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LAW FIRM NEWS

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Check Out the Letterhead ↑↑

Congratulations to Tiffany! After many years as a legal secretary and paralegal, then law school, then the bar exam, Tiffany (now *Ms. Malin*, *Esquire*) passed the Colorado bar exam and was sworn in as a Colorado attorney a few weeks ago. Three lawyers are better than two!

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 any legal issue connected with federal sector employment. In addition, we provide representation to Union members in MSPB appeals, EEO complaints nd 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.

D.C. Circuit Upholds NSPS (Sky Not Falling Yet)

On May 18, 2007, the D. C. Circuit released its decision in *AFGE v. Rumsfeld,* No. 06-5113a. It can be accessed online at: www.cadc.uscourts.gov/bin/opinions/allopinions.asp. By a 2-1 vote, the D.C. Circuit disagreed with the decision of the District Court (Judge Sullivan) and upheld the NSPS regulations issued by DOD under the 2003 National Security Personnel Act.

In response to many calls and e-mails, we do not think "the end is near," at least not yet. Here's our "quick take" on where federal employees and their unions stand as far as NSPS is concerned at this point.

The Unions will ask the D.C. Circuit to re-hear the case "en banc," meaning that all the judges on the D.C. Circuit would decide the case (including the three other judges who struck down the NSPS clone implemented by the

Dept of Homeland Security!) If this request is granted, there is a good chance that the May 18 decision would not be effective or would be "stayed" so that Judge Sullivan's injunction remains in force.

DOD needs to decide if they really want to go "full speed ahead" with their NSPS regulations in light of the decision issued by the D.C. Circuit. There are enough "bugs" and "delays" with NSPS that it seems unlikely DOD would want to increase the pace at which DOD employees "spiral" into NSPS. As far as we know, the "National Security Labor Relations Board" established in the NSPS regulations doesn't even exist. Remember too that the 2003 law that allows for NSPS states that the labor relations portion of that law expires on November 24, 2009.

If it dawns on our Republican brethren in Congress that the current NSPS regulations can be completely rescinded by a new Secretary of Defense who is a Democrat (if a Democrat is elected president in November of 2008) and that those regulations can then be replaced by a whole new set of NSPS regulations they might consider "pro-Union" or "left-leaning," the Republicans may lead the stampede to repeal the NSPS law.

Our advice at this point is that any DOD unions that have the option to re-open their labor contracts in the near future should not re-open those contracts if possible. Any DOD unions that are currently involved in collective bargaining on a labor contract should assume that nothing has changed until otherwise informed by agency management.

Do "Continuing Violations" Exist Any More?

The Supreme Court just about eliminated the "continuing violation" doctrine in its 2002 decision in "*Amtrak v. Morgan."* On May 29, 2007, it took another bite out of that doctrine; now you'd need a microscope to see it any more. Another 5-4 vote, courtesy of President Bush's newest appointee, Justice Alito. In *Ledbetter v. Goodyear Tire Co.,* the Supremes ruled that a female employee's complaint of sex discrimination was not timely filed, because the events that caused her salary to lag behind that of her male co-workers were performance ratings given to her years ago by a sexist male supervisor. As Justice Ginsburg pointed out for the dissenters, if the plaintiff filed her lawsuit immediately after the performance ratings were issued, it probably would have been dismissed on the basis that no "adverse employment action" had occurred yet! The decision comes close to vesting employers with a "prescriptive right to discriminate" as long as they've discriminated longer than the period for filing a discrimination charge without a charge being filed.

ULP Decision by An Arbitrator

USDA Food and Nutrition Service, 45 GERR 594 (Pacht, 2007), is another example of a smart decision by a federal sector union to seek a remedy for an unfair labor practice through the grievance and arbitration process rather than from FLRA. The agency implemented a voluntary early out (VERA) program before completing negotiations with the Union. Arbitrator Arline Pacht ruled that the Union's bargaining proposals were negotiable, contrary to what the agency argued, and that negotiations over the VERA program were not precluded on the basis that this topic was already "covered by" the parties' basic labor contract.

