

How to Practice Law without a License but with Impunity. Federal Preemption of State-Law Malpractice Claims

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I am convinced beyond peradventure that some infants exit their mothers' wombs with the compulsion to litigate, which, thereafter, they are powerless to resist. They are not at fault; they were born to litigate. A case in point:

I knew a postmaster of a small post office, who not only had several of his own cases against the Postal Service going on at most times, but also stirred up other postal workers to file all manner of complaints against the Postal Service. Let's call this postmaster "Perry Mason," the famous, fictional TV trial lawyer. Before he and I nearly came to blows outside of the Brick, NJ Post Office (I think), Perry would refer cases to me for which I was eternally grateful. Perry referred to me an MSPB case involving the removal of a supervisor. He insisted on being co-counsel with me on the case. After I finished deposing a few witnesses, to my surprise, Perry announced that he would also question the witnesses. Perry asked some questions and the Postal Service representative objected to the questions for being off-the-wall. I adjourned the deposition for a moment and Perry, the client, and I stepped outside of the post office at which the deposition was being taken. Perry and I got into a nasty fight about the relevancy of his questions and finally I told my client that he had to choose between Perry and me. The client wisely chose me, and we had a successful outcome to the case. As I now fantasize about the fight between Perry and me, I tell Perry, "Graduate from college; graduate from law school; pass the bar; and then you can practice law." Whether I said this to Perry or not, one thing is for sure: Perry never referred me another case. After filing several more cases against the Postal Service, Perry quit, retired or was fired.

The compulsion to play lawyer infects craft employees, too. One letter carrier who subscribes to this newsletter stated in an email to me that the law was his "hobby." I was tempted to write back to him that brain surgery was my hobby. But when I thought it over, I concluded that I should not discourage him from playing lawyer; rather, I should teach him how to enjoy his hobby while substantially reducing his risk of being sued in state court for malpractice when, inevitably, he screws up one of his "client's" cases. I need to teach this hobbyist the nuts and bolts of federal preemption of state-law tort claims.

Federal Preemption of State-Law Tort Claims Arising Out of a Breach of the Duty of Fair Representation

(Postal workers should keep in mind that their unions are governed by the National Labor Relations Act (NLRA) and federal employees should remember that their unions are governed by the Civil Service Reform Act of 1978 (CSRA). I will keep both groups on the same track until the rights afforded by each statute diverge and then I will put you on

This article contains no legal advice. It is intended only to stimulate the reader's interest in legal issues which are of interest to me. If you need legal advice, you should get it from someone qualified to dispense it.

separate tracks. Trust me: you will both arrive at the same station at the same time and on the same train.)

By statute, what do you get back from the union to which you do or don't pay dues? By statute, the union negotiates with management a collective bargaining agreement (CBA), which the union then administers and enforces through the CBA's grievance procedure.ⁱ In all likelihood, you get much more from your union. My union, AFGE Local 1904, allows members to subscribe to its wonderful group dental insurance plan. (Query: how can I be a member of a federal employee union when I am not a federal employee? The answer lies in knowing the difference between a member of the bargaining unit of which the union is the exclusive representative and a member of the union itself.) What you get from the union by statute is called "the duty of fair representation."ⁱⁱ The *scope* of that duty is straightforward: if the union is allowed to negotiate with management about it, then the union must represent you fairly on it.ⁱⁱⁱ The boundary between what the duty comprises and what it does not may be difficult to discern. For example, the union certainly can negotiate with management about employee discipline, but it cannot negotiate with management about the *statutory* appeal of discipline. Congress granted that appeal right to the employee separately from the CBA. For example, an employee has the right to appeal her removal to MSPB by virtue of 5 U.S. C. § 7701, *infra*, and not by virtue of anything her union might have negotiated in the CBA. If the union's duty of fair representation is "coterminous" with its power as exclusive representative and if that power does not include the right to negotiate over statutory appeals procedures does that mean, for example, that the duty of fair representation does not compel the union to represent non-dues paying members before MSPB? That's the exact holding of *American Federation of Government Employees, AFL-CIO, Local 916 v. Federal Labor Relations Authority*^{iv} But what if the union (foolishly) volunteers to represent a bargaining unit member (dues-paying or otherwise) before the Merit Systems Protection Board and botches the appeal? The *Karahalios-Montplaisir* line of cases^v implies that the union cannot hide behind the Civil Service Reform Act of 1978 (CSRA) to preempt the employee's state-law malpractice claim against the union.

