Minahan and Shapiro, P.C.
Attorneys at Law
Daniel Minahan
Barrie M. Shapiro

MINAHAN AND SHAPIRO, P.C.
Attorneys at Law

Phone: 303.986.0054
FAX: 303.986.1137
165 S. Union Blvd. Suite 366
Lakewood, CO 80228

LAW FIRM NEWS

June 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.

R.I.P., First Amendment

It's amazing what a few hanging chads in Florida can do to the founding documents of our Republic. On May 30, 2006, the Supreme Court issued its decision in Garcetti v. Ceballos, which comes pretty close to putting the First Amendment out of reach for public employees. Like the fiasco in Florida, it was a close one: a 5-4 vote with President Bush's newest nominee to the Court, Justice Alito, casting the deciding vote. The Court established a new rule for public employees: if a public employee does not speak out "as a citizen" on a matter of public concern, the First Amendment does not apply. According to the Court, this means that if the employee spoke out pursuant to his duties as a public employee, any disciplinary action given to him as a result does not even implicate the First Amendment. The case involved an assistant city attorney in Los Angeles who became convinced that a police officer's affidavit used to obtain a search warrant contained false statements. He wrote a memo to his boss explaining his concerns and urging that the prosecution of the case be dismissed. He got into a heated argument with his boss and the police officer, and the city attorney's office decided to prosecute the case anyway. He was later reassigned to a "dead-end" job and transferred to another duty station. The Supreme Court ruled that even if all this happened to him because he complained about what he considered to be an illegal search warrant, the First Amendment does not come into play since he was speaking out as part of his official duties and not "as a citizen." It will be interesting to see how the lower courts deal with the relationship between this decision and the Government-wide ethical rule that all federal employees "shall disclose waste, fraud, abuse and corruption to appropriate authorities." 5 CFR

2635.101(b)(11). The Supreme Court's decision hinted that First Amendment protection is denied only when the public employee is doing something directly related to his or her particular job rather than something that falls within the general obligations of all public servants, but the 4 dissenting justices predicted this will be a completely unworkable distinction. The Court also tried to reassure the dissenters by saying that nothing in the decision takes away the statutory protections that public employees enjoy, such as the Whistleblower Protection Act. Justice Souter's response to this in his dissenting opinion is the highlight of the whole 46-page decision; in the space of one paragraph, he referred to all the MSPB and Federal Circuit decisions that have just about repealed the Whistleblower Protection Act. Until the country comes to its senses, federal employees who want to speak out on matters of public concern will either have to leave work and do it somewhere else or hope that the "just cause" and "efficiency of the service" protections they still enjoy under labor contracts and civil service law will protect them from reprisal.

MSPB and FLRA too pro-employer for Court of Appeals?

You know the MSPB and FLRA have gone too far if the Federal Circuit and the D.C. Circuit- no staunch defenders of employee rights- are disagreeing with them. On May 30, 2006, the Federal Circuit issued its decision in Harding v. Dept of Veterans Affairs. The Federal Circuit reversed the MSPB's 2005 ruling in that case that the "title 38" health care professionals in the VA are not covered by the Whistleblower Protection Act. The MSPB felt that a law passed by Congress in 1991 clearly limited these employees to appeals to internal VA "professional standards boards" for major adverse actions. The Federal Circuit pointed out what the dissenting member at the MSPB pointed out, which is that Congress amended the law in 1994 to state in express terms that "title 38" employees are covered by the whistleblower protection laws in title 5 of the U.S. Code. . . . The D.C. Circuit, once again, reversed the FLRA on a decision that tried to narrow the scope of bargaining for federal unions. In AFGE v. FLRA, 179 LRRM 2705 (D.C. Cir. 2006), the Court ruled that the Customs Service committed an unfair labor practice when it implemented a change in firearms training policy without providing the union with advance notice and an opportunity to bargain. The FLRA said that the change, which shortened the amount of remedial training available to officers who failed firearm proficiency training, was "de minimis" and triggered no bargaining obligation. The D.C. Circuit basically said, "What?" What they really said was, "When a policy change increases the likelihood of an employee's termination, it almost certainly rises above the level of trivia." The Court reversed and sent the case back to FLRA with instructions to provide an appropriate remedy.

