Department of Budget and Management
Office of the Statewide Equal Employment Opportunity Coordinator

February 2012

Issue IV Volume I

EEO CONNECTION

Inside this issue:

Coordinator's Message

Out with the old, in with the new…What does that mean to you? Well, to us, in the Statewide EEO Coordinator's Office, it means refresh, refocus, and renew. The start of a new year has always been a time that we look at past accomplishments and set new goals. We are reenergized and excited about discovering new ways of building a workforce that is reflective of the communities we serve.

For the past five years, the Office of the Statewide EEO Coordinator has been driving the message that equal opportunity and fair employment practices are the law. This newsletter is just one tool that we offer which will help you understand your employment rights and protections by providing a glimpse of the latest news and information in employment law, helpful tips to enrich the workplace, and spotlights of the various achievements and contributions of the many men and women that make the United States the most culturally diverse and prosperous nation we are today.

In this issue, read up on EEOC's fiscal 2011 enforcement and litigation statistics (pg. 2). Want answers to some of the most often asked questions about mental impairment accommodations? Get answers on pg. 3. Read how an employee's termination raised questions about a supervisor's motives (pg. 4) and learn why Blockbuster Inc. shelled out over $2m to female and Hispanic workers (pg. 5).

In agency news, Department of Natural Resources received the U.S. Fish and Wildlife Service's National FY 11 "**Civil Rights-Best Practices"** award (pg. 8). Have you ever heard of "The Cat's Paw" fable? A must read on pg. 9. Did you know that State government has a mediation program? Read about the Shared Neutrals Mediation Program (pg. 10). February is Black History Month. Learn about our own Baltimore native, Thurgood Marshall, in the "Diversity Corner." Read on for additional news, information and training opportunities.

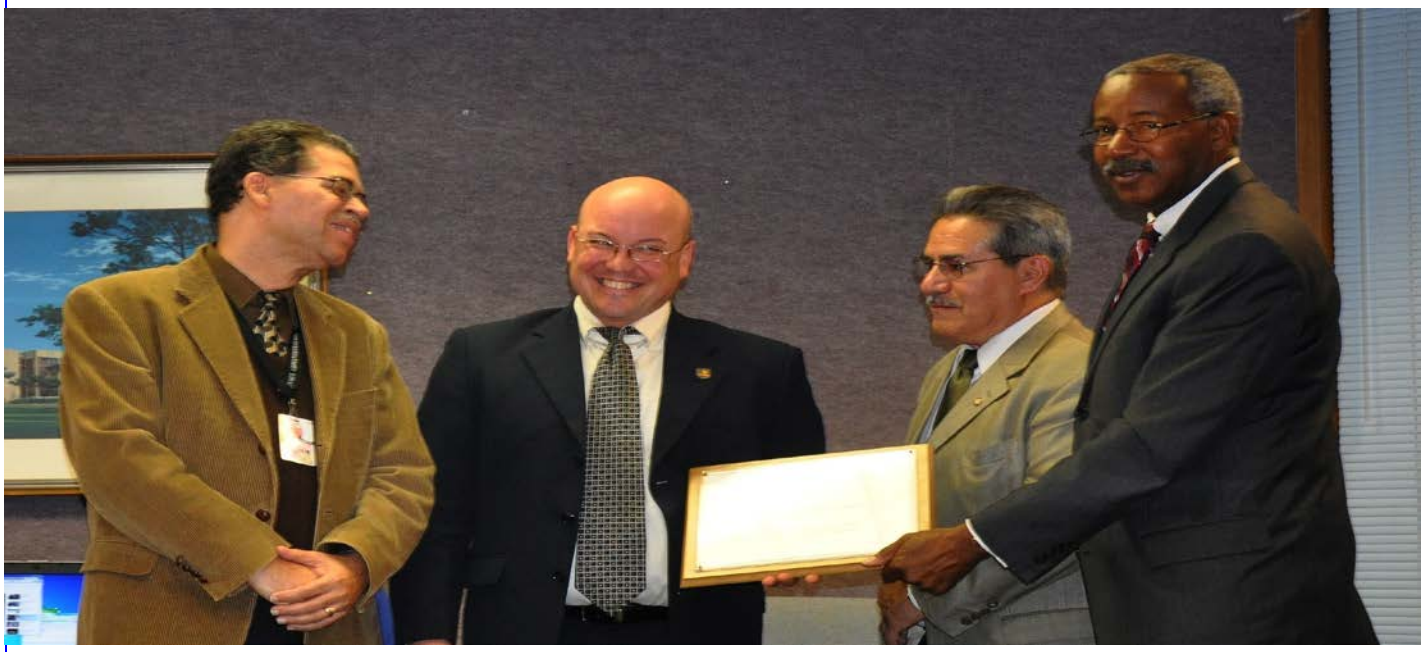
Enjoy!