In *Karahalios*, an employee of the Defense Language Institute sued NFFE in federal district court, alleging that NFFE's refusal to arbitrate his grievance constituted a breach of the duty of fair representation. The district court entered judgment for Karahalios; NFFE appealed; the 9th Circuit reversed; and the Supreme Court granted certiorari. In affirming the 9th Circuit, the Supreme Court held that Title VII of the CSRA does not create a private cause of action against a union for breach of its duty of fair representation, but rather, the Federal Labor Relations Authority (FLRA) and its General Counsel had exclusive enforcement authority over the duty of fair representation.

Karahalios argued that just as the Supreme Court implied the duty of fair representation from the National Labor Relations Act^{vi}, it should imply the same duty from Title VII of the CSRA, and the Supreme Court agreed: "This duty [of fair representation] also parallels the fair representation obligation of a union in the private sector that has been found implicit in the National Labor Relations Act."^{vii} By extension, Karahalios argued, since a private-sector employee can sue his union in federal district court for the breach

of the duty of fair representation,^{viii} he should be able to sue NFFE in federal district court for the breach of the same duty. Denying that Title VII of the CSRA is a “carbon copy” of the NLRA, the Supreme Court held Congress intended to delegate to the FLRA exclusive authority to decide ULP claims, like the breach of the duty of fair representation, whereas it intended the federal courts and the NLRB to share enforcement authority over the duty of fair representation in private-sector cases:

Because this Court found implicit in the NLRA a private cause of action against unions to enforce their fair representation duty even after the NLRB had construed the NLRA to make a breach of the duty an unfair labor practice, petitioner argues that Congress must have intended to preserve this judicial role under Title VII. Much of the argument rests on our decision in *Vaca v. Sipes, supra*. There are, however, several difficulties with this argument.

In the first place, Title VII is not a carbon copy of the NLRA, nor is the authority of the FLRA the same as that of the NLRB. The NLRA, like the RLA, did not expressly make a breach of the duty of fair representation an unfair labor practice and did not expressly provide for the enforcement of such a duty by the NLRB. That duty was implied by the Court because members of bargaining units were forced to accept unions as their exclusive bargaining agents. Because employees had no administrative remedy for a breach of the duty, we recognized a judicial cause of action on behalf of the employee... Very dissimilarly, Title VII of the CSRA not only expressly recognizes the fair representation duty but also provides for its administrative enforcement.^{ix}

From *Karahalios*, the legal hobbyist, whom I am tutoring, should deduce that postal workers can sue in federal court for their union’s breach of the duty of fair representation,^x but federal employees cannot.

In *Montplaisir*, former air traffic controllers brought a federal-diversity jurisdiction, state-law malpractice action against attorneys for their union claiming that they participated in the PATCO strike only on assurances by attorneys that they would not lose their jobs. The district court dismissed the complaint for lack of subject matter jurisdiction and controllers appealed. The 1st Circuit Court of Appeals affirmed, holding that the CSRA preempted the state-court action claims. Citing *Karahalios*, the 1st Circuit held that a federal employee could not maintain a state-court tort action against his union or the union’s attorney on a claim which amounted to an unfair labor practice charge because Congress preempted those claims by delegating to the FLRA the exclusive right to adjudicate ULPs. The 1st Circuit reasoned that if state courts and the FLRA shared the

authority to adjudicate ULP claims, they would likely render conflicting judgments about the propriety of the union's conduct toward its bargaining members. To insure that unions would hear only one voice, the FLRA, Congress intended to disallow state court claims of legal malpractice.

