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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.

ULP is a Good Grievance

AFGE Council 214 made a smart decision when it reacted to a unilateral change in personnel policy for Air Force Logistics Command (AFMC) employees by filing a union grievance over management's decision to terminate a "goal days" program. "Goal days" were group time-off awards based on the achievement of productivity goals set for the most or all of an entire Air Force Base. The "time-off" awards were extra days added to holiday weekends. Management announced that the program was not being administered in compliance with Air Force regulations and so it terminated the program. The Union filed a Union grievance and Dan Minahan represented the Union at arbitration. On February 28, 2007, Arbitrator Thomas Angelo ruled that the unilateral termination of the "goal days" program without affording the Union prior notice and an opportunity to bargain was an unfair labor practice. The Arbitrator directed management to resume the "goal days" program and to credit each affected employee who would have received a "goal day" with an equivalent amount of annual leave.

Order to Federal Employee to Resign from Off-Duty Position Enjoined by Federal Judge

The headline is news in itself! It is extremely rare for a federal judge to issue an injunction against any threatened personnel action involving a federal employee. The typical excuse is that the harm done to the employee is not "irreparable" since he or she can obtain reinstatement and back pay if they win a grievance or an appeal someday. However, in *Ramirez v. Customs and Border Patrol,* 45 GERR 335 (D.D.C. 2007), a federal district judge in Washington, D.C., issued an

injunction to DHS-CBP, ordering the Agency to retract its threat to fire Mr. Ramirez by March 12 if he did not step down from his elected position on the city council in Presidio, Texas. The judge found the city council position was not a partisan position (meaning, he wasn't elected to it as a Democrat or a Republican) and that it was an unpaid position. The court rejected the Agency's argument that there was a potential for a conflict of interest and concluded that a ruling in favor of Mr. Ramirez was necessary to prevent irreparable harm to his First Amendment rights.

"Due Process" Still Means Something

The Federal Circuit issued a somewhat surprising decision on the rights of employees who are indefinitely suspended pending an investigation into their security clearances in *Cheney v. Dept of Justice,* No. 06-3124 (March 2, 2007). After the Supreme Court's disastrous 1988 *Dept of Navy v. Egan* decision, federal employees who are being fired or suspended due to loss of a security clearance are entitled only to advance notice of the reason for the action and an opportunity to respond; they are not allowed to challenge the actual reasons why their clearances are being suspended or revoked. In a case a few years back, the Federal Circuit ruled that it was enough "notice" to tell an employee he was being indefinitely suspended because his security clearance had been revoked for "medical reasons." The court said the employee knew what "medical reasons" the agency was referring to. In *Cheney,* the employee was told that his clearance was being suspended because of questions about whether he'd engaged in general categories of criminal or unethical conduct. The Court disagreed with the MSPB that he got all the notice he was entitled to and ordered the Agency to reinstate him with back pay. The Court explained that the notice did not tell the employee, and he had no way of finding out, what he was suspected of doing and when he was suspected of doing it.

Is "McDonnell-Doulgas"Alive Again?

Last month's newsletter addressed the EEOC's January 20, 1997, decision in *Heffernan v. Dept of Health and Human Services,* EEOC No. 0320060079. Disagreeing with the MSPB that the employee had not established a case of discrimination on the basis of religion, EEOC applied the classic *"McDonnell-Douglas"* 3-part analysis, under which an employee first establishes a *prima facie* case of discrimination, the employer then puts forth a non-discriminatory reason for its decision and, at the final step, the employee can win by showing that the employer's explanation makes no sense, leaving the inference of discrimination raised by the *prima facie* case as the most likely explanation for the employer's action. The EEOC made no mention of the MSPB's trashing of the Supreme Court's *"McDonnell-Douglas"* test in MSPB's *Simien* and *Paris* decisions, addressed in our November 2005 and January 2007 newsletters. EEOC referred the *Heffernan* appeal back to MSPB. On February 23, 2007, the MSPB issued a decision to concur with the EEOC. MSPB noted how the EEOC had evaluated the case under the 3-part *McDonnell-Douglas* test but said nothing about its earlier decisions in *Simien* and *Paris* putting *McDonnell-Douglas* out to pasture. No doubt, MSPB and MSPB judges will continue to think they can ignore the *McDonnell-Douglas* analysis on EEO claims but the *Heffernan* decision should mean they cannot.

