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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 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.

MSPB Repeals ADA

The current Members of the MSPB may have just enough time left in their terms to undo every civil rights law dating back to the 13th Amendment. In Paris v. Dept of the Treasury, issued on December 20, 2006, the MSPB did to the Americans with Disabilities Act (ADA) what it did to Title VII of the Civil Rights Act in Simien v. U.S. Postal Service. Our November 2005 newsletter ranted about the Simien decision, so here we go again. In Simien, the MSPB ruled that, once a hearing has been held, there is no need to evaluate whether the parties met their "intermediate" burdens under the Supreme Court's 3-step "McDonnell-Douglas" analysis for proving discrimination. It doesn't matter whether the employee established a prima facie case of discrimination at step 1. It doesn't matter whether the employer has sufficiently put forth a legitimate, non-discriminatory reason for the challenged personnel action at step 2. The employee cannot win the case at step 3 by proving that the explanation offered by the employer at step 2 is completely baseless. The MSPB says there is only one question in discrimination cases: has the employee proven by a preponderance of the evidence that, say, race discrimination is the most likely reason for the challenged personnel action? Basically, the MSPB's attitude is "let's just get on with doing what we should have done at the first step, which is making up our own minds about whether we think discrimination occurred or did not occur." The upshot, of course, is that the employee derives no benefit from the inference of discrimination

established by a prima facie case and, even better for the defenders of the status quo, the employer doesn't get pinned down to any specific reason for its decision, leaving the employee with a moving target or no target at all to try to knock down. Proving discrimination indirectly by the employer's failure to present evidence of a non-discriminatory reason for its decision, or by showing the employer's reason to be completely false, thus becomes impossible.

Well, they did it again in Paris. Every court, including the Supremes, has ruled that a claim of disability discrimination can be proved in 2 steps. At step 1, the employee must show she is a person with a disability and then identify an accommodation that at least looks "reasonable," in that it would enable the employee to remain employed despite her disability and it doesn't appear onerous or unrealistic for the employer to provide. At step 2, the burden of proof actually shifts to the employer: unless the employer can prove that the accommodation proposed by the employee would be an "undue hardship" on the employer's operation, the employee prevails. [Just one recent example: Armstrong v. Burdette Tomlin Hospital, 438 F.3d 240, 252 (3rd Cir. 2006]. The MSPB itself has repeatedly said that a federal agency at least bears the burden of coming forward with evidence of "undue hardship" once the employee identifies a reasonable accommodation. The Paris decision ignored all these prior case decisions.

In Paris, the employee was removed from employment for medical inability to perform his job, which required a lot of keyboarding. The employee has a severe case of carpal tunnel syndrome and even the MSPB agreed that he is a "person with a disability" covered by the ADA. The employee stated in his MSPB appeal that he could be accommodated with voice recognition software that would relieve him of almost all his keyboarding tasks, and he pointed out that the agency even promised to look into this before he was fired. The MSPB AJ ruled in his favor on the basis that he put forth a facially reasonable accommodation and the agency did not show that using the voice recognition software would be an undue hardship. The MSPB HQ exhumed Simien to rule that there are no "intermediate" burdens of proof after all the evidence in a case has been submitted, so the employee derived no benefit from proposing a facially reasonable accommodation, and the employer was not saddled with the burden of proving that the proposed accommodation would be an "undue hardship." Instead, said the MSPB, it all came down to one question, which is whether the employee proved by a preponderance of the evidence that the employer discriminated against him by not allowing him to work with voice recognition software. The MSPB decided there was not enough evidence to prove to their satisfaction that voice recognition software would have been a reasonable accommodation. To complete the farce, the MSPB sent the case back to the AJ so both parties can present evidence on this issue. So even though the employee's evidence supposedly did not prove discrimination, the "lucky" employee gets a second chance! (He already won the case once). The agency will probably get a third chance if the AJ finds in the employee's favor again.

