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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, MSPB or EEOC. We are also just a phone call or an e-mail away if you need help or feedback on legal issues 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.

Busy Month in Parallel Universe

There were many developments in the law affecting federal employees in the past month or so. Some are favorable, but a disturbing number of recent decisions are not just wrong, they are psychotic. Or maybe we are psychotic. The only explanation for the last five to six years that makes any sense to us is that a rare and fleeting quantum fluctuation shifted us to a parallel universe, in which the morals and spirit of this version of the USA are falling apart. If anyone agrees and has any idea about how to get back to our home universe, please let us know. (But don't call the men in the white coats – at least not yet).

The Supremes

- The Supreme Court issued a mostly encouraging decision on June 22, 2006 in *Burlington Railway v. White.* This was the Court's first opportunity to address directly the "adverse employment action doctrine" which has been infecting the lower courts since the early 1990's. Under this doctrine, no violation of an employee's civil rights is considered a sufficient basis for a complaint or a lawsuit unless it does something "important" to the employee's job. Hundreds of case decisions have seized on this doctrine to dismiss complaints of race, sex, age, national origin discrimination and reprisal when they involved "minor" matters, such as a reassignment, a performance appraisal or a change in working hours. Critics of this doctrine, like us, maintain that there is no level of unlawful discrimination that is too

"minor" to make it legal; if a supervisor tells an employee he has to wait five extra minutes for his afternoon break because he is a "slimy Mexican" that's against the law the way we read it. In *Burlington,* the plaintiff obtained a jury verdict in her favor based on her claim that her employer suspended her without pay for 37 days and changed her work assignments in reprisal for her filing of a discrimination charge with the EEOC. Believe it or not, the employer argued there was no basis for a lawsuit since it rescinded the 37-day suspension, gave her back pay, and no loss of pay or fringe benefits occurred when she was reassigned. In an encouraging decision, the Court unanimously agreed that the employer's actions definitely justified the jury verdict in her favor. The Court stressed that it was deciding a claim of reprisal and not a claim of discrimination on the basis of race or sex, for example. The Court declared that whether pay or fringe benefits have been taken away does not control whether an employee has a viable claim of reprisal. Instead the question is whether the employer's conduct, no matter what it was, would be likely to deter any "reasonable" employee from filing an EEO complaint. The Court would not directly confront whether the employer would have had a valid defense if the plaintiff's complaint involved discrimination rather than reprisal, but the language in the court's opinion suggests a more expansive view of what is an "adverse employment action" than the view taken by many of the lower courts up to now.

- The Supreme Court's long-awaited decision in *Whitman v. Department of Transportation* on June 5, 2006 was a dud. The case raised very significant questions about the right of federal employees to file lawsuits in court based on employment issues. The plaintiff is an employee of the FAA who filed a lawsuit alleging that the Agency's random drug testing procedures violate his rights under the U.S. Constitution. The lower court dismissed the lawsuit on the basis that he was covered by a labor contract and that 5 USC 7121 provides that the grievance procedures of a labor contract are the "exclusive" procedures for federal employees to challenge anything concerning their employment.

  The Supreme Court's decision was somewhat helpful in declaring that the lower court asked the wrong question. The question is not whether something in the federal sector labor statutes confers jurisdiction on the federal courts to hear a case like this, said the Court, but rather something in those statutes <u>deprives</u> the federal courts of the general jurisdiction they possess to entertain all claims under the U.S. Constitution. Unfortunately, the Court said the case was not ripe for a decision and returned it to the lower Court for further findings on all the alternatives that may have been available to the plaintiff for resolving his complaint and on whether he should be required to use one of those alternatives or at least "exhaust" one of them before filing a lawsuit.

