

Federal Disability Retirement And The Agency Cover Of "Accommodation"

"A man who acts without knowledge is a man who merely acts."

-- From "Compendium of Sage Verses"

I am receiving too many phone calls from people who have been fooled by his/her Agency that they have been "accommodated", and therefore they cannot file for disability retirement. From Federal Workers at all levels who are told that they can take LWOP when they are unable to work, to Postal Workers who are given "Limited-Duty Assignments" -- all need to be clear that you are NOT BEING ACCOMMODATED, AND THEREFORE YOU HAVE A RIGHT TO FILE FOR DISABILITY RETIREMENT. Let me clarify this issue by first discussing the important case-law of *Bracey v. Office of Personnel Management*, 236 F.3d 1356 (Fed. Cir. 2001). *Bracey* was, and still is, a landmark decision -- one of those cases that pushed back the attempt by the Office of Personnel Management to create a broad definition of what "accommodation" means, and thereby try and undermine a Federal and/or Postal Employees' right to disability retirement.

5 U.S.C. 8337(a) states that a disabled employee is eligible for disability retirement unless the employee is able to render "useful and efficient service in the employee's position", or is qualified for reassignment to an existing vacant position in the agency at the same grade or level. What this basically means is that, if you have a medical condition and you cannot do one or more of the essential elements of your job, you are entitled to disability retirement unless your Agency can (a) do something so that you can continue to work in your job, or (b) reassign you to an existing vacant position at the same pay or grade (all of those words are key to understanding the *Bracey* decision). As to the first issue, if your medical condition, either physical or psychiatric, is impacting your ability to perform the key functions of your job (in other words, "useful and efficient service" means that you must be able to perform the "critical or essential" elements of your position), then it means that you are eligible for disability retirement -- unless the Agency can reassign you to an existing vacant position (the second issue). As to the second issue, what the Court in *Bracey* meant is that there has to be an actual position existing, which is vacant, to which a person can be reassigned and slotted into, at the same pay or grade.

In *Bracey*, the Office of Personnel Management was trying to have it both ways: they argued that (a) an individual is "accommodated" if he can do his "job", and the "job" which the Agency was having Mr. *Bracey* do was a "light-duty" job that was made up by the Agency. As a result, the Office of Personnel Management had denied Mr. *Bracey's* application for disability retirement, and the case reached the Merit Systems Protection Board, and then to the U.S. Court of Appeals for the Federal Circuit on appeal. More recently, Agencies have been trying to convince Federal workers that they can take "Leave Without Pay" and work less hours; or revert to part-time status; or perform some other functions -- and this constitutes an "accommodation". Or, in the case of Postal Workers, especially those who have intersecting OWCP issues, one is often told that "Limited-Duty Assignments" constitute an "accommodation". However, for the latter, it is important to review such assignments -- does it include jobs from another craft? Are you offered a new "Limited Duty Assignment" each year, or every two years (which would imply that it is not a permanent assignment)? Can a new supervisor or Postmaster come in tomorrow and declare that there are no longer any "Limited Duty Assignments" available (which is often the case)?

Remember that a "position" in the federal employment system is "required to be classified and graded in accordance with the duties, responsibilities, and qualification requirements associated with it. The 'resulting position-classification' system is 'used in all phases of personnel administration'. 5 U.S.C. 5101(2)" (*Bracey* at page 1359). It cannot be a position "consisting of a set of ungraded, unclassified duties that have been assigned to an employee who cannot perform the duties of his official position." *Id.*

Similarly, for Postal employees, you cannot be slotted in your craft position, but then be given duties crossing over from other crafts; and you cannot be told that you have been slotted into an already existing "vacant" position, but then be offered the same "Limited-Duty" position a year later. If it was truly a permanent "vacant" position, why would you be offered the same position a year later?

Remember that under 5 C.F.R. Section 831.502(b)(7), an offered position must be, among other things, of the same tenure as the position from which the employee seeks disability retirement. "Tenure" is defined at 5 C.F.R. Section 210.102(b)(17) as "the period of time an employee may reasonably expect to serve under his current appointment."

If you are a Federal or Postal employee, and you find this discussion about the Bracey decision to be somewhat confusing, do not let the complexity of disability retirement laws keep you from inquiring about your eligibility. In its simplest form, disability retirement is about 2 issues: Are you able to perform the essential elements of your job? If not, Can your Agency slot you into an already-existing position at the same pay, grade and tenure, and not just in some "made up" position that hasn't been graded and classified"? If your answer is "No" to both questions, then you are entitled to disability retirement benefits.

As true with all things in life, it is always better to affirmatively act with knowledge, especially knowledge of the law. Like the Tibetan proverb, to act without knowledge of the law is to act blindly. To fail to act, or to allow your circumstances to control your destiny, is to allow your Federal Agency or the U.S. Postal Service to dictate your future for you. If you are disabled, and unable to perform the critical elements of your job, then you should consider the option of disability retirement. Opting for disability retirement does not mean that you can no longer be productive in society in some other capacity; indeed, you are allowed to receive a disability annuity and go out and get another job, and make up to 80% of what your position currently pays. Opting for disability retirement merely means that you have a medical condition which is no longer a good "fit" for the type of job you currently have.

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