS of July 21, 2011 indicates. Said letter stated Mr. Jaloma called me on April 19, 2011 and expected me to show up for work the next day. First of all, this was totally unreasonable since my doctor would have needed a full job description to see if the job was within my job restrictions. This phone call should have been followed up by mailing me an "Offer of Modified Assignment (Limited Duty) (PS Form 2499. I NEVER received any such "written" offer. If I had been notified properly, I would have responded appropriately.

NOTE: In the meeting of August 18, 2011 with Mr. Worley, et al., I inquired why nothing had been put in writing and mailed to me about this alleged "job offer". Mr. Worley stated that it was a difference of management style and Mr. Worley told Mr. Jaloma to use current employees instead of calling back any other employees to work.

In April 2009, NRP Coordinator Linda Squire, notified me no work was available due to my work restrictions. My union filed a grievance on my behalf on or about April 24, 2009. The union NEVER notified me what happened.

Accordingly, from April 2009 to February 2010, I used almost all of my sick time (see No. 1 above) and then switched into an LWOP status.

I have contacted my Union about this since the memo from USPS of July 21, 2011 stated that I could do this and/or hold a meeting with the Plant Manager (City of Industry). His name is Steve Worley.

17. After speaking with my Union Rep., (Colleen Street), she reviewed all the facts with me and set up a meeting with Mr. Worley. This meeting was held on August 18, 2011. My union rep (Colleen Street) and another union rep named Indra and myself along with Mr. Worley and Danny Jaloma (NRP Coordinator) were present for this meeting. During this meeting, facts were presented, and Mr. Worley stated he would need to do a lot of research and then had 10 days to render a decision.

Mr.Worley asked me if I had looked for work. I told him that I had not done so since I thought the USPS was supposed to do that. After said meeting, I reviewed the memo to me from the USPS dated 4/16/09 that stated this and thus, proved my answer to be correct.

Mr. Worley asked if I had refused to take the rehab testing. I told him that my doctor (Dr. Steiger) had advised me the day before the testing (March 17, 2011) that I was not able to take this test again due to my pain level and limitations as stated above. I did not refuse to take the test on March 18, 2011. Instead, I followed Dr. Steiger's orders. Dr. Steiger's written report of March 17, 2011 advised me not to take any further testing due to my injuries (with post traumatic degenerative arthritis) and my extensive pain.

Mr. Worley made a statement in the meeting of August 18, 2011 that because the mail has slowed down, the USPS must get rid of over 200,000 employees over the next few years. However, I have looked at the USPS website, and they are currently hiring people. Why would they be hiring employees if they need to get rid of over 200,000 employees since the mail volume is very low now due to electronic processing, etc. They are trying to hire employees at very low wages and little or no benefits. Is this discrimination to current employees including those with disabilities? Is this a violation of the Rehabilitation Act of 1973? This doesn't make sense!

In said meeting, my Union Rep, Colleen Street, advised Mr. Worley that she has four other employees that have had severe problems in testing with Lisa Fitzpatrick at Ergo Links. She has intimidated them as she did to me. She forced them as well as me to do things in the testing that the employees were not able to perform due to their job restrictions.

I am awaiting the decision of Mr. Worley which should be rendered within 10 days or August 29, 2011.

18. In August 2011, my union filed a grievance (Step 1) on my behalf.

19. The Federal Employees Compensation Act, as well as the Office of Personnel Management (OPM) implementing regulations provide that federal employees who experience on-the-job compensable injuries have certain rights to be restored to employment.

OPM's regulations provide the following restoration rights to a partially recovered employee:

Agencies must make every effort to restore in the local commuting area according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty.

At minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended.

Again, why are they advertising employment positions on the website, but yet they have no job for me?

20. At no time during this entire process since my injury date of November 19, 2002 has the USPS ever notified me about the Merit Systems Protection Board (MSPB) rights as an employee. Accordingly, my rights as an employee have been jeopardized and violated. There are many other employees that were walked out in approximately April 2009 besides me. They have definitely been out of work for over 365 days. They have NOT received the same letter (Notice of Proposed Separation) that I did about terminating me since I have been out of work for over 365 days. I feel that I am being singled out. Where do I go from here?

I am ready, willing and able to go back to work as long as the job follows my work restrictions.

21. I declare under penalty of perjury that the foregoing is true and correct.

DATED: August 22, 2011

Respectfully Submitted,

MICHAEL HILLINGS
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(818) 613-8022

CERTIFICATE OF MAILING

I certify that this document was sent as indicated on August 22, 2011 to the following:

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DATED: August 22, 2011

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