More Good News for VA "title 38's"

Thanks to Dr. Don Fernandes of AFGE Local 1045 for informing us of a favorable arbitration decision on the requirement in 38 USC 7410 that the VA compensate health care professionals for their continuing education expenses. Arbitrator Stuart Goldstein ruled on April 28, 2006, that the employees made timely and proper requests for reimbursement and that, given the language of the statute, the VA had no basis for denying the claims because they hadn't "budgeted" for these payments. Congratulations to Attorney Jeff Euchler out of Virginia Beach, Virginia, for winning the case!

No "PATCO re-run"

As long-time federal employees may recall from the 1981 air traffic controllers strike, it is not a good idea for federal employees to engage in a work slowdown or a

work stoppage. The arbitrator's decision in Dept of Veterans Affairs, 122 LA 300 (Petersen, 2006), involved 3 employees who were upset when they didn't receive a bonus they'd been promised. One of them sent an e-mail suggesting that they "kick down a bit," and they did. Over the next 6 months, their productivity statistics declined by almost 50 percent. When the Agency put "2 plus 2" together, it fired all of them. The Arbitrator agreed with the Agency that there was a deliberate work slowdown, but he ruled that the penalty of removal from employment was too harsh under the particular circumstances of this case and ordered the employees reinstated.

MSPB Cases

- Whether an initial decision of an MSPB administrative judge merits full review at MSPB Headquarters may depend on who's asking for the review. In Velez v. Dept of Homeland Security (MSPB, May 5, 2006), the Board chewed up page after page to review the factual and credibility findings of an administrative judge who reversed the removal of an employee for "negligent performance of duties." After deciding that enough of the evidence and the testimony supported the charge, the MSPB reversed the administrative judge's decision and upheld the action taken against the employee. In a decision issued 2 days later, the MSPB had this to say about an employee's appeal from an administrative judge's decision there was enough evidence to support his removal from employment: "We have considered the appellant's assertions and find that they constitute mere disagreement with the AJ's factual findings, credibility determinations, and legal conclusions." Batts v. Dept of the Interior, (MSPB, May 8, 2006).

- Sometimes, it's worse if MSPB forgets its prior case decisions rather than overrules them. In Dias v. Dept of Veterans Affairs, (MSPB, May 11, 2006), the agency fired the employee for AWOL. On appeal, the administrative judge reversed her removal on the basis that she had a "serious health condition" that would have entitled her to LWOP under the Family and Medical Leave Act (FMLA). The MSPB headquarters, predictably, reversed the administrative judge, pointing to special provisions of the FMLA that condition the granting of any leave under that law on a timely and proper request for the leave. Since the employee did not submit a timely and proper request for FMLA leave, the MSPB said the agency was justified in firing her for AWOL. The problem is that in all its previous decisions, the MSPB has ruled that, even though an employee can be disciplined or fired for failure to follow proper leave request procedures, an employee cannot be disciplined or fired for AWOL if she actually <u>was</u> too sick to work, even if the medical evidence isn't submitted until the MSPB hearing itself. The MSPB did not overrule these decisions, but it never got past the FMLA issue to evaluate whether the employee did or did not have the evidence necessary to prove she was incapacitated. Even if an employee is not entitled to LWOP under the FMLA, she is still entitled to plain-old LWOP if it would be abuse of discretion not to grant it to her. The MSPB said nothing about this one way or the other!