Glynis Watford
Statewide EEO Coordinator

"One of the best ways to persuade others is with your ears — by listening to them." —

Dean Rusk

MD DNR Receives USFWS –DOI FY11 "Civil Rights-Best Practices" Award



The U.S. Fish and Wildlife Service (USFWS) Civil Rights Program presented the Maryland Department of Natural Resources with a Certificate of Excellence for **"Best Practices in Public Access Civil Rights"** on November 8, 2011 at the agency's Leadership Team Meeting. 2011 was the first year of the Fish and Wildlife Service's Best Practices program and DNR is the first winner of this award. USFWS commended DNR for their dedication, hard work and professionalism in pursuing best practices, and ensuring equal access in its programs, activities and facilities.

Recognized best practices include:

- an active mediation and conflict resolution program, whereby 20 employees have been trained in mediation skills to resolve complaints and workplace disputes,
- trained 45 DNR staff members, including upper management, on disability access,
- updated its language access plan,
- secured $310,000 in funding to pay for accessibility renovations at DNR, and
- created an eleven member Disability Advisory Council of subject matter experts that meet quarterly.

In the picture, from left to right are: Mr. Richard W. Allen, MD DNR Equal Opportunity Administrator, Mr. Leopoldo Miranda, Director, USFWS Chesapeake Bay Field Office; Mr. David Quirino, Equal Opportunity Specialist, USDOI-Office of Civil Rights, Washington, D.C.; and Mr. Wilson Parran, MD DNR Assistant Secretary for Mission Support.

Courtesy of Department of Natural Resources

SPOT LIGHTS (cont.)

EEOC Intake, Relief Obtained and Charges Resolved Hit Record Highs in 2011

The U.S. Equal Employment Opportunity Commission (EEOC) finished fiscal year 2011 with a ten percent decrease in its pending charge inventory. The first such reduction since 2002, achieved the highest ever monetary amounts through administrative enforcement, and received a record number of charges of discrimination. The agency reported in its annual Performance and Accountability Report (PAR) filed November 15, 2011.

The EEOC received a record 99,947 charges of discrimination in fiscal year 2011, which ended Sept. 30, the highest number of charges in the agency's 46-year history. EEOC staff also delivered historic relief through administrative enforcement—more than $364.6 million in monetary benefits for victims of workplace discrimination. This is also the highest level obtained in the Commission's history. The fiscal year ended with 78,136 pending charges—a decrease of 8,202 charges, or ten percent. In previous years, the pending inventory had increased as staffing declined 30 percent between fiscal years 2000 and 2008.

"I am proud of the work of our employees and believe this demonstrates what can be achieved when we are given resources to enforce the nation's laws prohibiting employment discrimination," said EEOC Chair Jacqueline A. Berrien. "The EEOC was able to strategically manage existing resources and take full advantage of increased resources in the past two fiscal years to make significant progress towards effective enforcement of the nation's civil rights laws."

Due to EEOC's enforcement programs in both the private and federal sectors, 5.4 million individuals benefited from changes in employment policies or practices in their workplace during the past fiscal year. Additionally, EEOC's public outreach and education programs reached approximately 540,000 persons directly.

The agency continued to build a strong national systemic enforcement program. At the end of the fiscal year, there were 580 systemic investigations involving more than 2,000 charges under way. EEOC field legal units filed 261 lawsuits—23 of which involved systemic allegations affecting large numbers of people; 61 had multiple victims (less than 20); and 177 were individual lawsuits.

The EEOC's private sector national mediation program also achieved historic highs, obtaining more than $170 million in monetary benefits for complainants, and securing the highest number of resolutions in the history of the program—9,831. This is five percent more than the number of resolutions reported in fiscal year 2010.

