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

December 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.

Watch This One

The Supremes are considering a case involving the scope of a federal employee's immunity from personal liability in a lawsuit. The case is Osborn v. Haley and it involves a plaintiff who was an employee of a federal contractor who claims that a Forest Service employee developed a personal grudge against her and persuaded the contractor to fire her, which it did. She filed a lawsuit against the federal employee in state court alleging the tort of "intentional interference with contractual relationships." The U.S. Attorney for that district certified that the federal employee was acting within the scope of his employment and had the case transferred to federal court, where the Government was substituted as the defendant in place of the federal employee. There have been many court decisions over the years involving the question of whether a federal employee was "acting within the scope of his employment" when he harmed another person (including, sometimes, a fellow federal employee). The answer is important. If the defendant was acting within the scope of his employment, he is immune from being sued and the Government must be substituted as the defendant, and the Government is not liable for a number of "torts" under the Federal Tort Claims Act. If he was not acting within the scope of his employment, he may be sued personally, but the Government will not be responsible for any judgment against him. The Supremes heard oral argument on Osborn case on October 30, 2006, and a number of the justices questioned whether it would be impossible for the defendant to be

acting with the scope of his employment if he really did what he was accused of doing, since that would break the law and no federal employee is authorized to break the law. That sounds weird, since federal agencies are constantly being sued for, say, sexual harassment or race discrimination by a supervisor. The supervisor clearly is not authorized to break the law this way but the Government is still liable for what he does (and he's off the hook for any personal liability!) It will be interesting to see what the Supremes say in the Osborn case. Their decision should be issued early next year.

This Union was on the Ball!

One of the more frustrating aspects of the federal labor statute is that decisions by FLRA on appeals (called, "exceptions") from arbitrator decisions are final and there is no further appeal to court. If an arbitrator has made a clear mistake of law or completely ignored the evidence, there is no further recourse if the FLRA won't correct this. Worse, the FLRA in recent years has gotten in the habit of overturning arbitrator decisions in favor of employees and unions basically because the right-wing members of the FLRA don't like them, and again there is no further appeal to court. However, 5 USC 7123 allows one exception to this rule: when the grievance "involves an unfair labor practice." In NTEU v. FLRA, 466 F.3d 1079 (D.C. Cir. 2006), the D.C. Circuit not only allowed the Union to appeal the FLRA's decision on an arbitration award, it reversed the FLRA's decision. The Union had originally filed a grievance protesting management's repudiation of a memorandum of understanding (MOU) that provided "time-off awards" as an incentive for IRS employees to volunteer for additional duties during tax season. The Union made two smart moves: 1) it filed a grievance instead of a ULP charge, and 2) it alleged in the grievance that management had committed an unfair labor practice. The Arbitrator granted the grievance and ordered management to make the affected employees whole. FLRA reversed the Arbitrator's decision (61 FLRA No. 33), saying that the MOU was contrary to law and OPM regulations because it allowed time-off awards to employees without a determination as to whether those employees were performing at a particular level of achievement. Normally, that would be the end of the case. But the Union had alleged an unfair labor practice in the grievance and so the Union appealed FLRA's decision to the D.C. Circuit. The D.C. Circuit reversed FLRA, saying that neither the MOU nor the Arbitrator's interpretation of the MOU necessarily resulted in a violation of law or OPM regulations. Bless her heart, the real Democrat at the FLRA, Ms. Pope, dissented from the FLRA's decision and the D.C. Circuit vindicated her point of view.

Union recovers leave employee had to use until agency granted her "reasonable accommodation" request

In Social Security Administration, 122 LA 1317 (Owens, 2006), the employee filed a grievance seeking the restoration of almost 100 hours of various types of leave she had to use while the Agency considered her request for reasonable accommodation of her disability. Her requested accommodation was granted, but that didn't mean the Agency wasn't responsible for discrimination. The Arbitrator ruled that the Agency was "dilatory" in acting on her request and that, but for her status as a disabled employee, she would have been gainfully employed rather than forced to chew up all those hours of her own leave. The Arbitrator ordered the Agency to re-credit her leave account.

Co-Worker Testimony In Discrimination Cases

One of the enigmas of employment law is how testimony from co-workers about the way they were treated can be "controversial"

in a discrimination case. If discrimination means treating people differently, then you'd think such testimony would be one of the only ways to prove it. Yet, year after year the courts try to narrow and restrict which employees can be regarded as "similarly situated" to the employee claiming discrimination. The Tenth Circuit's decision in Mendelsohn v. Sprint, 466 F.3d 1223 (10th Cir. 2006) is a rare breath of fresh air. The plaintiff alleged he was separated in a RIF due to age discrimination. The company argued that evidence of the way employees in different departments were treated was irrelevant. In a rare display of common sense, the court noted that the RIF was conducted company-wide and was coordinated by a single personnel office. The fact that other employees worked for different supervisors or different departments did not mean their testimony about the treatment of older workers was irrelevant, said the court. Remarkably, the court recognized that it was the employer who was accused of age discrimination, so such testimony was admissible as evidence of the employer's discriminatory habits or behaviors.

Court Refuses to Enjoin Pre-Printed Waiver of Right to File EEO Claims in the Future

In EEOC v. SunDance Rehab. Corp., 99 FEP Cases 1 (6th Cir. 2006), the court refused the EEOC's request for an injunction to stop a company from putting waivers of the right to file future EEO charges into its standard severance pay packages. The court agreed with EEOC that the waivers are almost certainly unenforceable but disagreed that a policy of "offering" them in all severance pay packages is a form of reprisal that deters employees from using the EEO process. (As if the typical employee is going to think the severance pay forms are an "offer" to which he may respond with a "counteroffer.") In reality, language like this in a formal document signed by an employee is likely to make many employees assume it is a binding contract preventing them from taking any action against the company if the company discriminates against them in the future. Saying the language is "void as against public policy" is great for lawyers; taking the language out of the agreements is better for the people supposedly protected by that policy.