"Ex Parte" Contact During Proposal Phase of Adverse Action May Require Ruling in Employee's Favor

The Federal Circuit issued an important reaffirmation of its 1999 decision in *Stone v. FDIC* in its March 12, 2007, decision in *Kelly v. Dept of Agriculture,* No. 2007-3012. In

Stone, the court ruled that a federal employee has the right under the "due process" clause of the Fifth Amendment to know the evidence against him and to respond to that evidence before he is fired. *Kelly,* like *Stone,* involved a situation where a deciding official interviewed key witnesses against the employee before making the decision on the proposed removal, without sharing that information with the employee. Since *Stone*, the MSPB has tried hard to convert the *Stone* ruling into a "harmful error" rule, under which no "ex parte" contacts with deciding officials call for a ruling in the employee's favor unless the employee can show that he wouldn't have been fired in the absence of those contacts. The Court in *Kelly* reminded MSPB that if the additional information provided "ex parte" to the deciding official is, in fact, important information that the deciding official did not know before, the "ex parte" contact alone is enough to call for a ruling in the employee's favor.

Whistleblower Protection: Is the Third Time a Charm?

It's starting to look like another effort by Congress to fix the whistleblower protection law may be enacted. Narrow interpretations of the law have prompted Congress twice, in 1989 and 1994, to amend the law to overturn those rulings. Yet the hostile rulings continued, particularly from the Federal Circuit. H.R. 985 has now passed the House and is under consideration in the Senate. It would, we hope, put an end once and for all to declarations by the Federal Circuit that a federal employee is not protected from whistleblower reprisal if she is disclosing wrongdoing as part of her normal job duties and that a whistleblower must present irrefutable proof that a supervisor or a manager is deliberately trying to punish him for disclosing fraud, waste or abuse. Probably the most satisfying feature of the bill is that it would strip the Federal Circuit of any power to hear whistleblower reprisal cases and allow whistleblowers to file their own cases in federal court and obtain jury trials.

VEOA Developments

A number of significant decisions on the 1998 Veterans Employment Opportunities Act (VEOA) were issued recently. This is the law that was supposed to put more "teeth" into the laws and regulations on veterans preference in federal employment. In *Kirkendall v. Dept of Army,* No. 05-3077, the Federal Circuit on March 7, 2007, ruled *en banc* (with all 13 judges on the Court participating) that the 60-day deadline for filing a VEOA complaint with the Dept of Labor is not absolute. This means late filing of a VEOA complaint may be excused on a showing of "good cause." . . . . In *Jolley v. Dept of Homeland Security,* issued on February 21, 2007, the MSPB ruled that the right of veterans to compete as "status" applicants whenever an agency opens up a position to applications from outside it own workforce cannot be conditioned or limited in any way, other than requiring the applicant to be qualified for the job. The agency in that case announced the vacancy to applicants outside its own work force but required applicants to reside currently in a specific geographic area. The MSPB ruled this was illegal. . . . .The Federal Circuit's decision in *Dean v. Consumer Products Safety Commission,* No. 2007-3038 (February 28, 2007) may be a "sleeper." The case involves the common practice by federal agencies of maintaining separate "lists of eligibles" - a list with "inside" candidates, a list with "outside" candidates and so forth, and selecting off one of the lists where veterans preference does not apply. Mr. Dean argues that this practice allows agencies to manipulate appointments and to bypass veterans preference. The MSPB dismissed his appeal. The Federal Circuit declared "this procedure on its face raises questions" and remanded Mr. Dean's appeal back to MSPB for further development. This one is worth following.

Compensation for Credit Hours on Flextime (Does Anybody Understand This?)

It's probably not a good idea to report on a case decision we don't understand. (Lawyers are supposed to act smart). But the court decision in *Doe v. United States,* 74 Fed. Cl. 592 (Ct. Fed. Cl. 2007) probably means something important. The case involved a group of SSA employees who sued the Government because of the way SSA is compensating them for overtime work. The court ruled that compensatory time does not have to be "paid" at the rate of one and a half hours for every hour of overtime work, but that it is one hour of comp time for every hour of overtime worked. The court also ruled that SSA does not have to pay employees the cash value of "credit hours" earned under a flextime program as long as they are still participating in the flextime program. If anybody knows whether the court was right or wrong, send us an e-mail.