In the federal sector, where the EEOC has different enforcement obligations, the Commission resolved a total of 7,672 requests for hearings, securing more than $58 million in relief for parties who requested hearings. It also resolved 4,510 appeals from final agency determinations.

The EEOC's FY 2011 PAR is posted on the agency's website at http://www.eeoc.gov/eeoc/plan/index.cfm. Comprehensive enforcement and litigation statistics for fiscal year 2011 will be available in early 2012.

Courtesy of www.eeoc.gov

SPOTLIGHT

Mental Impairment Accommodations Q & A

Examples and remarks are courtesy of Attorney Audra Hamilton of Tulsa, Oklahoma.

Accommodation Example #1: Depression

John Doe is a vice-president in your company. Last year his son was killed in a car accident, and he became intensely sad and withdrawn (except for coming to work). This behavior has continued, and other employees have complained to you about John's inability to interact with them on major projects and his lack of concentration. Yesterday, John came to you and said that he needed to take a leave of absence for treatment of what his doctor says is clinical depression.

Is this an ADA accommodation request?
Is John disabled?

Answer: Probably yes to both questions, Hamilton says. John has been diagnosed with a mental impairment and the impairment appears to substantially limit a number of his major life activities (e.g., interacting with others and concentrating)

Accommodation Example #2: Anxiety Disorder

Sue Bee works in a large room with co-workers performing statistical analysis. Lately, Sue's productivity has declined, and she has snapped at her co-workers. When you speak to Sue, she tells you that she has been diagnosed with an anxiety disorder that may last indefinitely and that causes her mind to wander when she is distracted. Sue says she likes her work, but can't do it unless she is moved to a quieter environment.

You are hesitant to do this because you know that Sue's co-workers will view this as preferential treatment.

Has Sue made an accommodation request?
Is Sue disabled?
Do you need to move Sue even though her co-workers may complain?

Answer: Probably yes to all three questions, Hamilton says.
· Sue's anxiety disorder is long-term and substantially limits a major life activity, i.e., concentration;
· A quieter work environment is a reasonable accommodation; and
· Reactions of co-workers are not grounds to deny an accommodation.

'Why does she get special treatment?'

Other employees will certainly ask why the employee in question is getting special treatment, says Hamilton, but you may not disclose the reason.

You can say, "We have done this for reasons that are not your concern. We treat all employees according to law and policies."

Courtesy of HR Daily Advisor

** Reminder: It is important to conduct a thorough investigation to verify facts in all cases.**

SPOT LIGHTS (cont.)

5th Circuit: Terminations Must Be Based on Sound, Demonstrable Facts

A termination based on questionable conclusions by a supervisor can place the ultimate question of an employer's liability in the hands of a jury, according to the 5th U.S. Circuit Court of Appeals.

Carol Vaughn, a white woman, was hired by Woodforest Bank in September 2008 as an assistant bank manager in Starkville, Miss. Several months later, Vaughn was promoted to the position of bank manager. Misty Gaskamp, a regional manager and Vaughn's supervisor, approved three pay increases for her between September 2008 and February 2009. Gaskamp also gave Vaughn a positive performance review on Feb. 3, 2009.

On Feb. 20, 2009, Gaskamp fired Vaughn. After conducting a "climate survey" of the Starkville branch, Gaskamp concluded that several employees had "indicated concerns" about comments made by Vaughn in the workplace.

Vaughn brought a suit claiming racial discrimination under Title VII of the Civil Rights Act of 1964, and the trial court granted summary judgment in favor of the bank.

The appellate court concluded that Vaughn had presented a genuine issue of material fact concerning Woodforest's proffered reason for firing her, reversed the district court's grant of summary judgment and remanded for a trial on the merits.

In her deposition, Gaskamp identified three specific facts that caused her to make the decision to terminate Vaughn: (1) while watching television coverage of President Barack Obama's inauguration in January 2009, Vaughn told a retail banker that she wished the media would stop making the election a "black and white" issue; (2) Vaughn told another retail banker, Rhonda Williams, that the banker should not use the "N-word," that Vaughn had been reprimanded by a former employer for using the N-word and that she no longer uses the word; and (3) Vaughn told a white applicant for a retail banker position that she was not a "prejudiced" person and confirmed that the applicant could work with the team (which was predominantly black) "as is."