As a couple, *Karahalios* and *Montplaisir* hold that a federal employee cannot file suit against his union in federal court alleging breach of the duty of fair representation or one in state court alleging legal malpractice. If our legal hobbyist is a federal-employee union officer or steward, he should conclude that he can screw up an employee's grievance without fear of getting sued anywhere.

But if our hobbyist is a postal-worker union officer or steward, he would not have that assurance. For a postal worker can file a "hybrid" federal-court action, pursuant to section 1208(b) of the Postal Reorganization Act of 1970 (39 U.S.C. § 1208(b)), alleging that (1) the Postal Service violated the CBA and (2) his union breached its duty of fair representation, implied under section 159(a) of the NLRA. Our hobbyist should not sweat the filing of a hybrid action against the union^{xi}---he is not a proper party to such an action---if he is guilty of nothing more than negligence in handling the employee's grievance.

Bargaining unit members claiming breach of duty of fair representation must allege that the union intended to deprive them of their contract rights, discriminated against them for forbidden reasons, sabotaged possibly meritorious grievance because of personal enmity, intentionally undermined grievance on basis of political allegiances within union, or intentionally caused harm through fraud, deceitful action, or dishonest conduct.^{xii} As a matter of law, an allegation of negligence or error in judgment on part of union officials in its representational capacity would not sustain an unfair representation claim.^{xiii}

But the bargaining-unit member injured by our would-be attorney's malpractice does not want to file a duty-of-fair representation law suit in federal court because: (1) he must file the action within six months from the date on which he has reason to believe that the union breached the duty of fair representation^{xiv} and (2) damages for breach of that duty may not be coextensive with the damages he can recover for malpractice.^{xv} Instead, he wants to file a state-court malpractice suit, which, in all likelihood, will be preempted by 39 U.S.C. § 1208(b).

In *Allis-Chalmers Corp. v. Lueck*,^{xvi} the Supreme Court held that "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract," the plaintiff's claim is pre-empted by § 301 of the Labor Management Relations Act. Since 39 U.S.C. § 1208(b) of the Postal Reorganization Act, which gives district courts jurisdiction over "suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees...." is essentially identical to § 301(a), a postal worker's state court action against his union will also be preempted if resolution of his claims are substantially dependent on interpretation of the CBA.^{xvii} Because resolution of the bargaining unit member's malpractice claim would require a court to "ascertain, first, whether the

collective-bargaining agreement in fact placed an implied duty of care on the Union ..., and second, the nature and scope of that duty," the Supreme Court has held that the tort claim was not sufficiently independent of the collective-bargaining agreement to withstand the pre-emptive force of § 301.^{xviii} In short, if our legal hobbyist botches the bargaining unit member's grievance, the bargaining unit member will lose in a duty-of-fair representation suit in federal court or a malpractice suit in state court.

"Okay. I understand now that I can practice law without a license but with impunity provided I *confine* myself to grievance arbitration," our hobbyist acknowledges. "But how challenging is that?" he laments. "I want to write briefs; I want to file motions; I want to depose witnesses. I can't do any of that in arbitration. Besides, my union does not always have enough money to go to arbitration."

"I want to practice law where it is free to practice it. I want to practice law before MSPB and EEOC," our hobbyist says rapaciously. "That's where the action is."

"Stay away from MSPB. Stay away from EEOC," I yell out to the hobbyist. "You don't know how to swim in those waters and I cannot throw you a life preserver."

5 U.S.C § 7701 provides in pertinent part:

- (a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right -
 - (1) to a hearing for which a transcript will be kept; and
 - (2) to be represented by an attorney or other representative.

Notice first that the source of the employee's right to appeal to MSPB is derived from other than the collective bargaining agreement. Notice second that the union does not have the right to determine who is going to represent the employee before MSPB; the statute gives that right to the employee alone. These same two principles reappear in the Federal Service Labor Management Relations Statute which provides in pertinent part at 5 U.S.C.A. § 7114 as follows:

- (5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from--
 - (A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or
 - (B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal procedures negotiated under this chapter.