MSPB Decisions

- On June 22, 2006, the MSPB issued one of those decisions that conclusively proves that either they are insane, or we are insane. The case involved an effort by one of the rare employees to win an MSPB appeal in the past 6 years to enforce the final decision in his favor. According to the MSPB, he

was entitled to no back pay because of a "congressional oversight". The original case was *Ivery v. Department of Transportation*, 96 MSPR 119 (2004) in which the MSPB overruled the decision of one of its administrative judges and found that Mr. Ivery had been wrongfully removed from employment. Mr. Ivery was fired because of a positive drug test but the Agency failed to preserve the urine sample for independent retesting, as required by government-wide regulations. The MSPB ruled that the Agency had effectively deprived Mr. Ivery of the only evidence that could possibly prove his innocence and therefore ordered the Agency to retroactively reinstate him with back pay. After the decision became final, Mr. Ivery filed a petition for enforcement, claiming that some of the deductions and withholdings out of his back pay were incorrect. The case was again appealed to MSPB headquarters which, on its own and without Mr. Ivery or the Agency bringing it up, decided to examine whether Mr. Ivery was entitled to back pay <u>at all</u>.

The MSPB recounted how a law passed by Congress in 1995 removed FAA employees from the coverage of most of Title 5 of the U.S. Code so that the FAA could establish its own personnel system. In 2000, Congress amended the law retroactively to restore MSPB rights to FAA employees. Congress did not at the same time list the Back Pay Act, 5 USC 5596, as one of the portions of Title 5 of the U.S. Code that <u>did</u> apply to FAA employees. According to the MSPB, "it may have been an oversight by Congress to restore Board appeal rights to FAA employees without also restoring the right of a successful appellant to back pay under 5 USC 5596. . . but the doctrine of sovereign immunity will not allow the Board to assume that authority in the absence of the required waiver of that immunity."

The idea that any rational human, (even a congressional representative) could have intended to grant a category of federal employees the right to appeal a removal from employment without the right to recover back pay if they win is absurd. Faced with the same "sovereign immunity" argument when dealing with the fact that the law prohibiting age discrimination in federal employment contains no prohibition against reprisal against a federal employee for filing an age complaint, the D.C. Circuit said, "it is difficult to imagine how a workplace could be free from any discrimination based on age if in response to an age discrimination claim a federal employer could fire or take other action that was adverse to an employee." *Foreman v. Small,* 271 F. 3d. 285, 297 (D.C. Cir. 2001). The Supreme Court itself faced the same "sovereign immunity" argument in *West v. Gibson,* 527 U.S. 212 (1999) when the VA stated that nothing in the 1991 Civil Rights Act granted EEOC the power to award compensatory damages for unlawful discrimination, and that the Act expressly conferred that power on federal courts. The Supreme Court responded that Congress empowered the EEOC to enforce the discrimination laws "through appropriate remedies" and ruled

that it made no sense to allow federal employees to recover compensatory damages in a lawsuit but not in the same case when filed with the EEOC rather than in federal court.

Congress also granted the MSPB the power to hear and decide federal employee appeals in 5 USC 1204, but the MSPB did not mention this in its recent *Ivery* decision. Mr. Ivery was out of work for over 2 years. The way things are going, we wouldn't be surprised if the FAA now decides to try to recover the back pay it did pay him as an "improper overpayment."

- This next decision will make your blood run cold. On June 12, 2006, the MSPB issued its decision in *Special Counsel v. Sims and Davis.* The Office of Special Counsel (OSC) proposed disciplinary action against Sims and Davis, two SSA employees, for forwarding an e-mail endorsing John Kerry for President to some of their co-workers shortly before the 2004 election. The MSPB's administrative law judge dismissed the complaint against the two employees without holding a hearing, on the basis that forwarding the e-mail message was "the functional equivalent of watercooler type discussions of face-to-face expression of personal opinion that did not constitute prohibited political activity." The MSPB essentially said, "not so fast, OSC should be given a fuller opportunity to prove the accusations against these employees." While recognizing that forwarding this kind of e-mail in such circumstances is normally not considered to be prohibited political activity, the MSPB nevertheless felt that OSC should be allowed to develop and present additional evidence on the unique circumstances of this particular case. The goal, in our opinion, is to make sure the employees twist in the wind much longer while enduring additional grief and expense in the legal process, as well as to reinforce the old rule that an employee can never know for sure whether she has the right to express her personal opinion until some federal agency or court makes a determination after the fact based on the "particular circumstances" of her case.