Sexual Harassment Rulings

Two circuit court decisions were more encouraging than the Supreme Court's *Lebetter* decision. Both *Bombaci v. Journal Community Publishing,* 100 FEP Cases 632 (7th Cir. 2007) and *Andreoli v. Gates,* 19 AD Cases 196 (3rd Cir. 2007) involved claims of sexual harassment by male co-workers (not supervisors) and both appeals courts reinstated lawsuits that were dismissed by the lower courts. The key was that, even though the harassers were not supervisors, their behavior had been reported repeatedly to supervisors and management officials who did nothing about those reports. The *Andreoli* court, though, dismissed the employee's ADA claim on the predictable basis that, despite her diagnosis of depression and PTSD, she was not a "person with a disability," because she still was able to get married, finish her bachelor's degree and attend nursing school. Proof once again that unless you are "flat-lined" you are not covered by the ADA (and if you are "flat-lined" you're beyond reasonable accommodation anyway).

More ADA Decisions

The theme of "nobody is a person with a disability is nothing if not consistent. In *EEOC v. Schneider National, Inc.,* 19 AD Cases 100 (7th Cir. 2007), the court ruled that a truck driver who was fired after he was diagnosed with a disorder of the nervous system was not a person with a disability since he was disqualified only from driving a truck and not many other jobs. Tell that to a person who's spent his whole career driving a truck! The decision in *Zwygart v. County Commissioners,* 483 F.3d 1086 (10th Cir. 2007) is a classic. The case involved another truck driver, who was given a note by his doctor saying that he "should be off work" for an extended period of time while being treated for a heart condition. Although this was not a particularly sympathetic case for the plaintiff, the court said he could not be a "person with a disability" because he did not provide evidence of "his vocational training, the geographic area to which he has access, or the number and type of jobs demanding similar training from which he would also be disqualified." Try getting your doctor to put all that on a medical excuse next time you need some accommodation for a physical or mental impairment.

Federal Circuit Decisions

The Federal Circuit awakened three times in May to reverse MSPB decisions. Given the rate at which this court rubber-stamps almost anything the MSPB does, it says something about how far off the pier the MSPB has gone.

- In *Lutz v. U.S. Postal Service,* (May 15, 2007), the Court reversed an MSPB decision that the agency did not violate a settlement agreement by providing negative references on a former employee. The agency agreed to support the employee's disability retirement application, but OPM denied the application after his former supervisor suggested in the retirement application paperwork that the employee faked his own injury!

- *Rhodes v. MSPB* (May 23, 2007) involved a decision by MSPB to dismiss an appeal filed by an employee who'd been indefinitely suspended pending the outcome of criminal charges, after he was acquitted of the charges. The Court reminded the MSPB that once an employee has been cleared of the charges in a suspension like this, the federal agency employer has to terminate the suspension and either put

the employee back to work or charge him with some sort of misconduct on its own.

- In *Davis v. Dept of Homeland Security,* (May 30, 2007), the Court faulted the MSPB for refusing to consider another decision involving a separate case filed by the same employee. The employee appealed to MSPB on the basis that she'd been forced to resign from employment due to sexual harassment. The MSPB decided against her claim but refused to look at a final decision issued by the EEOC on a related case she filed, which found that she had been subjected to sexual harassment.

Chairman McPhie Dissents

It's always good news when MSPB Chairman McPhie dissents, since it means that not even the other two Bush appointees could agree with him. The decision in *Guerrero v. Dept of Veterans Affairs,* 2007 MSPB 132 (May 8, 2007) is front-page news in itself because a federal employee actually won an MSPB appeal. The employee was fired on a charge that he made a deliberately false statement on his job application when he entered his "grade" while serving in the U.S. Army as "GS-12." Two of the three MSPB members agreed this was obviously an innocent oversight because there are no "GS" positions in the armed forces; "GS" is the General Schedule for civilian employees. Chairman McPhie dissented anyway, on the basis that the employee should have been more careful.