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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 from 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 attorney's 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.

Unions: 2, Bush: 1

On February 27, 2006 Judge Emmet Sullivan of the U.S. District Court for the District of Columbia issued a permanent injunction prohibiting the Department of Defense (DOD) from implementing the labor relations and appeals provisions of its National Security Personnel System (NSPS). Judge Sullivan's decision is very similar to the decision of his colleague on the same court, Judge Rosemary Collyer, on August 12, 2005, which enjoined the same parts of the new personnel system designed by the Department of Homeland Security (DHS). In essence, Judge Sullivan ruled that NSPS does not preserve collective bargaining, as required by Congress, and does not ensure a process for employee appeals that meets any definition of the word "fair" as required by Congress. Judge Sullivan also ordered DOD not to establish a National Security Labor Relations Board (NSLRB) in the form described in DOD's NSPS regulations. He invalidated the NSPS provisions on "mandatory removal offenses" and he also ruled that DOD's decision to prohibit pay bargaining in those DOD components where it is now allowed was illegal. The administration has consumed the better part of 4 years, and millions of dollars, trying to impose a new type of personnel system on half the federal workforce, and failing. This is a tragic waste of time and money. What makes it tragic is that there is general agreement among all the "stakeholders" that civil service law should be modernized and reformed. Instead of proposing a less complicated and less expensive system acceptable to most of the people affected by it, the administration proposed new systems far more complicated and expensive than the patchwork system of civil service laws that have been in place for the last 30 years. Here's hoping that Congress takes another look at this mess and enacts real civil service reform before the administration tries to implement the loose

ends of the DHS and DOD abominations that were not enjoined by Judge Collyer and Judge Sullivan.

First Amendment Wins, 2-1

MSPB Headquarters issued a decision on February 24, 2006 in one of our cases, Heaggans v. Department of Defense. The employee was demoted for forwarding what she thought was an interesting e-mail message that was "making the rounds" at that time about a passage from the Koran that supposedly predicted current events. The quotation was not authentic. A couple of Muslim co-workers pointed this out to her, and she promptly sent another e-mail apologizing for having offended anyone who saw the first e-mail. The Agency decided to demote her anyway but on appeal, the MSPB administrative judge reversed her demotion as contrary to the First Amendment. The Agency appealed to MSPB Headquarters, which took over a year to issue its final decision, last week. Two of the three MSPB members voted to affirm the administrative judge's decision in the employee's favor. Chairman McPhie, not surprisingly, filed the lone dissenting opinion, expressing a view that has become increasingly popular in court decisions involving public employees: that a public employer's right to manage its workforce as it sees fit is more important than the free speech rights of American citizens who happen to be public employees. We're not back to 1892 yet, but we are way too close the infamous court decision that year which declared, "petitioner may have a constitutional right to free speech, but he has no constitutional right to be a policeman."

EEO: A Sign of Sanity?

On February 21, 2006, the Supreme Court issued its decision in Ash v. Tyson Foods Inc, remanding back to the lower court a decision by that court which overturned a jury verdict in favor of two employees in a discrimination case. While the result was not a surprise, it was a surprise to see the appeal decided so quickly, and decided on a unanimous vote. For years, many lower courts have hamstrung the presentation of evidence of discrimination by ruling that "stray remarks" prove very little, and by saying that a plaintiff's superior qualifications for a job "must literally jump off the page and slap you in the face" before the disparity can be considered to be evidence of discrimination. Ash involved two black employees who claimed they were passed over for promotions in favor of two white employees because of their race. The lower court declared that the plant manager's habit of referring to each plaintiff as "boy" could not possibly be considered to be evidence of race discrimination. The Supreme Court said, in effect, "What planet did those judges grow up on?" The Supreme Court also put to rest the idea that superior qualifications are rarely useful in demonstrating that race, for example, had something to do with the selection of a white employee over a better-qualified black employee. In a sharp rebuke to the lower court, the Supreme Court stated, "The visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications."

MSPB Jurisdiction Clearly Explained

There have been a lot of weird decisions issued over the years about "constructive removals." [This is a claim by a federal employee that even though his agency did not expressly fire or demote him, the agency made his working conditions so intolerable that any reasonable person in his situation would have resigned or retired. If the employee proves this, his resignation or retirement is called a "constructive removal" and he is entitled to reinstatement with back pay]. In Garcia v. Department of Homeland Security, issued on February 10, 2006, the Federal Circuit chewed up over 60 pages to

