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M E M O R A N D U M

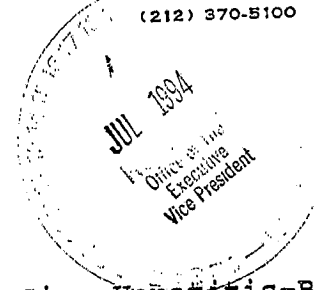
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TO: Malcolm T. Smith,
 National Representative-At-Large,
 Maintenance Division

FROM: Lee W. Jackson *[Signature]*

DATE: July 15, 1994

RE: Legal Effect of Employee's Failure to Sign Hepatitis-B
 Waiver, Dallas, Texas



You asked me to determine whether or not a Postal Service employee at the Dallas Bulk Mail Center who both refuses to take the voluntary Hepatitis-B injections offered without cost by the Postal Service, and also refuses to sign the Postal Service's "Informed Consent and Declination Form - - Hepatitis-B Vaccination", compromises any rights they may have. Initially, it is my view that to the extent any rights are compromised, or even implicated, that happens because of the refusal to take the Hepatitis-B shots, and not because of the failure to sign the Postal Service's Declination Form.

Initially, I looked into whether or not any of the employees rights under FECA would be compromised by a failure to take the series of Hepatitis-B shots. My examination of the relevant statutes, convinces me that an employee does not compromise his or her FECA rights by refusing to take the Hepatitis-B inoculations.

First of all there seems to be a FECA policy which mitigates against the idea that an employee may waive his or her rights under FECA. For instance FECA regulations at 20 CFR §10.21 state that:

"No official superior or other person is authorized to require an employee or other claimant to enter into any agreement, either before or after an injury or death, to waive his or her right to claim compensation under the Act. No waiver of compensation rights shall be valid." 20 CFR § 10.21

Additionally, there is no provision in the actual statute which states or implies that the employee who refuses to avail themselves of a voluntary preventative, such as inoculations, would

lose FECA coverage. There are however some specifically delineated conditions under which employees are not entitled to FECA benefits. Thus, Section 5 U.S.C. 8102 states that:

"(a) The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of duty, unless the injury or death is - -

- (1) caused by willful misconduct of the employee;
- (2) caused by the employee's intention to bring about the injury or death of himself or of another;
- (3) proximately caused by the intoxication of the injured employee."

The Hepatitis-B shots are optional, not mandatory, and therefore a refusal to take them could not rationally be defined by the Postal Service as willful misconduct within the meaning of the aforementioned section. Additionally, unless an employee's infection is a result of the employee's intention to injure himself or another, or intoxication, the above sections do not apply.

Finally, an examination of the Federal Personnel Manual (FPM) and the Postal Service ELM convinces me that there is nothing therein which would cause a forfeiture of FECA rights to an employee who refused to take Hepatitis-B shots. In fact, the FPM reinforces my belief that an employee who refused to take the shots would not be deemed to be guilty of "willful misconduct" within the meaning of 5 U.S.C. 8102 (a)(1). Thus, the FPM, with regard to "willful misconduct" states that "simple negligent disregard of such (safety) rules is not sufficient to deprive an employee or beneficiary of entitlement to compensation. Disobedience of such orders may destroy the right to compensation only if the disobedience is deliberate and intentional as distinguished from careless and heedless." FPM chapter 810, Section 3-6. Thus the employee who refuses to take the Hepatitis-B shots would not be considered to be deliberately disobeying safety rules, since he is given the option of refusing to take the shots. The result might be different if the shots were required. In view of all of these factors, I do not believe that an employee who refuses to take the Hepatitis-B shots offered by the Postal Service would compromise his or her rights under FECA.

The next issue which occurred to me is that an employee who refuses to take the Hepatitis-B shots offered by the Postal Service might compromise a possible case under the Federal Torts Claim Act, or common-law tort. After an examination of this issue, it is my conclusion that an employee's ability to recover damages under the Federal Tort Claims Act (FTCA) would not necessarily be precluded, but that the amount of the employees recovery may be reduced.

The FTCA adopts relevant state tort law. Therefore to examine an employee's rights in Dallas we would have to look at the Texas

law of torts. It is my view that actions under the FTCA against the Postal Service would be preempted by Workers Compensation claims. A Postal worker might however be able to sue any private entity, such as a medical laboratory which shipped the blood, if they were infected with Hepatitis-B. In that circumstance Texas tort law will apply once all jurisdictional and venue requirements have been met.

Texas is a "comparative negligence" state. Duncan v. Cessna Aircraft Co., 665 S.W. 2d 414, 27 Tex. Sup. J. 213 (1984). Under the comparative negligence scheme a plaintiff may only collect damages for injuries of which he or she is not the proximate cause. If the employee fails to take shots to prevent Hepatitis-B, that employee would still have the right to pursue a claim, but in Texas the employee's failure to take that precaution may be factored into the comparative causation equation. In that circumstance, a plaintiff's recovery may be reduced by the fact that they affirmatively decided not to take free Hepatitis-B shots. This determination would have to be made on a state by state analysis, and the Texas example would not apply to each state.

I do not believe that an employee's decision not to sign a Postal Service Declination form would have an effect on the employee's right to recover under the FTCA. If an employee did sign the form, it could however prejudice their rights if they brought suit after having been injured. Thus, the Postal Service's form includes the following language:

"I understand that due to my occupational exposure to blood or other potentially infectious materials I may be at risk of acquiring the Hepatitis-B virus (HBV) infection. ...I understand that by declining this vaccine I continue to be at risk of acquiring Hepatitis-B, a serious disease. ..."

Since a plaintiff's knowledge of danger would be considered by a jury in any personal injury action, the aforementioned language simply admits that the employee knew of the grave danger imposed by contracting Hepatitis-B and declined to take the shots anyway. A plaintiff's failure to sign a form would not however defeat the defendant's attempt to show that the plaintiff had knowledge of the danger, but the plaintiff's signature on the form as it is written today makes the issue of plaintiff's knowledge very much more certain.

In my point of view, Section B of the Postal Service's Declination form only needs to say the following:

"I have been given the opportunity to be vaccinated with Hepatitis-B vaccine at no charge to myself. However, I decline Hepatitis-B vaccination at this time."

It might be worth the time and trouble to attempt to get the Postal Service to modify their Declination Form to read as suggested above.

I hope that this memo answers any and all questions you may have had with regard to this subject, but if not please do not hesitate to contact me.

LWJ:khl

cc: Moe Biller
Bill Burrus ✓
Tom Neill
Jim Lingberg