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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.

Almost a Good Month

Two of the three decisions we received this month were good. In *VA Medical Center, Denver, Colorado and AFGE Local 2241*, Arbitrator Charles Pernal issued an award completely reversing the VA's decision to fire our client, a Union official. He was removed on a series of trumped-up charges of AWOL and insubordination (after having received "progressive discipline" in the form of prior disciplinary actions on other trumped-up charges) but the Arbitrator found that none of the charges were proven. The Arbitrator ordered the employee reinstated with full back-pay and benefits.

Then, after a long wait, the EEOC's Office of Federal Operations issued a decision granting our appeal in *Bergren v. Dept of Transportation*, EEOC No. 0720060007 (June 12, 2007). Ms. Bergren was denied a promotion in 2001. An EEOC AJ ruled in her favor in 2005. The Agency

(surprise!) rejected the AJ's decision and we appealed to EEOC/OFO. On June 12, 2007, the EEOC issued a final decision in favor of our client, finding that the decision not to select her for the promotion amounted to sex discrimination. The case is a reassuring example of how it *is* possible to prove discrimination indirectly, even if the complainant wasn't overwhelmingly better qualified than the other candidates and even if none of the managers (all men) involved in choosing the selectee (a man) are overt sexists. In an overwhelmingly male workplace, the selecting official relied exclusively on "peer feedback" ratings, and at the EEOC hearing he changed his mind and explained that he actually relied on all sorts of *other* differences between Ms. Bergren and the selectee. The AJ, applying the famous *"McDonnell-Douglas"* test, concluded that a finding of sex discrimination was in order because Ms. Bergren had raised an inference of discrimination and the employer, instead of explaining the inference away, put forth a reason for it's decision that wasn't even believable. EEOC/OFO agreed. Now comes the back pay. . . your tax dollars at work!

The third decision is another reminder (as if we needed one) that sometimes the legal system just won't work. It involved a long-term employee at Hill Air Force Base, Utah, with no prior discipline who was fired for "making an inappropriate statement." The case went to arbitration and management admitted they didn't charge the employee with making a threat because they didn't want to have to prove it was actually a threat. No witness said they were sure the employee was dangerous, and the employee spent every waking hour from the day he was accused of making the "inappropriate statement" to the day of the arbitration hearing saying he meant no harm and getting reams of supportive statements from friends and co-workers and even a "clean bill of health" from a psychiatrist. Arbitrator Barbara Bridgewater upheld the decision to fire him anyway, ruling that he didn't even deserve to be put back to work with a nasty suspension. The MSPB made a decision almost this bad last year in *Wiley v. U.S. Postal Service* (reported in our August 2006 newsletter) but we thought an arbitrator would better able to rise above all the hysteria about "workplace violence." We were wrong. So was Arbitrator Bridgewater.

NLRB Ordered to Bargain Over Telecommuting

It's ironic that the federal agency whose job is to remedy unfair labor practices committed by private sector employers can be found guilty of refusing to bargain with the Union that represents its own employees. On May 14, 2007, Arbitrator Suzanne Butler issued an award finding that the NLRB unlawfully refused to negotiate with the Union over a telecommuting program after it claimed this topic was already "covered by" the parties' labor contract and no further bargaining was required. *NLRB Professionals Assn.,* 181 LRR 510 (2007). Imagine what would have happened if the Union filed this as a ULP charge with the FLRA rather than taking it to arbitration! Smart move by the Union.

Watch This One

It's always unnerving when the Supremes agree to hear an appeal from a decision by an appeals court in

that was in favor of an employee. On June 11, 2007, the Supremes agreed to hear an appeal filed by the employer from the Tenth's Circuit's decision in *Mendelsohn v. Sprint,* 466 F.3d 1223 (10th Cir. 2006), reported in our December 2006 newsletter. The Tenth Circuit ruled that testimony of coworkers on the employer's hostility to older employees was admissible in a lawsuit alleging that the plaintiff had been laid-off due to age discrimination, rejecting the employer's argument that only testimony from co-workers who worked for the same supervisor as the plaintiff should be allowed. Hardly seems like a revolutionary ruling, but somebody on the Supremes thinks it is. Stay tuned.

Why is a Habeas Corpus Decision in the MSPB Case Summaries?

Speaking of the Supremes, on June 14, 2007, with the help of Justice Alito (now there's an oxymoron), they issued yet another 5-4 decision favoring the state over the individual. The ruling in *Bowles v. Russell* was that a prisoner's *habeas corpus* petition alleging he was being incarcerated in violation of his constitutional rights must be dismissed as untimely filed, because it was filed 2 days after the statutory deadline. The prisoner argued that his delay should be excused because *the trial judge told him he had 17 days to file the petition instead of 14 days*, but Justice Alito, Justice Thomas, Justice Scalia, etc. ruled that the statutory deadline could not be waived. These days that's not news. What's news is that the MSPB published a summary of the case in its June 22, 2007, weekly digest of recent case decisions. What does this mean? All of the answers to that occur to us are discouraging ones.

