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LAW FIRM NEWS

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Our Regular Reminder

This is a reminder to all our union clients of the various services available through our firm. Most of our retainer agreements provide for unlimited legal advice, on-site visits and filing and processing of unfair labor practice charges. Please contact us if you would like to have one of us do training, meet with employees, or review a case for arbitration or MSPB. We are also just a phone call or a fax or an e-mail away if you need help or feedback researching any legal issue on federal sector employment. In addition, we provide representation to Union members in MSPB appeals, EEO complaints and labor arbitration for reduced or flat fees if there is a chance we can obtain attorneys fees from the agency if we win. You can learn more about our law firm, and check out our very own law firm proposal for real civil service reform legislation ("The Modern System, MS.1.") online at http://minahan.wld.com.

Watch this One

It's always unsettling when the Supreme Court agrees to review a case won by an employee in the lower court. On December 5, 2005, the Supremes agreed to review the decision of the Sixth Circuit in White v. Burlington Northern and Santa Fe Railway Co., 364 F.3d 789 (6th Cir. 2005). The case involves perhaps the most controversial theory that has ever emerged from civil rights litigation: the "adverse employment action" doctrine. This doctrine started showing up in court decisions about a decade ago and has become very popular. According to this doctrine, an employee has no grounds to file a complaint over an employer action or decision if it is too minor to constitute an "adverse employment action." Under this doctrine, complaints about "petty harassment," or "minor annoyances" such as a lower performance appraisal or a reassignment to another job with no loss of pay are routinely dismissed. Many commentators on the law, while sympathetic to the courts' desire to reduce crowded dockets, have been sharply critical of this doctrine, since it permits an employer to engage in unlawful discrimination as long as the action or decision is "minor." We agree with these commentators. If an employee is told he must wait 15 extra minutes on one day to take his lunch break because he is Hispanic, that's against the law, no matter how minor it may seem to the overworked judges. In White, every judge on the Sixth Circuit participated in an en banc decision in which a bare majority of the judges agreed that a 37-day suspension was an "adverse employment action," even though it was later rescinded and the employee was paid back pay. The Supreme Court's decision will either revive Title VII, or repeal it by enabling employers to discriminate at will until they do something "really" bad.

Other EEO Cases

Other recent Title VII cases show why there is so much court litigation over what the Civil Rights Act means, 40 years after it was enacted:

- A few steps up, then a step back. Just about every court in the nation has ruled that a plaintiff in a case alleging discrimination on non-selection for a promotion need only show that she met the basic qualifications for the promotion and that a person of, say, a different race or gender was selected, in order to raise a prima facie case (or, an inference) of discrimination, which will require the employer to put forth a reason for why it didn't select her. In White v. Columbus Metro. Housing Auth., 96 FEP Cases 1545 (6th Cir. 2005), the court ruled that a plaintiff in a non-selection for a promotion case must show that she and the selectee had at least similar qualifications before an inference of discrimination can be raised. Seems like that raises more than an inference of discrimination! Wonder how much more evidence the employee has to present once the employer puts forth its alleged non-discriminatory reason for not selecting her?

- The Tenth Circuit took a step back of its own in Jaramillo v. Colorado Judicial Dept. 43 GERR 1174 (10TH Cir. 2005). Although many courts have ruled that an employer that offers shifting or contradictory reasons for not selecting a female candidate over a male candidate for a promotion has cast sufficient doubt on the employer's motives to be entitled to a jury trial, the Court disagreed. In this case, the employer said the selectee got a higher score on the placement exam. When that turned out not to be true, the employer said the selectee was better qualified for the promotion anyway. "Sounds good to us," said the Court. The Court suggested that if an employer offers multiple explanations for an employment decision, the employee must cast doubt on every one of them before she can present her case to a jury.

Americans with Disabilities Act Cases

The eternally ad hoc explication of what kind of physical or mental impairments are "real" disabilities continues.