- This one is from "the bizzaro zone." In Martin v. U.S. Postal Service, (MSPB, May 4, 2006), the MSPB dismissed a postal employee's appeal from a decision to remove him from employment on the basis that he wasn't

removed from employment anymore by the time he filed the MSPB appeal. Postal employees, unlike other federal employees, can file grievances and statutory appeals over the same matter, and this employee filed a grievance over his removal under the labor contract and also filed an EEO complaint. The grievance resulted in a settlement that reinstated him to work with back pay. The MSPB decision says nothing about whether the settlement agreement resolved his EEO complaint. Later, the Postal Service told him he could file an MSPB appeal based on his EEO complaint, so he did. The MSPB dismissed his appeal saying there was no "removal action" to appeal at that time. Huh? According to the famous "mixed case statute" (5 USC 7702), an employee can start in the EEO process on a removal case and then go to the MSPB later for a hearing on the case. Unless Mr. Martin dropped his EEO complaint in the grievance settlement (and there is no indiciation that he did), he had a "live" claim for compensatory damages for an EEO violation when he filed his appeal with the MSPB, even if he had been reinstated to his job. Maybe he'll appeal to EEOC or to federal court and we'll hear more about it later.

Disability Discrimination

- The Supreme Court's evisceration of the ADA in the 1990's was bound to lead to a decision like Scheerer v. Potter, (6th Circuit, April 10, 2006). The Supreme Court has interpreted the phrase "person with a disability" so narrowly that it requires every plaintiff to prove "from scratch" that he has a physical or mental impairment that severely affects every aspect of his life all the time. No "diagnosis" is enough in itself to bring the employee within the protections of the ADA, not even diabetes, bi-polar disorder, carpal-tunnel syndrome, multiple chemical sensitivity syndrome, etc. [One federal judge actually decided that a man with only one arm was not a "person with a disability" some years ago but the judge's decision was overturned on appeal!] In Scheerer, the 6th Circuit ruled that a Postmaster with a progressively worsening diabetic condition was not covered by the ADA. Said the Court, Mr. Scheerer was able to walk and stand, even though he required a protective boot for diabetic ulcers on his leg and he experienced episodes of significant nerve pain. He did not experience severe hypoglycemia, seizures, or loss of consciousness. He filed an EEO complaint over the agency's delay in obtaining an assistant for him as an accommodation for his worsening condition. In essence, the Court said his diabetes hadn't gotten bad enough by the time he filed the EEO complaint. No doubt, if Mr. Scheerer files another EEO complaint, the Court will agree that he is a "person with a disability" if his condition has become much worse, but his impairments will be so severe by then, that there will be no "reasonable accommodation" the agency will be required to provide for him!

Sexual Harassment

- Can an employee be the victim of sexual harassment when she doesn't know it at the time its happening? The 8th Circuit faced this unusual question in Cottrill v. MFA, Inc., 443 F.3d 629 (8th Cir. 2006). A supervisor spied on

female employees through a peep-hole in the restroom for years. After this was discovered, one of the employees sued for sexual harassment. The employer had already fired the supervisor and replaced the wall, however. The Court ruled that the employee was not subjected to sexual harassment because she didn't know it was happening at the time. Something's not quite right about this. . . . She certainly experienced all the pain and humiliation of sexual harassment when she found out what the supervisor had been doing for years! Hopefully, she found a personal injury lawyer and sued the guy personally for invasion of privacy.

- In Jespersen v. Harrah's Operating Co., 97 FEP Cases 1473 (9th Cir. 2006), the Court rejected a claim of sex discrimination filed by a female bartender who was fired because she refused to wear trampy-looking makeup. The Court ruled that the employer's rule was not adopted to make women bartenders conform to sexual stereotypes, nor was it intended to make them sexually provocative. Hmmmm.

- A female employee of the U.S. Navy got a better result on a claim of sexual harassment in Howard v. Winter, 97 FEP Cases 1729 (4th Cir. 2006). The woman complained to a human relations specialist that a co-worker was sexually harassing her. The HR specialist told her to write a letter to the co-worker and to keep a record of what he did in the future. The Navy claimed this was a reasonable response, since the woman did not tell the HR specialist the "gory details" of what the co-worker was doing (which included groping her repeatedly). The Court said, "Nope, U.S. Navy, you're liable for the sexual harassment." Because the HR specialist was designated as the person to contact about sexual harassment, and because he had been trained on the law and the employer's policies, the Court said he was responsible to follow-up with an investigation to find out what was going on.