A federal-employee union cannot limit a bargaining unit member's right to appeal to MSPB in favor of grieving the same action for that would deprive the employee of his statutory right to elect between the two.^{xix,xx} Indeed, the employee's statutory right to appeal to MSPB is so entrenched that a federal-employee union cannot negotiate away his right to have a measly last chance agreement enforced by the Board.^{xxi} I have not found a Postal Service case but it cannot be that a postal-worker union could infringe on a bargaining unit member's statutory right to appeal to MSPB (if he is a veteran's preference eligible) or to file an administrative discrimination complaint.

This brings us full circle to *American Federation of Government Employees, AFL-CIO, Local 916 v. Federal Labor Relations Authority*, which, as I said earlier, held that a federal-employee union could offer to represent dues-paying members in an MSPB appeal while withholding that same service from non-dues paying members because the right to appeal to MSPB did not originate, and could not have originated, in the CBA. This means of course that if the union bungled the dues-paying member's MSPB appeal and if the dues-paying member sued the union in state court for malpractice, the state court would not have to look to the CBA to define the duty the union owed the dues-paying member because the CBA contains no such duty. If the state court does not have to analyze the CBA to define the duty which the employee claims the union breached, then the state court can steer clear of NLRB and FLRA's domain to regulate the relationship between the union and its bargaining members under the CBA. Since the state court will not be invading that domain, our legal hobbyist cannot hide behind the preemption doctrine as an affirmative defense to the state-court action against his union and him. The bottom line is that the hobbyist can practice law before MSPB and EEOC without a license---the states' unauthorized practice of law statutes are overridden by the employee's federal right to choose anyone he wishes as a representative in MSPB or EEOC---but he cannot practice with impunity. As Benjamin Cardozo put it: "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all."^{xxii}

Trust me, I have warned union officers not to get involved in statutory appeals, EEOC cases (including accompanying the employee to the EEO counselor's office), disability retirements and worker's compensation claims and most have turned a deaf ear to me, because like I said they are genetically compelled to litigate. To a few, for a fee, I have offered to prepare documents to transfer their assets to their spouses or significant others to keep them out of reach of judgment holders. Again, I have had no takers. Perhaps they could make their clients (victims?) sign a waiver of liability. Maybe something like this:

I, Gil T. Assin, hereby waive all claims that I might have in the future against Perry Mason for negligently representing me in the appeal of my removal to MSPB.

Contrary to Perry's claim that he can provide me with reasonably competent representation on my appeal, I know that he cannot.

Perry knows squat about the Federal Rules of Evidence, the Federal Rules of Civil Procedure,^{xxiii} the Civil Service Reform Act of 1978, and Title VII of the Civil Rights Act of 1964 (I am raising an affirmative defense of discrimination). Even if he had access to these statutes and the cases decided thereunder he could not read and write about them like a lawyer because, well, he is not a lawyer.

More or less, I am letting Perry handle my appeal to appease his compulsion to litigate. I have nothing to lose because I am, after all, guilty as sin.

About the author

Mitchell Kastner served as an Administrative Judge with the United States Merit Systems Protection Board and its predecessor, the United States Civil Service Commission, for ten years. During the last three years of his tenure, he was the Deputy Regional Director of the Board's New York Regional Office. As an Administrative Judge, he conducted hearings and wrote decisions on all of the appeals over which the Board's Regional Offices had jurisdiction, including adverse actions (removals, demotions, and suspensions for more than 14-days); reductions in force; denials of within-grade salary increases; disability retirement reconsideration decisions; legal retirement reconsideration decisions; performance-based removals or reductions in grade; OPM suitability determinations; denials of restoration of reemployment rights, and certain terminations of probationary employees.