It's impossible to overstate how corrosive this "bottom line" approach is to the enforcement of the laws prohibiting discrimination. In essence, it requires an employee alleging discrimination in an MSPB appeal to prove everything and enables a savvy employer to do nothing. If an employee shows he is the only employee in his office who ever got fired for AWOL, that all the other employees ever disciplined for AWOL got 5-day suspensions, and that he is the only minority in the entire office, the employer can simply respond, "beats me" and the employee will probably lose since, according to the MSPB, it doesn't matter if he's established a prima facie case of

discrimination. If an employee develops a disability and is fired for medical inability to perform her job and then proves to the MSPB that she told the agency there were other jobs she could do in the agency and the agency should try to reassign her, the employer can simply respond "beats me" and the employee will lose because the MSPB will say that the employee failed to prove there was a specific vacancy available for which she qualified. It will take years to undo this damage, if it can ever be undone.

FLRA Hammered by D.C. Circuit, Again

There are very few positive aspects to an administration dead-set against employee rights; one of them, however, is seeing appeals courts issue more and more decisions like the D.C. Circuit's decision in AFGE Local 2924 v. FLRA, 180 LRRM 3282 (D.C. Cir. 2006). Here's how we described the FLRA's original decision in our July 2005 newsletter:

- *The decision in Davis-Monthan Air Force Base, 60 FLRA No. 166 (2005), shows that the two Republican appointees on the FLRA must have skipped contract law in law school. The union filed a grievance against the agency for violation of a negotiated agreement which stated that employees who test positive for drug use must report for counseling and rehabilitation and that the agency will retain employees in a duty status while they are undergoing rehabilitation. The case involved a number of employees who, after testing positive for illegal drugs, were simply fired without being allowed to complete rehabilitation. The union filed an unfair labor practice charge saying this was a clear breach of the negotiated agreement. The Authority allowed the testimony of management negotiators who explained that they did not understand the agreement to require employees to be retained while undergoing rehabilitation. Basic contract law says that if a written agreement is clear on its face, evidence from outside the agreement (called "parol evidence") is inadmissible to vary the plain language of the agreement. The Authority found that the language of the agreement was open to interpretation and that in light of the testimony of the agency's negotiators, the agency's interpretation was a reasonable one. Without that testimony, however, the agreement would not have been open to interpretation!*

Well, on December 5, 2006, the D.C. Circuit took the FLRA back to law school, vindicating the lone dissent of FLRA Member Carol Waller Pope. Said the Court: "No doubt, the parties could have been even clearer in expressing their intention if they had added, 'and we really mean what we say.' But even without such a declaration, the agreements are unambiguously plain in their meaning." The FLRA's decision was reversed.

MSPB Settlements Involving Retirement Eligibility

Speaking of interpreting agreements to mean what they say, there may be a ray of light emerging from the Federal Circuit on the MSPB's recent practice of refusing to enforce some settlement agreements whereby agencies take steps to make former employees eligible for retirement. The MSPB struck down yet another one of these settlements in Stevenson v. OPM, 2006 MSPB 298 (September 26, 2006), agreeing with OPM that the former employee was not entitled to a disability retirement annuity because his agency had "set up" the case for him in an MSPB settlement by changing separation date so that his application for disability retirement

would be timely. In Lary v. U.S. Postal Service, No. 06-3050 (Fed. Cir. Dec. 21, 2006), the Federal Circuit overruled an MSPB decision which refused to enforce a settlement agreement between the Postal Service and one of its former employees whereby the Postal Service promised to take care of filing his application for disability retirement with OPM. The Postal Service didn't keep its promise and the 1-year deadline passed for the employee to file his retirement application with OPM. Not only did the Court say the Postal Service violated the agreement, but it directed the Postal Service to expunge and modify his personnel records to create a new separation date for him, so that his application to OPM for disability retirement will be timely.

A Little Racism is OK

We've addressed the "adverse employment action" doctrine a lot in recent years-- the doctrine under which courts will dismiss an EEO complaint on the basis that, even if the employer was biased, nothing really "serious" or "significant" happened to the employee. Here's another one that'll make historians shake their heads when writing about our times. The plaintiff in Gordon v. Shafer Contracting Co., 469 F.3d 1191 (8th Cir. 2006), sued the company alleging that he was subjected to a hostile work environment because he is black. He presented evidence that a co-worker made racially offensive remarks to him. The court ruled that "three to four racially offensive comments . . . is insufficient to create a hostile work environment." Wonder how many racist remarks he needed to endure before filing an EEO charge? We do too.