- Not all is bleak at the MSPB. On April 21, 2006, the MSPB ruled that an employee who took a demotion to avoid a fitness for duty examination might have been subjected to an involuntary reduction in grade, appealable to the MSPB. The case is *Huyler v. Department of the Army* and it involved an employee who was ordered to undergo a physical examination to determine if he was fit for deployment overseas. The employee argued that the position he occupied was not designated as mobile or deployable and that he had never been told this was a condition of employment for him. He "voluntarily" took a demotion when the Agency refused to drop the mandatory medical examination. The MSPB ruled that the employee should be allowed to prove his case and that, if he is correct in claiming his position is not mobile or deployable, the mandatory medical examination was improper and his demotion would have to be reversed.

Hot Off The Presses: Bush: 0 Unions: 3

How sweet it is! On June 27, 2006, the D.C. Circuit issued a unanimous decision upholding the decision of Judge Collyer of the D.C. federal district court to enjoin permanently the labor relations and employee appeals parts of the Department of Homeland Security's "MaxHR" personnel system. The court's opinion is strongly critical of the administration's effort to defy Congress' explicit instruction to preserve collective bargaining. It is likely that a similar fate awaits the appeal filed by the Department of Defense from another judge's order invalidating the same parts of its National Security Personnel System (NSPS). The D.C. Circuit decision is available online at ***http://pacer.uscourts.gov/docs/common/opinions/200606/05-5436a.pdf***.

EDP for Handling Hazardous Waste

Congratulations to the Laborer's Union (LIUNA) and their Regional Counsel, Robert Purcell, for the excellent result in an arbitration award issued on May 22, 2006 in favor of National Park Service employees at the Golden Gate National Recreation area in San Francisco. As part of their duties, these employees are required to pick up and dispose of animal waste, syringes, and other hazardous items discarded on a regular basis in this popular public park. The Union alleged that the employees were not provided with sufficient training or protective equipment to avoid the high risk of infection with serious or deadly illnesses. Arbitrator Thomas Angelo agreed and directed the Agency to pay the employees an extra environmental differential and to negotiate with the Union for the purpose of eliminating or reducing the hazards these employees face.

Is In-Person Testimony Needed?

(It depends on which side wants it!) The Federal Circuit's decision in *Uliano v. Centers for Medicare Services* (No. 05-3326, June 16, 2006) is dripping with irony. The case involved a federal employee who filed a grievance under a labor contract alleging he had been forced into involuntary retirement. The employee continued to experience serious emotional and psychological trouble and provided statements from healthcare professionals to prove this. The employee could not testify in person at the arbitration hearing due to his fragile condition and he asked for permission to testify from his home by speakerphone. The arbitrator denied his request saying that it would be unfair to the opposing party to be deprived of the opportunity to cross-examine the employee in person. When the employee did not show up for the hearing the arbitrator dismissed the employee's grievance as a sanction for failure to appear. The Federal Circuit upheld the arbitrator's decision saying it was well within the arbitrator's power to regulate the presentation of evidence at the hearing. What is ironic is the lack of any reference to *Koehler v. Department of the Air Force,* 99 MSPR 82 (2002) in the decision. In *Koehler,* the MSPB reversed years of prior decisions and ruled that a federal employee is <u>not</u> entitled to an in-person hearing in an appeal of an adverse personnel action and that the MSPB's

administrative judge may require the hearing to be conducted by video conference, with the participants in multiple locations, solely on the ground of convenience. It's hard not to wonder what would have happened to Mr. Uliano if he'd filed an MSPB appeal.

New Regulations

- On June 2, 2006, the Department of Labor published final regulations affecting labor unions in the federal sector. A new requirement, to be published at 29 CFR 458.4 states that all federal unions must notify a new union member within 90 days and existing members once every three years of the standards of conduct for labor organizations representing federal employees. Unions may use the form designed by DOL for this purpose, which can be obtained online at ***www.dol.gov/esa/regs/compliance/olms/CSRAFactSheet.pdf***. The regulation also requires all federal unions with a website to post this notice, or a link to this notice in a conspicuous manner on the website. 71 Federal Register 31929.

- On June 21, 2006, OPM issued a proposed regulation on performance-based cash awards that would amend 5 CFR 451.104 to ensure that cash awards reflect meaningful distinctions based on levels of performance. "In other words," said OPM in the comments accompanying the proposed regulation, "When agencies grant rating-based awards, employees with higher performance ratings must be granted larger cash awards." 71 Federal Register 35561.