try to explain what it means when an employee wins or loses a "constructive removal" claim at MSPB. According to the Federal Circuit, the MSPB never actually has jurisdiction over an appeal like this until the employee wins the appeal. In other words, the employee's resignation or retirement is assumed to be voluntary and not appealable to MSPB up until the moment the MSPB issues a decision that the employee was constructively removed. At that moment, the employee not only establishes that the MSPB has jurisdiction over her appeal but she also wins the whole case. The court ruled that an employee who files an MSPB appeal alleging constructive removal must put forth at least enough evidence and factual allegations that would win the case if they were all credited, in order to be entitled to a full hearing. The court cautioned, however, that filing an "offer of proof" sufficient to entitle the employee to a hearing does not establish that the MSPB has jurisdiction over the appeal; only a final decision in favor of the employee will establish MSPB jurisdiction. Garcia has important implications for constructive removal appeals that include EEO allegations. Federal agencies sometimes argue that if the MSPB dismisses an appeal by an employee who claims she was constructively removed due to discrimination, the MSPB's decision ought to be final and binding and should prevent the employee from taking her claim to the EEOC for a hearing. The EEOC has rejected this argument, saying that an MSPB decision dismissing a claim of discrimination on the basis that the MSPB has no jurisdiction over the claim is not a decision which is binding on the EEOC, and that the employee is entitled to keep pursuing her claim in the EEO process. The decision in Garcia supports the EEOC's position.

No More Guarantee of a Hearing at MSPB on EEO Claims

In a decision somewhat related to Garcia, the MSPB on February 28, 2006, ruled in Redd v. U.S. Postal Service that an employee who has appealed a personnel action within the MSPB's jurisdiction is not assured of a hearing if he or she raises an EEO claim in connection with that personnel action. The MSPB overruled its earlier decision in Currier v. U.S Postal Service 97 MSPR 177 (1998), which said that employees who raise discrimination claims in MSPB appeals have the absolute right to a hearing on those claims. Similar to Garcia, the MSPB ruled that an employee who has appealed his removal from employment, for example, to MSPB is not entitled to a hearing on his claim that the removal was motivated by EEO discrimination unless he offers at least enough evidence or factual allegations that would prove an EEO violation if the evidence or allegations all turned out to be true. Redd is not disturbing for this holding, but rather for the MSPB's commentary on what it takes to prove discrimination. First, Redd is likely to trigger the same "motion for summary judgment free-for-all" that has taken hold at EEOC, with agency attorneys throwing "dispositive motions" at unrepresented or poorly represented appellants and over-worked administrative judges, just to make sure the employee never gets her "day in court" on her EEO claim. More unnerving, the MSPB used Redd as another opportunity to explain why it believes discrimination claims are virtually impossible to prove. The MSPB is not alone. It repeated the nostrum common in many court decisions, which is that an employee claiming she was fired because of race discrimination, for example, is not even entitled to a hearing unless she shows that an

employee of a different race with the same job title and the same supervisor committed the same misconduct and received lesser discipline. According to this conception of "discrimination," the fact that a black employee with a spotless record is fired for shoving his supervisor up against a wall in anger cannot be compared to the fact that a white employee on the other side of the same Air Force base is a known "hot-head" who has physically assaulted co-workers and supervisors on three different occasions for perceived insults and who has received no more than a written reprimand, a 5-day suspension, and then a 14-day suspension. Common sense sometimes prevails. In a few cases, the court asks the employer the sensible question, "Are the two employees held to the same standards of conduct by the same employer, no matter what their job is or who is their immediate supervisor?" The answer is usually "Yes". But at the MSPB, the answer is "That's irrelevant". One day, perhaps, the people who enforce the civil rights laws will ask themselves what Congress was trying to achieve by enacting those laws. The prevailing view now is that an employer is responsible for discrimination only if an individual supervisor or manager is a racist, for example, and fires a black employee after giving lesser discipline to a white employee for a much more serious offense. Under this view, the fact that different supervisors and managers react to the same misconduct in different ways is just the natural order of things and has nothing to do with discrimination. It is fair to ask, however, whether Congress was more concerned with punishing evil supervisors or with hastening the day when all employees can expect fair treatment and when harsher treatment of a minority or a female in the same workforce will not make most people think that race or sex had something to do with that disparity.

The View from "The Other Side"

We came across an interesting website recently that seems to be sponsored by federal HR types who have no use for unions, employee rights, or the various enforcement agencies such as FLRA and EEOC. Check out http://www.lrcentral.com. It is therapeutic to see this kind of ranting and raving coming from "the other side." It's a sobering reminder of how we and other employee advocates may sound in our more "robust" moments. The writer or writers of the commentary on "LR Central," whose names are unlisted, offer a number of "gems," including praise for an FLRA ruling finding no adverse impact on employees from a requirement to park in another parking lot, with the commentary "Need we say it? Member Pope dissented." And there is the fictional story of a $25,000 award for compensatory damages to "employee Mona Warblemayer, a GS-5 hog hernia inspector" who was frowned upon by her supervisor. The fictional story says that "EEOC Administrative Judge Velma Jones, dismissed as 'pretty lame', the supervisor's explanation that his grimace was not directed at Warblemayer personally, but was merely a response to 'intestinal distress' following consumption of a 2 pound burrito." Funny, huh?