- In Cutrera v. Board of Supervisors, 43 GERR 1095 (5th Cir. 2005), the Court reversed the decision of a lower court that an employee who is legally blind in one eye is not a "person with a disability." The Court actually agreed with the employee that she did have a substantial limitation in the "major life activity" of "seeing." Kind of restores your faith in the judicial system- just like the decision by another appeals court a few years back that an employee with only one harm was "a person with a disability." Such is the legacy of the Supreme Court's evisceration of the ADA in the "Sutton trilogy" a few years ago, in which the Court held that no impairment is automatically a "disability" under the ADA but that it depends on the particular circumstances of each case. The Supremes did this to the First Amendment a generation ago, so that a person can never be confident he is protected by the law until some appeals court rules on his case years after he needed the law to protect him. The Court in Cutrera, however, did provide some excellent commentary in response to the employer's defense that the employee never suggested a

reasonable accommodation that would have enabled her to perform the job. The employer had abruptly fired the employee. The Court said, "an employer may not stymie the interactive process of identifying a reasonable accommodation for an employee's disability by preemptively terminating the employee before an accommodation can be considered or recommended."

- A similar encouraging observation was made in Rodriguez v. ConAgra Grocery Products, Inc., 17 AD Cases 481 (5th Cir. 2005). The employer in that case withdrew a job offer to an applicant once it was informed that the applicant had "uncontrolled diabetes." The Court ruled that the employer based its decision on a presumption or stereotype that anyone with "uncontrolled diabetes" was unqualified for the job. The employer should have made an "individualized assessment" of the employee and explored the possibility of a reasonable accommodation. The decision raises another question, though. Is an employer's refusal to engage in an "interactive process" with an applicant or employee for the purpose of trying to identify a reasonable accommodation for his disability a violation of the ADA in itself? Many decisions have said "no," including decisions of the MSPB, which invokes one of its many "no harm/ no foul" rules, saying that if the employee could not be accommodated anyway, what does it matter whether the employer violated its obligations under the ADA?

- In keeping with the same theme, but under a different law, the decision in Jones v. Denver Public Schools, 43 GERR 1121 (10th Cir. 2005), involved whether an employee's back condition was a "serious health condition" under the Family and Medical Leave Act (FMLA). The Court ruled that a "serious health condition" should involve more than 3 days off work and should entail at least 2 visits to a health care professional. Wonder what would happen to the lawyer who fell off a cliff at the beginning of the 4th of July weekend, saw a doctor one time and didn't miss more than 3 days from work?

MSPB Decisions

For sheer entertainment, the MSPB still has the highest "off the wall decision" rate:

- Do federal agencies have to comply with final orders of the MSPB? Well, ... In Johnston v. Dept of Treasury, the MSPB ordered the agency to reinstate the employee with back pay. The employee claimed that the agency withheld the wrong amounts for federal and state taxes from the back pay. The MSPB on September 21, 2005, said "the Board does not get involved with tax disputes regarding back pay, so she should seek refunds from those governments." On October 28, 2005, the MSPB issued its decision in Lua v. OPM, which involved an order from the MSPB to OPM to grant the employee's application for disability retirement, retroactive to her last day in a pay status. In that case, the Board "got involved with tax disputes" by ruling that it was improper for OPM to withhold income tax from her back-annuities.

- Who can forget the decision in Spruill v. MSPB, 978 F. 2d 679 (Fed. Cir. 1992), in which the Federal Circuit ruled that, even though the law defines a "whistleblower" as one who

makes a good faith disclosure of a violation of law, a person who files an EEO complaint is not a "whistleblower"? The MSPB went wild with this holding in the early 1990's, ruling that even if an employee did not actually file a formal complaint of any kind, such as an EEO complaint, a ULP charge, or an MSPB appeal, she is still not a "whistleblower" if she claims she was retaliated against for making some kind of complaint about a violation of these laws. In Mitchell v. Dept of Treasury, 68 MSPR 504 (1995), the Board ruled that if the facts disclosed by an employee demonstrate the existence of ULP, the employee is not a "whistleblower," even if he never filed a ULP charge. In Devera v. Smithsonian Institution, issued on December 9, 2005, the Board ruled that an employee who sent an e-mail to a manager alleging that his agency unilaterally changed conditions of employment (which the Board recognized is a ULP) is covered by the Whistleblower Protection Board. The Mitchell decision was not mentioned. As the poet Walt Whitman once declared, "Do I contradict myself? Very well then, I contradict myself." See, you don't have to be a lawyer to work at the MSPB!