Since returning to private practice in 1985, he has represented employees before the Board on all of these types of appeals and several others which were added after he left, most notably, representing whistleblowers in Independent Right of Act appeals under the Whistleblower Protection Act of 1989. He has also represented federal employees and postal workers before EEOC and in federal court on claims under all of the federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act. With the exception of the National Treasury Employees Union (which employs its own attorneys), he has represented bargaining unit members of every major federal employee and postal service worker union in arbitrations. He is featured with former MSPB Chairman Daniel Levinson on Dewey Publication's compact disc *MSPB LITIGATION TECHNIQUES*

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Endnotes

ⁱ The bargaining representative's duty ... does not come to an abrupt end ... with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. *International Union of the United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U. S. and Canada, Local Unions Nos. 141, 229, 681, and 706 v. N. L. R. B.* 675 F.2d 1257, *1264, 219 U.S.App.D.C. 32, **39 (C.A.D.C., 1982)

ⁱⁱ The duty of fair representation was first formulated by the Supreme Court in *Steele v. Louisville & Nashville R.R.*, 323 US 192, 15 LRRM 708 (1944). The Court found the duty to be inferred from the union's status as exclusive representative of the employees in the bargaining unit. Thus, the Court said, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, but it has also imposed on the representative a corresponding duty."ⁱⁱ The Court stated it was "the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."

ⁱⁱⁱ The union's broad authority in negotiating and administering effective agreements is 'undoubted,' *Humphrey v. Moore*, 375 U.S. 335, 342, [84 S.Ct. 363, 367, 11 L.Ed.2d 370] (1964), but it is not without limits. Because '[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit,' *Vaca v. Sipes*, 386 U.S. 171, 182, [87 S.Ct. 903, 912, 17 L.Ed.2d 842] (1967), **the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, 'the responsibility and duty of fair representation.'** *Humphrey v. Moore*, *supra*, at 342 The union as the statutory representative of the employees is 'subject always to complete good faith and honesty of purpose in the exercise of its discretion.' *Ford Motor Co. v. Huffman*, *supra*, at 338," That this duty of fair representation under the NLRA may be judicially enforced was made clear in *Vaca v. Sipes*, 386 U.S. 171, [87 S.Ct. 903, 17 L.Ed.2d 842]. (My bold and my italics). *United Parcel Service, Inc. v. Mitchell* 451 U.S. 56, *67, 101 S.Ct. 1559, **1566 (U.S.N.Y.,1981)

^{iv} "We conclude that the union's duty to represent all employees within its bargaining unit is coterminous with the union's power as exclusive representative and hold that because the statutory review procedures do not vest the union with any exclusive authority, the duty of fair representation does not apply to such proceedings." *American Federation of Government Employees, AFL-CIO, Local 916 v. Federal Labor Relations Authority* 812 F.2d 1326, *1326 (C.A.10,1987)

"Union did not violate its duty of fair representation to government employee, even though it refused to provide attorneys to represent nonunion employee in statutory procedure to challenge removal action, where union was not exclusive representative as to that appeal, so that duty of fair representation did not attach." *National Treasury Employees Union v. Federal Labor Relations Authority* 800 F.2d 1165, 255 U.S.App.D.C. 140 (C.A.D.C.,1986)

^v *Karahalios v. National Federation of Federal Employees, Local 1263* 489 U.S. 527, *531, 109 S.Ct. 1282, **1285 - 1286 (U.S.Cal.,1989) 875 F.2d 1 (1st Cir. 1989) and *Montplaisir v. Leighton*, 875 F.2d 1 (1st Cir. 1989)

^{vi} "). The Supreme Court has long recognized that a union has a statutory duty of fair representation under the NLRA.^{vi} Although the Act does not explicitly articulate this duty, the Court has held that the duty is implied from "the grant under § 9(a) of the NLRA, 29 U.S.C. § 159(a) (1982 ed.), of the union's exclusive power to represent all employees in a particular bargaining unit." *Breining v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 87 (1989).