First Amendment Still Exists

It's reassuring to see there is some life left in the First Amendment after the Supreme Court's Garcetti v. Ceballos decision a few months ago. In Scarbrough v. Morgan County Bd. Of Ed., 480 F.3d 250 (6th Cir. 2006), the court ruled that a public employee had the right to proceed to trial on his claim that he was not selected for a promotion because he agreed to speak at a church with a primarily homosexual congregation. County officials said it would be impossible to work with him because of tension between them and him over the practice of homosexuality. The court ruled, however, that retaliation because of disagreement over beliefs is what the First Amendment is intended to prevent. Lucky for Mr. Scarborough he wasn't planning on exercising his free speech rights in the course of performing his job!

Discharge for Alleged Threat Reversed

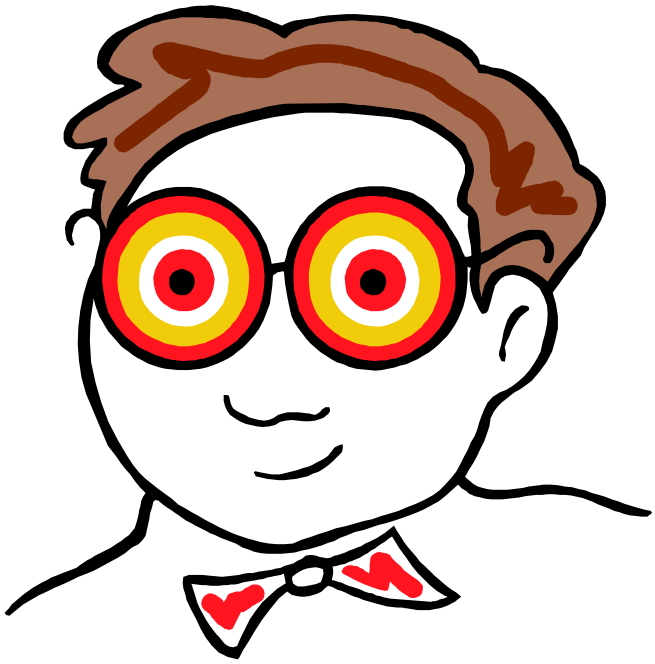
An employee who was fired for making an alleged threat was reinstated by an arbitrator in Garelick Mfg. Co., 122 LA1520 (Jacobowski, 2006). The employee was often taunted by two co-workers. One day, he responded, "are you going to duck when I bring in my .44?" The arbitrator ruled that the comment was a "joking banter" and not a serious threat and ordered the company to reinstate the employee with a 3-day suspension.

Pre-Employment Strength Test Was Discriminatory

In EEOC v. Dial Corp., 469 F.3d 735 (8th Cir. 2006), the court agreed with a lawsuit brought by EEOC that pre-employment strength tests for entry-level positions at a canned food plant had a "disparate impact" on females and were not justified by business necessity. The court noted that men and women worked in the same job together for years before the test was instituted. Even though the company said the test was implemented to decrease injuries the evidence showed that female employees had a lower injury rate than male employees anyway, and

that the test was more difficult than the job itself.

SF-78 Has Got to Go



OPM has finally realized that the Standard Form 78 “Certificate of Medical Examination” needs to be changed. This form, often used by federal agencies for “fitness for duty” exams, has not been revised since 1969. On December 20, 2006, OPM announced in the Federal Register (71 FR 76377) that the SF-78 is “no longer accurate” and needs to take into account the laws that have been enacted since 1969 protecting employees from handicap discrimination and medical inquiries or examinations that are not job-related and justified by business necessity. OPM has invited comments and suggestions from any member of the public, within 60 days of the Federal Register announcement. Comments to OPM may be e-mailed to phil.spottswood@opm.gov.