The appeals court noted that Vaughn made a preliminary showing of race discrimination by reason of the fact that she was replaced by a black employee. It also noted that the bank had articulated legitimate reasons for her discharge. In concluding to send the case to a jury, however, the appeals court held that the reasons offered by the bank could be reasonably considered as untrue.

With regard to the inauguration episode, the appeals court noted that evidence existed that all of the bank employees engaged in political and race-related conversations during the event. Regarding the N-word incident, the appeals court highlighted that Vaughn was not alleged to have used the N-word and that Williams did not find the conversation to have been offensive. Lastly, with regard to the interview, Vaughn disputed Gaskamp's version of events and thereby created a disputed and triable issue of fact.

In ruling in favor of Vaughn, the appeals court noted further that evidence indicated that Woodforest had knowledge of all three instances of alleged misconduct prior to the climate survey but did nothing upon initially learning of the facts. The lack of documentation of alleged complaints of Vaughn's conduct, the appeals court opined, casted further reason to doubt the truthfulness of the reasons provided for her discharge.

Vaughn v. Woodforest Bank, 5th Cir., No. 11-60102 (Dec. 21, 2011).

Professional Pointer: Effective human resources practice should routinely include a review of the support for a planned termination decision. Unexpectedly faced with a discrimination claim months after the decision, employers are often stuck with the previously articulated reasons for a termination.

Courtesy of SHRM

NOTEWORTHY RULINGS

Federal Court Signs Order for Blockbuster Inc. To Pay Over $2m to Settle EEOC Suit for Sex, Race, National Origin Discrimination and Retaliation

EEOC Said Retailer Created Hostile Environment for Female and Hispanic Workers

BALTIMORE – Blockbuster, Inc. has entered into a consent judgment requiring it to pay over $2 million to settle an employment discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC), the agency announced December 14, 2011. The EEOC had charged the Dallas-based global entertainment retailer with subjecting female temporary employees to sexual harassment, retaliating against them for resisting sexual advances and complaining, and subjecting Hispanic temporary employees to national origin and race harassment and other discrimination. The litigation concerned events that occurred in 2004 and 2005 at a distribution center in Gaithersburg, Md.

In its suit filed in U.S. District Court for the District of Maryland (*EEOC v. Blockbuster Inc.,* Case No. RWT-07-CV-2612), the EEOC charged that the male supervisory staff engaged in and condoned the harassment of a class of seven female employees, four of whom are Hispanic. The EEOC charged that the incidents of harassment committed by Blockbuster supervisors included repeated requests for sexual favors; yelling; insults; threats; unwelcome sex-related questioning; offense racial remarks; touching women's intimate body areas; and other discriminatory conduct. This pervasive and unlawful conduct culminated in the denial of work hours, discriminatory firings, forced resignations and other discriminatory actions, according to the EEOC.

Such alleged conduct violates Title VII of the Civil Rights Act of 1964. The EEOC filed suit after first attempting to reach a pre-litigation settlement through its conciliation process.

Blockbuster filed a bankruptcy petition during the pendency of this case, which remains pending in the U.S. Bankruptcy Court, and it has discontinued its former business operations.

"This case should act as a warning to all employers who use staffing agency personnel," said EEOC Philadelphia Regional Attorney Debra M. Lawrence, whose jurisdiction includes Maryland. "Employers who are customers of staffing agencies have a responsibility to protect their temporary workers from unlawful discrimination. Too frequently, such employers fail to create systems to prevent and detect abuse of temporary workers and fail to respond forcefully to it. Those employers do so at their peril."

Courtesy of www.eeoc.gov

NOTEWORTHY RULINGS cont.

OSHA sues Whole Foods, Saying 'Whistle-blower' was Improperly Fired

The U.S. Department of Labor's Occupational Safety and Health Administration has sued Whole Foods Market Inc., alleging that the Austin-based grocer improperly fired a whistle-blower in a Florida store in 2009. The dispute centers on a store employee who voiced concerns about a ruptured sewer line in a Miami Beach, Fla., store. According to OSHA, the employee told a supervisor on Nov. 2, 2009, that the sewer line — which had ruptured the day before — was continuing to spill into the store, including the "specialty cheese department and the restrooms." The employee later called the company's anonymous tip line "since no corrective actions had been conducted by store management," according to an OSHA release. On Nov. 5, the worker expressed concerned to another manager that the problem had not been fixed, according to OSHA.