^{vii} *Karahalios v. National Federation of Federal Employees, Local 1263* 489 U.S. 527, *532, 109 S.Ct. 1282, **1286 (U.S.Cal.,1989)

^{viii} Union can be sued for breaching responsibility of fair representation due to its members, and such cause of action arises under Labor-Management Relations Act. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185. *Maisonet v. Trailer and Marine Transport, Inc. (TMT)* 514 F.Supp. 1129 (D.C.Puerto Rico, 1981)

^{ix} *Karahalios v. National Federation of Federal Employees, Local 1263* 489 U.S. 527, *534, 109 S.Ct. 1282, **1287 (U.S.Cal.,1989)

^x Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy. 39 U.S.C.A. § 1208(b)

^{xi} A labor organization and the Postal Service shall be bound by the authorized acts of their agents. Any labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets. 39 U.S.C.A. § 1208(c).

^{xii} *Martin v. Youngstown Sheet & Tube Co., C.A.7 (Ind.)* 1990, 911 F.2d 1239. See also *Morales-Valllellanes v. Potter* 339 F.3d 9, 16 (C.A.1 (Puerto Rico),2003) “Courts conduct a tripartite inquiry to determine whether a union breached its duty of fair representation so materially as to render the CBA's grievance procedures inadequate. ‘The three separate levels of inquiry ... are as follows: (1) did the union act arbitrarily; (2) did the union act discriminatorily; or (3) did the union act in bad faith.’”(Internal citations omitted.)

^{xiii} The courts have in general assumed that mere negligence, even in the enforcement of a collective-bargaining agreement, would not state a claim for breach of the duty of fair representation. *United Steelworkers of America, AFL-CIO-CLC v. Rawson*, 495 U.S. 362, *372-373, 110 S.Ct. 1904, 1911 (U.S.Idaho,1990); *Smith v. St. Regis Corp.*, S.D.Miss.1994, 850 F.Supp. 1296, affirmed 48 F.3d 531.

^{xiv} The six-month filing limitation set forth in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) applies to "hybrid § 301/duty of fair representation" claims. *DelCostello v. Teamsters*, 462 U.S. 151, 152, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). The statute of limitations begins to run when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation. *Christiansen v. APV Crepaco, Inc.*, 178 F.3d 910, 914 (7th Cir.1999).

^{xv} E.g., Since punitive awards could impair financial stability of unions and upset attempt to afford individual employees redress for injuries caused by union misconduct without compromising collective interests of union members in protecting limited funds, and since threat of punitive damages could disrupt responsible decisionmaking essential to peaceful labor relations, such damages may not be assessed under the Railway Labor Act against a union that breaches its duty of fair representation by failing properly to pursue a grievance. *International Broth. of Elec. Workers v. Foust* 442 U.S. 42, 99 S.Ct. 2121 (U.S.Wyo.,1979)

^{xvi} 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985)

^{xvii} *Johnson v. U.S. Postal Service* 756 F.2d 1461, *1465 (C.A.9 (Wash.),1985)

^{xviii} *United Steelworkers of America, AFL-CIO-CLC v. Rawson* 495 U.S. 362, *369, 110 S.Ct. 1904, **1909 (U.S.Idaho,1990)

^{xix} 5 U.S.C.A. § 7121(d) provides: “An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.”

^{xx5} 5 U.S.C.A. § 7121 (e)(1) provides, “Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.”

^{xxi} *AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES COUNCIL 214 (Union) and U.S. DEPARTMENT OF THE AIR FORCE AIR FORCE LOGISTICS COMMAND WRIGHT PATTERSON AIR FORCE BASE, OHIO (Agency)* 38 F.L.R.A. 309, *324, 1990 WL 201597, **12

^{xxii} *Glanzer v. Shepard*, 233 N.Y. 236, 239, 135 N.E. 275, 276 (1922) cited in *United Steelworkers of America, AFL-CIO-CLC v. Rawson* 495 U.S. 362, *380, 110 S.Ct. 1904, **1915 (U.S.Idaho,1990)

^{xxiii} Neither MSPB nor EEOC strictly applies the Federal Rules of Evidence or the Federal Rules of Civil Procedure, but you had better know them cold. How else are you going to try the case if you don't know the rules of foundation or how are you going to defend against a motion for summary judgment or file a motion to compel discovery?