EEO Cases

● We hope the Tenth Circuit's decision in *Santana v. City and County of Denver,* 100 FEP Cases 1160 (10th Cir. 2007) doesn't go to the Supremes too. It's a little weird, but also a little good. Unlike the EEOC's *Bergren* decision and unlike a decision by the Supremes themselves last year, the Court found that the plaintiff's claim of sex discrimination on non-selection for a promotion wasn't even good enough to submit to a jury because she wasn't overwhelmingly better qualified than the male selectee. However, the Court said the trial court was wrong to dismiss her claim of *disparate impact* discrimination, saying that if she could prove with statistical evidence that the type of interview used to screen the applicants has a disparate impact that results in many more men being selected than women, she could win the case on that basis regardless of whether the selecting official intended to discriminate against her on the basis of her gender. The Court returned the case to the lower court for further proceedings on her disparate impact claim.

● *Smith v. Dept of Transportation,* 2007 MSPB 142 (June 5, 2007), involved an appeal to MSPB HQ from a decision by an AJ that reversed a 30-day suspension imposed on an employee on the finding that it amounted to reprisal for protected EEO activity, so you already know what the result was. Sure enough, in a 2-1 vote, MSPB disagreed with the AJ and upheld the 30 day suspension. In what passes for a "victory" these days at MSPB, however, the MSPB decided that one part of one charge against the employee could not be sustained: the accusation that the employee

committed misconduct by giving his attorney copies of agency documents he innocently acquired which he thought would help his EEO case. The MSPB said it was "a close call" but that this activity was protected by the EEO laws. The AJ found everything else he was disciplined for was protected EEO activity too, but MSPB HQ said it was unprotected misconduct and upheld the 30-day suspension.

● Another reprisal case should at least have been a "close call," but for the D.C. Circuit it was not. *King v. Jackson,* 45 GERR 731 (D.C. Cir. 1997), involved the refusal of William King, the EEO Manager for HUD, to sign a declaration that HUD's 2003 affirmative employment plan would not be renewed. He thought it was against the law for HUD not to have an affirmative employment plan since 42 USC 2000e-16 (the statute that applies the Civil Rights Act to the federal government) says that all federal agencies must submit an affirmative employment plan to EEOC every year. The Court said in essence, "that's what the law says but you aren't opposing an unlawful employment practice." Sure enough, the protection against reprisal (42 USC 2000e-3) applies only if you oppose or file a complaint against an "unlawful employment practice" such as a refusal to hire or promote, a decision to discipline or discharge, or some other action that affects an employee's terms or conditions of employment. The D.C. Circuit ruled that HUD's failure to renew its affirmative employment program didn't affect Mr. King's working conditions or the terms of employment of anyone else, and that this is so obvious that Mr. King could not have reasonably believed it did. Something about this decision is right, and wrong, at the same time.

● Not all is gloomy at the D.C. Circuit. In *Greenhill v. Spellings,* 482 F.3d 569 (D.C. Cir. 2007), a federal employee appealed from the dismissal of her lawsuit seeking enforcement of a settlement agreement on her EEO case. The Court ruled that such a settlement is a contract like any other contract signed by the Government and that the Court of Federal Claims has the power to hear a claim for breach of such an agreement if the amount sought is over $10,000. Federal employees should keep this in mind if they find the administrative process for enforcing settlement agreements at the EEOC to be ineffective.

OSHA Directive on Federal Safety and Health Councils

DOL/OSHA has had regulations in place for many years that apply safety and health standards to federal government employees: 29 CFR Part 1960. What is not well-known is that OSHA has published Federal Agency Program (FAP) manuals from time to time. On May 21, 2007, OSHA published FAP 00-00-002, a manual for interagency federal safety and health councils. This and the other FAP publications are available online at www.osha.gov/pls/oshaweb.

Comic Relief

Even if you can't get justice from MSPB and the Federal Circuit, at least you can get some entertainment. Two decisions issued last month belong here at the rear end of this newsletter.

In *Davis v. Dept of Homeland Security,* No. 2006-3061 (Fed. Cir. 2007), one of the arguments made by a federal employee appealing an adverse decision by the MSPB was that the MSPB's decision was just a

"boilerplate" decision, which did not sufficiently or clearly state the reasons why her appeal was denied. To the contrary, said the Court, "the Board noted that the newly submitted evidence was not previously available, the AJ made no error in law or regulation that affected the outcome, and the record on review had already closed. Thus, the Board did not issue a 'boilerplate' decision." There were only a few hundred decisions issued with those same words last year (!)

Guerrero v. Dept of Veterans Affairs, 2007 MSPB 148 (June 8, 2007), involved the VA's request that the MSPB stay it's May 8, 2007, decision (reported in last month's newsletter) until OPM can file a petition with MSPB seeking reconsideration. The case is of considerable importance because the MSPB actually ruled in favor of the employee and put him back to work. The MSPB denied the VA's request. The comic relief was supplied by Chairman McPhie, who issued a rousing dissent saying "there is a high likelihood that the agency will ultimately succeed on the merits should OPM seek reconsideration." In essence, he said the other two members of the MSPB weren't really paying attention when they ruled in the employee's favor. Not satisfied with demeaning his fellow Bush appointees, he took a pot shot at the appellant by saying "the public is not well-served by having federal employees who have obtained their credentials from diploma mills continue in jobs for which they are not qualified." Memo to Chairman McPhie (and the VA too): if the appellant isn't qualified for his job, fire him for not being qualified for his job instead of some other charge that couldn't be proved.