Extended Placement on Administrative Leave was not "Adverse Employment Action"

Just when you thought the "adverse employment action" was defused in the Supremes' recent decision in Burlington and Northern Railway v. White, 126 S.Ct. 2405 (2006), it shows it's still a potential landmine for EEO cases in Joseph v. Leavitt, 44 GERR 1010 (2nd Cir. 2006). That case involved an employee of the Food and Drug Administration who was indefinitely suspended pending the outcome of a criminal investigation into allegations of misconduct against him. He was placed on administrative leave, however, so he suffered no loss of pay. He filed an EEO complaint alleging race discrimination. The court declared his placement on administrative leave did not affect his conditions of employment so significantly that it entitled him to file an EEO complaint. He may have lost valuable job experience and opportunities for training and professional development, but with no loss of pay nothing really happened to him (!) The most galling aspect of these "adverse employment action" decisions is not the unwillingness to recognize that "significant" things can happen to an employee even if she does not lose pay, but that there is a level of, say, race discrimination against an employee that is so "minor" that it does not violate the law.

Court Orders Chemical Hazard Testing for Federal Employee

Here's one you don't see much. A federal district judge in Wellard v. Federal

Bureau of Investigation, 44 GERR 1210 (D. Idaho 2006), ordered the FBI to conduct tests for the presence of certain chemicals in files routinely handled by an FBI employee. The employee developed severe respiratory problems and her doctors suggested that certain chemicals used in her workplace might be causing those problems. She sued the FBI seeking samples of the files so she could have them tested. The federal judge instead ordered the FBI to conduct the testing itself and report the results to the employee and her doctors, saying this was required by one of the OSHA regulations applicable to federal employment: 29 CFR 1960.28(d).

MSPB Decisions

MSPB decisions usually belong at the back of the newsletter and this month's sample is no exception. An MSPB decision that is just plain wrong no longer qualifies for the newsletter; there are too many of them. The decision must be a truly "bonehead decision," and these are:

- In McKenna v. Dept of Navy, (October 30, 2006), the two Republican appointees decided that MSPB could not grant an application for attorney's fees to an employee who obtained a final decision in his favor on a RIF appeal, because he hadn't really obtained anything yet. The MSPB AJ issued a decision saying that the agency improperly failed to consider his qualifications for a number of better jobs before demoting him and ordering the agency to re-evaluate his qualifications and place him in one of the better jobs if he qualified. No party appealed the AJ's decision so it became final. Later, the employee filed a separate "petition for enforcement" with the MSPB alleging that the agency did not do what the AJ ordered it to do and re-evaluate his qualifications for other positions properly. In the meantime, the AJ granted the employee's application for attorney's fees on the original case. The agency did appeal that decision and MSPB HQ reversed it, saying the employee was not a "prevailing party" yet because he didn't get a better job out of his appeal. The MSPB said the employee will have to await the outcome of his petition for enforcement to see whether he "prevails" and then becomes entitled to attorney's fees. Neither the majority decision nor the dissent by the ersatz Democrat, Ms. Sapin, recognized how ironic it was for all 3 MSPB Members to criticize the AJ for not making a "complete" decision on the case the first time around: "The administrative judge's initial decision at the merits phase of the case left out the final step: a determination of whether the agency's error in conducting the RIF prejudiced the appellant's substantive rights." Yet, in Henry v. Dept of Veterans Affairs, 100 MSPR 124 (2005), the MSPB ruled that an earlier final decision in an employee's favor which ruled that the agency refused to consider reasonable accommodations for a disabled employee didn't entitle the employee to anything and sent the case (a petition for enforcement) back to the AJ to give the agency another opportunity to argue that it would be an "undue hardship" to continue to employ her rather than fire her for medical inability to perform her job. In Dean v. Dept of Agriculture, 99 MSPR 533 (2005), the MSPB took a bite out of the veterans preference laws (VEOA) by ruling that an applicant who was not afforded his veterans preference rights on a position open to the general public was entitled only to an order from the MSPB to the agency to "reconstruct" the hiring process to see if he would have been hired in the absence of this violation. The MSPB said that if the

Applicant was unhappy with the agency's "reconstruction" he could file a petition for enforcement and work his way through another MSPB appeal!

- These two are in the "just plain mean" category. Jones v. U.S. Postal Service (September 27, 2006), overruled an AJ's decision to mitigate a removal penalty to a 14-day suspension. The employee was charged with abusing his FMLA leave. The "abuse" was that the employee, on two days in one month when he obtained FMLA leave to care for his wife, didn't call in or report back to work when his wife felt well enough to go out in the afternoon on each day. . .

  Another AJ decision in favor of an employee was reversed and the employee's removal was upheld in Rivoire v. U.S. Postal Service (October 10, 2006). The employee was charged with failure to obtain approval to work at a second job. The employee requested and was granted sick leave on the 5 days in question and worked at the second job on those 5 days. What makes the case a "bonehead decision" is that the MSPB found nothing wrong with the employee obtaining sick leave and also recognized that the hours he worked at the second job did not overlap at all with the hours he would have worked for the Postal Service if he hadn't taken sick leave. Yet, the MSPB still upheld his removal because of the Postal Service's policy that an employee in sick leave status may not engage in any gainful employment unless prior approval has been granted by his supervisor. . . .