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LAW FIRM NEWS

May 2006

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, MSPB or EEOC. We are also just a phone call or an e-mail away if you need help or feedback on legal issue connected with 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 proposal for real civil service reform legislation ("The Modern System, MS.1.") online at http://minahan.wld.com.

"Instant Formal Discussion"

We've had a sharp increase in the number of calls we get from union representatives about supervisors and managers insisting on having closed-door meetings with employees without union representation. Sometimes there is a legal right to union representation, and sometimes there isn't. Regardless of what the law says, though, common sense ought to tell a supervisor that an employee should be allowed to bring a union representative with him if he has any concerns or misgivings about a closed-door meeting he has been ordered to attend. If common sense is in short supply at your installation, consider the use of the "instant formal discussion". Under the labor statute, a union is entitled to be present at any formal meeting where general personnel policies or conditions of employment are being addressed, or at any meeting where the topic of the meeting is a "grievance" (meaning any kind of formal complaint) filed by a bargaining unit employee. Most closed-door meetings with individual employees do not involve personnel policies or conditions of employment that apply generally to everyone in the work area. Most closed-door meetings with individual employees do not involve a "grievance" since no formal grievance or complaint has been filed, though a formal complaint may well follow the meeting. However, a grievance can be filed under your labor contract at any time. If an employee is about to be hauled into a meeting she would rather not attend, her union representative may immediately file a grievance over the requirement to attend the meeting and over the meeting itself. If, for example, a supervisor refuses to allow an employee on a performance improvement plan to bring her union representative to the crucial progress review sessions, the

employee or her union representative may file a grievance protesting this and protesting the sessions themselves. All of these meetings will be "instant formal discussions" because the meetings will be about a grievance that has already been filed.

Duty of Fair Representation – Grievance Settlements

In AFGE Local 3283, 61 FLRA 80 (2005), the Authority concluded that the Union violated the duty of fair representation by failing to advise a group of employees of the objective criteria the employer would use in deciding how much money each of them would receive under a grievance settlement. This kind of oversight will not violate the duty of fair representation in all situations, but it is still an important reminder that when processing a grievance or arbitration settlement the union needs to keep the affected employees informed as to how the case is being processed and how they will be affected by it.

Proposal Re: Delays in Promotions

Section 7106(b)(3) of the labor statute enables federal unions to negotiate over "appropriate arrangements" for employees adversely affected by the exercise of a management right. This provides unions with considerable clout, depending on how they frame their proposals in collective bargaining. In Federal Aviation Administration, 61 FLRA 83 (2006), the Authority ruled that a proposal that would require the agency to compensate employees for delays in their promotions when those delays result from assignment to certain training is completely negotiable and ordered the agency to bargain with the union over it.

Protected Union Activity

In a private sector case, a company fired a union representative for "forging" the signatures of employees on a document submitted to the company. While this would ordinarily justify severe discipline, it turns out that the union steward signed the co-workers' names to a grievance challenging a significant change to the company's policies since he was running out of time to file the grievance. The court ruled that it was an unfair labor practice to fire the union steward for this and ordered his reinstatement with full back pay. OPW Fueling Components v. NLRB, 179 LRRM 2449 (6th Cir. 2006).

EEO Cases

- The debate rages on over who is a "similarly situated" employee for comparison purposes in an EEO case. Many courts have defined this so narrowly that no one could ever compare himself to anyone else. However, in Goodwin v. University of Illinois, 97 FEP Cases 1281 (7th Cir, 2006) the court ruled that a black female employee did raise an inference of discrimination when she compared her situation to the way a white male was treated. The plaintiff was demoted for allegedly intimidating a subordinate employee. The white male – also a supervisor – was given only a written warning after he threw a bottle at a fellow supervisor and cussed at her. The employer, predictably, argued there was no basis to compare the two situations since the white male supervisor went after another supervisor rather than a subordinate. Thankfully, even the 7th Circuit didn't buy this and ruled that the plaintiff could ground her claim of discrimination on this comparison.

- Employers, especially public employers, often argue that an employee who applies for and is not selected for a promotion has no basis for a discrimination complaint if the position was never filled. This

argument was rejected in Chappell-Johnson v. Powell, 44 GERR 400 (D.C. Cir. 2006). The plaintiff, an employee of the FDIC, filed an EEO complaint after she was told that she could not compete for a promotion because she was ineligible for it, due to her grade level. The FDIC decided not to fill the position. The plaintiff argued that the agency in the past had lowered the grades of vacant positions to enable white and younger employees to compete for them. The court ruled that the plaintiff should be allowed to develop evidence on this point and that, if she presented such evidence, she would have a legitimate complaint of race and age discrimination.

- The plaintiffs in Mlynczak v. Bodman, 97 FEP Cases 1377 (7th Cir. 2006) were not able to convince the court that they had enough evidence to proceed to trial on a claim of "reverse discrimination." Each of the plaintiffs was rejected for a promotion in favor of women. The fact that a manager not involved in those particular selections expressed a desire for "diversity" and made comments that she was happy that women were being hired, and the fact that the positions were opened to external applicants when most positions like that had been limited to internal applicants in the past, were not enough, said the court, to suggest the plaintiffs were not promoted because of their gender.

Disability Discrimination

- A bone of contention in almost every ADA case is whether the duty or task the disabled employee cannot perform is an "essential" element of the job. Employers argue, usually with success, that if a person with a disability cannot perform an "essential duty" of the job, even with reasonable accommodation, the employer has no obligation to change the fundamental nature of the job or hire or assign other employees to do it. In Turner v. Hershey Chocolate USA, 17 AD Cases 1249 (3rd Cir. 2006), the court ruled that it was <u>not</u> an essential duty of a production job that an employee be able to perform all the tasks that were rotated among her team. The court ruled that if it would not be an undue hardship on the other team members to pick up the one task she was unable to perform when her turn in the rotation came up, she would be entitled to be excused from that task as a reasonable accommodation to her disability. Also, the more vague and subjective the "essential duty" is, the less likely it is that a court will agree it is an "essential duty" just because the employer says it is. In Bishop v. Georgia Department of Family and Children Services, 44 GERR 383 (11th Cir. 2006) an employee with bi-polar disorder was fired on the basis that she could no longer satisfy the essential job requirement of "exercising good judgment." The court agreed that this is an essential requirement of all jobs but that "the required degree of acuity and consistency of judgment varies between jobs." Noting that the employee had proposed specific accommodations involving closer supervision of her work, the court ruled that she was entitled to present her case to a jury for a decision as to whether her proposed accommodations were reasonable.

- Whether an employer's failure or refusal to engage in an "interactive

process" with a disabled employee before firing that employee because of his disability is a violation of the ADA in and of itself is a controversial question. Most courts (and the MSPB, and the EEOC) have stated that even if the employer gives no consideration at all to finding a reasonable accommodation for an employee with a disability or to reassigning that employee, no violation of the ADA can be established unless the employee can show there was an accommodation available to the employer that would have avoided the need to separate him because of his physical or mental disability. However, in Canny v. Dr. Pepper, Inc., 17 AD Cases 1153 (8th Cir. 2006) the court came close to going the other way. The court upheld a jury verdict in favor of a route driver who could no longer drive due to a vision impairment. The driver suggested a number of accommodations, including reassignment to a position that did not require driving. The employer did not even check to see if any positions were available. The court ruled this was enough to support the jury's verdict in favor of the employee.