"Whole Foods then fired the worker on Nov. 5 for allegedly making false and malicious statements to the effect that management had not taken any steps to redress the sewage contamination at the workplace," according to OSHA. Without discussing the specifics of the employee's firing, Whole Foods officials denied that the employee was retaliated against and said that she was not the first to report the problem. In a statement released by company spokeswoman Libba Letton, Whole Foods said that particular area of Miami Beach has problems with backed-up pipes when significant rainfall causes high tides. "The backup in our store equated to about an inch of water that encompassed about a three-foot span over one of the drains," according to the statement. "The entire area was closed for complete cleaning as soon as the problem was discovered, and was cleaned and sanitized again the next day by a professional cleaning service. When it happened again the same professional cleaners were back at the store in less than 24 hours and the entire area was sanitized again." The areas of the store open to customers were "clean and safe" at all times, according to the statement.

Whole Foods said the allegations were investigated and dismissed this year by the federal Equal Employment Opportunity Commission, which enforces workplace discrimination laws involving age, race, religion, sex, nationality and other factors. Whistle-blower protection statutes, on the other hand, are enforced by OSHA. Letton said on Thursday that she did not have a copy of the EEOC's findings. EEOC personnel could not be reached for comment.

The OSHA suit, which was filed in the U.S. District Court for the Southern District of Florida, claims that an OSHA investigation found that Whole Foods violated whistle-blower protection provisions of the Occupational Safety and Health Act. The suit asks for the court to issue an injunction against Whole Foods "to prevent future violations of the laws" and to reinstate the employee with benefits and back wages. It also seeks punitive and compensatory damages. "OSHA takes allegations of workplace discrimination very seriously," Teresa Harrison, OSHA's acting regional administrator in Atlanta, said in a statement. "These types of allegations are thoroughly investigated, and employers violating the whistle-blower protection provisions of the OSH Act are held accountable and prosecuted to the fullest extent of the law."

Courtesy of www.statesman.com

NOTEWORTHY RULINGS cont.

Matrix L.L.C. Will Pay $450,000 to Settled EEOC Race Discrimination and Retaliation Lawsuit

Matrix, L.L.C., one of the region's largest cleaning companies, will pay $450,000 to a class of 15 former employees and provide significant relief to settle a race discrimination and retaliation lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC).

In the lawsuit, the EEOC alleged that Matrix officials told white supervisor Barbara Palermi not to hire any more black cleaners to work at a client's site in Concordville, PA. When Palermi hired additional black cleaners based on their qualifications to do the job, Matrix dismissed her in retaliation for opposing the company's racial discrimination. The EEOC alleged that Matrix management officials also discriminated against the African-American cleaners, telling them to sit in the back of the cafeteria during lunch break times and later disallowing them from using the cafeteria at all for their breaks. Matrix later fired all of the employees at the worksite and replaced them with an entirely non-black cleaning crew, the EEOC said in its lawsuit filed in U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 2:11-cv-06183.

Such alleged conduct violates Title VII of the 1964 Civil Rights Act, which prohibits discrimination based on race, and makes it unlawful for an employer to retaliate against an employee for opposing discrimination, including opposing instructions to make hiring decisions based on race. The EEOC filed suit after first attempting to reach a pre-litigation settlement through its conciliation process.

