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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.

NSPS: Stay Tuned

As expected, the federal employees' unions have filed a petition for rehearing *en banc,* asking all the judges on the D.C. Circuit to reconsider the May 18, 2007, 2-1 ruling by a 3-judge panel of the D.C. Circuit which upheld DOD's National Security Personnel System (NSPS) regulations. On July 6, 2007, the Court issued an order requiring DOD to respond to the unions' petition, which is a good sign since most petitions for rehearing are quickly denied without asking the other side for comments. Now we wait. So does DOD, which has got itself in the awkward position of having a "legitimate" (for now) NSPS program with no organization in place to administer or enforce it.

DOL Issues Final Rules on Reports to Be Filed by Unions

There were many comments submitted to the Dept of Labor in response to its publication in August 2005 of new recordkeeping and reporting requirements for unions. The proposed regulations addressed a new version of the LM-30, a report to be filed regularly with DOL by union officials and union employees. DOL's final rules were issued on July 2, 2007, and are effective August 16, 2007. They were published in volume 72 of the Federal Register, starting at page

36105. [The Federal Register may be accessed online at www.gpo.gov]. DOL's comments accompanying their new regulations consume more than 50 single-spaced, 3-column pages! Our favorite part is the language that will now be printed on the back of the LM-30 that says "the public reporting burden for this collection of information is estimated to average 120 minutes per response." Heck, it would take more than 120 minutes just to read and understand the comments to the regulations! All this from an administration that says it wants to get "Government off the backs of the people." The regulations cover too much to describe or even summarize in this newsletter; you'll need to set aside that 120 minutes!

Has OPM Put a Limit on "Sick Leave Certification" Letters?

We think the answer is "yes," thanks to an astute observation by the always-asute president of AFGE Local 2382 at the VA Medical Center in Phoenix, Randy Brumm, RN. Mr. Brumm was reviewing OPM's comments that accompanied its publication of revised regulations for sick leave usage by federal employees, published in the August 17, 2006, Federal Register (reported in our November 2006 newsletter). On page 47695 in that issue of the Federal Register, OPM responds to a comment that allowing employees up to 15 days to provide "administratively acceptable evidence" for sick leave after an employer requests it may conflict with the practices or policies of some agencies when they put employees on "sick leave certification." Although they could've said it better in plain English, we think OPM said, "we agree." OPM's comment was that it is necessary to impose the same requirement for sick leave as for leave requested under the FMLA- that an employee must provide justification for the leave, if requested or required to do so, within 15 days. We see no other way to read this than as a declaration by OPM that any sick leave certification requirement to produce a doctor's note sooner than 15 days after it is requested or required is invalid.

A Tale of Two Cases

What can a court do to enforce a settlement agreement in favor of a federal employee when his agency won't comply with it? The answer is, a lot, or a little, depending on what court you go to. The Federal Circuit's decision in *Lary v. U.S. Postal Service,* 2006-3050 (July 3, 2007), was encouraging. The Court reconsidered and then reaffirmed a decision it issued last year (reported in our January 2007 newsletter) in favor of a former federal employee who was harmed when his former employer, the Postal Service, violated an agreement settling his MSPB appeal [472 F.3d 1363 (Fed. Cir. 2006)]. The violation resulted in OPM denying his application for a retirement annuity. The Court reaffirmed it had the power to order the Postal Service to correct Mr. Lary's records so he could qualify for the annuity or, if OPM still denies the annuity, that it could order the Postal Service to make him "whole" with a back pay award. . . . In *Frahm v. U.S.,* 100 FEP Cases 1631 (4th Cir. 2007), the Fourth Circuit ruled on June 27, 2007, that an employee who succeeded in getting her settlement agreement on an EEO complaint enforced in federal court was entitled to no compensation or attorney's fees. The Court ruled that, under EEOC regulations, an employee in this

situation can either get the settlement enforced or have the settlement rescinded and reinstate her original EEO complaint. In either case, all she accomplished in court was getting the Government to admit (after 2 years of litigation!) that it violated the settlement agreement, so now the case will be sent back to the administrative level for more proceedings. According to the Court, this did not make her a "prevailing party" for attorney's fees. The Court seemed unaware of an EEOC decision issued a couple of years ago that contradicted this holding and ruled that a federal employee is a "prevailing party" entitled to attorney's fees when she succeeds in enforcing a settlement agreement on her EEO case: *Burns v. Dept of Commerce,* EEOC No. 01A40530 (August 2, 2005).