MSPB Lowlights

It's a miracle! No MSPB decisions in the past month or so that make you want to heave; just normal nonsense. The decision in *Evans v. U.S. Postal Service,* February 23, 2007, ought to be front-page news. An MSPB AJ mitigated a removal penalty to a demotion, the agency appealed, and MSPB HQ did <u>not</u> reinstate the removal penalty. The appellant was a supervisor who was fired for "goosing" a subordinate employee and, even worse, for being aware that other employees were "goosing" and doing nothing about it. The MSPB majority agreed with the AJ that the supervisor should be allowed to keep drawing a paycheck in a non-supervisory job. (Needless to say, Chairman McPhie dissented.)

ADA Cases

There were a surprising number of positive decisions on disability discrimination claims in recent weeks.

● Not all of them were good. We keep hoping that some court someday will rule that a given diagnosis in itself renders the person with that diagnosis a "person with a disability" as defined by the ADA. (Maybe, quadriplegia?) The Seventh Circuit couldn't make this bold leap in *Kampmier v. Emeritus Corp.,* 18 AD Cases 1607 (7th Cir. 2007). The case was filed by a woman who's suffered from endometriosis since she was a teenager. She relied on a comment by Justice Rehnquist (now there's an oxymoron) in a Supreme Court decision that "there are numerous disorders of the reproductive system, such as endometriosis which are so painful that they limit a woman's ability to engage in major life activities such as walking and working." The Seventh Circuit said this was just a concurring opinion in one case and the facts that Ms. Kampmier had numerous surgeries, complicated pregnancies and an ectopic pregnancy do not mean she is a "person with a disability." After all, said the court, she can brush her teeth, bathe, comb her hair and dress herself. Proof once again that the "major life activity" in shortest supply in the judicial system is common sense.

● *EEOC v. E.I. Du Pont De Nemours & Co.,* 18 AD Cases 1793 (5th Cir. 2007), represents a breakthrough. The company tried to argue that the employee, who is mobility-impaired was not a "person with a disability" because she could get around the workplace well almost all the time but could

not evacuate the plant quickly if there were an emergency. She was fired for exactly that reason. The court ruled she was not a safety hazard to herself or others and upheld a jury award of $300,000 in punitive damages to her.

- The Third Circuit reinstated a case filed by an employee with mild mental disabilities and other partial disabilities in *Wishkin v. U.S. Postal Service,* 476 F.3d 180 (3rd Cir. 2007). What makes the case interesting is the employee alleged he'd been forced into resigning because management was hounding him for medical records (sound familiar?) He'd been hired under a program for hiring the handicapped. His supervisor pressured him to get a note from his doctor saying he was completely disabled; then the supervisor ordered him to undergo a "fitness for duty" test and reacted angrily when Mr. Wishkin passed the test. The supervisor continued to insist on medical documentation and he told Mr. Wishkin that without it he might get fired for misconduct and then not be able to qualify for disability retirement. The Third Circuit ruled that these allegations, if they could be proven, would establish discrimination on the basis of disability and sent the case back to the lower court for a full trial.

- The Ninth Circuit ruled that another employee whose case had been dismissed without a trial was entitled to a trial to prove his allegations in *Dark v. Curry,* 451 F.3d 1078 (9th Cir. 2006). Significantly, the Supreme Court just recently refused to hear the case on an appeal filed by the employer. Mr. Dark was employed as a heavy equipment operator and he has epilepsy. He was fired because he admitted to operate a pick up truck while experiencing an "aura," which can signal an impending seizure. The court ruled that firing an employee for conduct that is a manifestation of his disability is firing an employee for his disability. Mr. Dark admitted he was unfit for work because he was adjusting to new medication and asked for time off until he could recover. The court disagreed with the employer's argument that this made him unable to perform his job, saying that a request for a specific period of approved leave can be a "reasonable accommodation" unless the employer proves it would be an "undue hardship" in that particular situation.