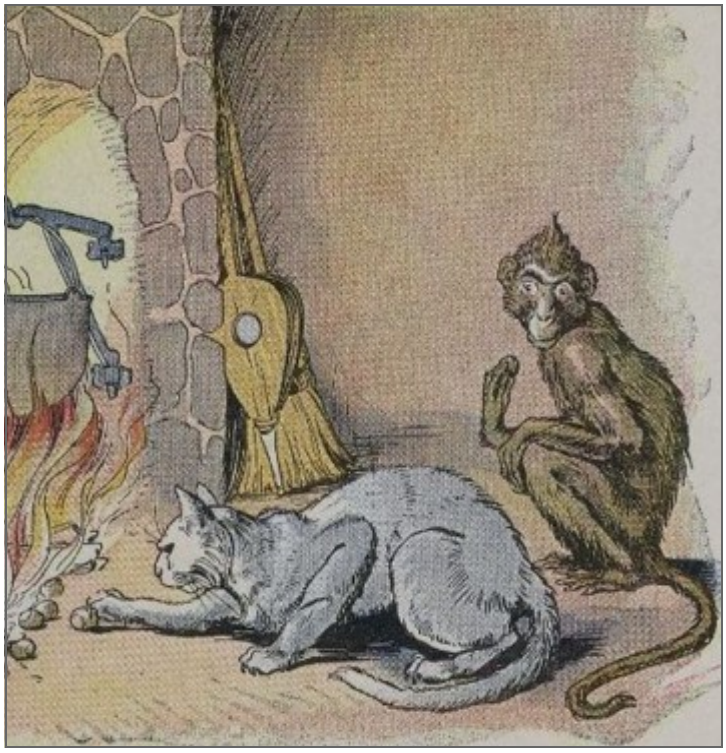
In addition to the monetary relief to the class of fifteen, the three-year consent decree resolving the lawsuits bars Matrix from engaging in any further race discrimination or retaliation. Matrix is required to train its supervisors and managers about prohibitions against racial discrimination and retaliation, report complaints of discrimination or retaliation at the Concordville, PA., work site to the EEOC and post a remedial notice. The consent decree was approved by the court on January 4, 2011.

"We commend the company for its agreement to carry out the significant equitable relief provided in the consent decree, including providing expansive annual training, which will benefit all company employees," said District Director Spencer H. Lewis, Jr. of the EEOC's Philadelphia District Office.

Courtesy of www.eeoc.gov

TIPS FOR THE WORKPLACE

Cat's Paw Decision Puts Fable in Employment Law



Reflecting back over the last year, perhaps one of the most interesting employment cases involved "The Cat's Paw" fable about the perils of allowing oneself to take action without regard to consequences due to the manipulative encouragement of another. The fable involves a conniving monkey who convinces a cat by flattery to extract roasting chestnuts from a fire. Of course, the cat's paws are seriously burned and the monkey, through his deception, is able to make off scott free with the chestnuts.

So what does any of this have to do with employment law? Well, about 20 years ago a Federal Judge injected the Cat's Paw theory into employment discrimination law (Shager v. Upjohn and Adgrow Seed, 913 F.2d 398).

The United States Supreme Court brought that concept forward again in a 2011 decision (Staub v. Proctor Hosp., 131 S. Ct. 1186; 179 L. Ed. 2d 144), now known as the Cat's Paw decision. The Court found that an employer could be held liable for discriminatory conduct when an unbiased HR director fires an employee for seemingly legitimate reasons if a manager motivated by discrimination set the termination process in motion. The Court concluded that even though the HR director conducted an independent investigation, if the termination takes into account the biased supervisor's report, then the termination is tainted by the underlying discrimination.

The lesson in all of this for HR personnel who are instructed to carry out terminations is to fully investigate the reasons and motives behind management's direction to fire employees and be sure that the decision is fair and non-discriminatory, and in particular, not based on a biased report. As one commentator succinctly put it, HR directors should not let management monkey around with employment decisions.

Courtesy of www.JDSUPRA.com

If you have doubts about how to handle such situations, we encourage you to contact your agency's EEO Office or legal counsel to assist in making the right decision.

Training Opportunities

Shared Neutrals Mediation Program

The State of Maryland is please to offer mediation services to its employees as an alternative to resolve workplace conflicts. Mediation is a confidential, voluntary, and participant-driven process in which one or two trained neutral third parties (mediators) help to facilitate communication and negotiation to promote voluntary decision making by the people involved in a dispute.

The Shared Neutrals Mediation Program is State government's mediation program for workplace disputes in Maryland State agencies. Shared Neutrals provides free mediation by using a pool of trained and experienced collateral duty mediators who provide mediation services to agencies other than their own, in exchange for similar services from the program by the other State agencies.

Mediation is an excellent way to resolve many types of workplace issues, such as, disputes with coworkers, conflict with supervisors/managers, personality clashes, boundary disputes, and communication problems. To get more information about Shared Neutrals or to discuss your concern, contact Awilda Pena, Coordinator, Shared Neutrals Mediation Program at apena@dbm.state.md.us or at 410-767-4953.

ADA Coordinator Training

Date: March 13, 2012

Topic: Traumatic Brain Injury and the Workplace

Speaker: Stacia Edmondson, TBI Project Director, MHA

Time: 9:30 a.m.—11:30 a.m.

201 W. Preston Street
Lobby Level L-1
Baltimore, MD 21201

EEO Group Meeting

Date: Spring

Topic: EEOC Process

Location: TBA

Shared Neutral Mediation Training

Train to become a Shared Neutrals Mediator

Date: Spring/Summer

Where: TBA

Mid-Atlantic ADA Center

JAN Webcast: Best Practices in the Employment of People with Disabilities

Wednesday, March 7, 2012

This webcast will cover best practices in the employment of people with disabilities. Speakers will address some of the most common issues federal agencies struggle with and will provide practical tips for overcoming these problems. Participants will have the opportunity to ask questions throughout the Webcast. This program has been approved for 1.0 hour (general) recertification credit hour through the HR Certification Institute.

Speakers: JAN welcomes Jeanne Goldberg, J.D., Senior Attorney, from the Equal Employment Opportunity Commission.

Time: 2:00 p.m. — 3:30 p.m.

www.adainfo.org

Investigative Techniques & Discrimination Law Theory

Date: Wednesday, April 11, 2012 and Wednesday, April 25, 2012

Time: 9:00 a.m.—4:00 p.m.

Maryland Department of Transportation

7201 Corporate Center Drive

Harry Hughes Room—Suite 3

Hanover, MD 21076

Presenter: Glendora Hughes, Counsel

This training will provide you with the tools to investigate complaints of unlawful employment practices. Discover how to identify, explore and analyze the components of an effective investigation of discrimination from start to finish that achieves credible investigative results.

To register call 410-767-3800

Office of the Statewide EEO Coordinator

Recommended Books

Constructing Affirmative Action: The Struggle for Equal Employment Opportunity by David Hamilton Gollan (March 2011)

Equal Employment Opportunity: The Policy Framework in the Federal Workplace and Roles of the EEOC and OPM by US Government (Jan 2011)

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HISTORY FACT

DIVERSITY CORNER

Thurgood Marshall

(July 2, 1908—January 24, 1993)

One of the greatest fighters of civil rights, Thurgood Marshall; was born on July 2, 1908 in Baltimore, Maryland. He achieved national recognition for his civil rights achievements as a lawyer and later as an associate justice of the Supreme Court of the United States.

Marshall attended public schools in Baltimore. He is a product of Frederick Douglass High School. Later Marshall graduated from Lincoln University in Pennsylvania and Howard University Law School in Washington, D. C.

Marshall returned to his native Baltimore to practice law. Most of his clients were people who made a modest living. Many could not afford the services he rendered. However, personal circumstances did not stop him from handling the problems that were presented to him. Marshall handled numerous cases involving legal disputes, police brutality, evictions, and other civil rights issues. Due to his untiring dedication and skillful court presentations, he became known as the "little man's lawyer."

In 1934, Marshall was appointed as an assistant to special counsel Charles Hamilton Houston, who worked for the Baltimore branch of the NAACP. In 1938, Marshall became a special assistant to the NAACP. Marshall represented clients with civil rights cases all over the United States. He won thirty-two out of thirty-five cases taken to the Supreme Court. His reputation spread throughout the United States for his outstanding work. Marshall was known as the greatest constitutional lawyer of this century when he served as chief attorney for the NAACP.

Marshall was nominated by President John F. Kennedy for appointment to the Second Supreme Court of Appeals in 1961. The appointment was confirmed by the Senate. President Lyndon B. Johnson nominated Marshall for appointment as Solicitor General of the United States. In August of 1965, Judge Marshall took his oath. In June of 1967, President Lyndon B. Johnson nominated Judge Marshall to become an Associate Justice of the Supreme Court. This nomination was indeed a historical event, Marshall became the first African-American to serve as a Justice of the Supreme Court.

Justice Marshall received many awards and citations for his outstanding contributions to the field of civil rights.

Courtesy of www.thinkquest.org