Reason to Believe

No, this isn't a "faith-based" article. Or maybe it is: we're starting to lose faith in the ability of the legal system to protect employees from reprisal when they oppose practices they reasonably believe to be discriminatory practices. Our July 2007, newsletter discussed the D.C. Circuit's recent decision in *King v. Jackson,* involving the firing of HUD's EEO Manager for refusing to sign a new affirmative action policy. The Court said this couldn't be unlawful reprisal because he was not, in the words of the law protecting employees from reprisal, opposing "an employment practice." Now we see a couple of more courts joining the "he couldn't have thought that was a violation of the EEO laws" club. In *Neely v. Broken Arrow, Oklahoma,* 45 GERR 768 (N.D. Okla. 2007), a federal district judge dismissed a lawsuit by a deputy fire chief who claimed he was demoted because he investigated and opposed instances of city firefighters sexually harassing members of the public. The court said, in essence, "sexual harassment is bad, but anybody should know that members of the public subjected to sexual harassment have not had their right to be free from employment discrimination violated." True, that's not a violation of the Civil Rights Act but is it a stretch to say that the deputy chief could have reasonably believed it was? . . . . *Adams v. Cobb County,* 45 GERR 832 (11th Cir. 2007), is even more unnerving. The plaintiff is a black school district employee who was denied a promotion, and then demoted for supposedly not having enough experience to be an administrator rather than a teacher. The plaintiff alleged reprisal based on an EEO complaint he filed in 1999 and race discrimination. The Court ruled that his 1999 EEO complaint was so long ago that nobody could think it would motivate a decision against him many years later and that, even if the plaintiff had a *prima facie* case of race discrimination, the school district's explanation for demoting him was so strong that no reasonable person could have thought he was the victim of race discrimination. The more it looks like you need to go to law school before you can safely file an EEO complaint without fear of reprisal, the less people are going to oppose what they honestly believe to be discrimination. We think the purpose of the statute prohibiting reprisal is better served by a less stringent definition of "a reasonable belief that an employer has violated the civil rights laws."

The "Douglas Factors" Are Still a Factor

Just when it seemed that the

concept of "mitigation of penalties" was almost eliminated in MSPB appeals by Chairman McPhie and his colleagues at today's "hang 'em high" version of the MSPB, the Federal Circuit gave an employee a rare break in *Crane v. Dept of Air Force* No. 2006-3238 (July 6, 2007). Mr. Crane was fired for building some barriers for the Las Vegas Motor Speedway to be used for a "welcome home" event for returning troops. His supervisor referred the Speedway officials to him and agency management was fully aware of and approved his construction of the barriers. He was fired for conducting an "unauthorized outside business." We are not kidding. The MSPB wasn't kidding either when it upheld the removal of this long-term employee with a stellar work history and a spotless disciplinary record. The Federal Circuit basically said, "No way. If he violated some rule against an unauthorized private side-business, he might deserve some discipline but removal from employment is clearly unreasonable." Just to show that the Dark Ages aren't over yet, though, one of the three judges deciding the case dissented!

EEO Cases

● A decision worth remembering is the D.C. Circuit's ruling in *Fogg v. Gonzales,* 100 FEP Cases 1601 (D.C. Cir. 2007). The case involves a federal employee who sued the U.S. Marshals Service alleging race discrimination after he was fired on charges of insubordination. He obtained a jury verdict in his favor. The agency argued during the trial and even in a post-trial motion that the employee had not presented sufficient evidence to show that the agency's reason for firing him- insubordination- was a pretext (meaning, "cover-up") for its true motive, which the jury found to be race discrimination. The agency then argued that the employee's back pay should be reduced because it had enough evidence to prove that, even if its decision was motivated in part by race discrimination, the insubordination charges were so serious that it would have fired him anyway. The Court did more than reject this argument: it ruled that the argument could not even be raised. The Court said that when the agency defended on the basis that it's charges of insubordination were not a pretext for race discrimination, it waived the right to argue that it would have fired him anyway even in the absence of race discrimination. In other words, the agency defended on the basis that there was no race discrimination; it couldn't later change course and say there was discrimination but it would have fired him anyway for something else.

● The Seventh Circuit provided a helpful reminder in *Boumehdi v. Plastag Holdings,* 100 FEP Cases 1377 (7th Cir. 2007), that sex discrimination isn't just about "sex." The plaintiff filed a complaint that she was forced to resign due to intolerable working conditions, consisting of incessant remarks to her by her supervisor. Just a few of those remarks referred to sex and most of them referred to what he saw as the proper role of women in the workplace (meaning, they shouldn't be in the workplace at all but at home raising children). The lower court tossed out her lawsuit, saying she hadn't really been subjected to "sexual harassment." The 7th Circuit reversed and sent the case back for a trial, on the basis that sexual harassment severe enough to support a claim of "constructive discharge" can include

sexist remarks as well as remarks about having sex.

Comic Relief

This month's comic relief comes from an unlikely source- the Ninth Circuit, one of the few appeals courts not consistently hostile to the rights of employees. Any court can have a bad day though, especially when trying to enforce the conventional wisdom that no person is a "person with a disability" under the ADA. The decision in *Walton v. U.S. Marshals Service,* 45 GERR 825 (9th Cir. June 26, 2007), involved a court security officer who was fired because of a partial hearing loss that made it hard for her to "localize" sound. The Court ruled that localizing sound is <u>not</u> a "major life activity" and so an employee with a physical impairment that substantially limits her ability to do that is not a "person with a disability" protected from discrimination by the ADA. We hope one of the judges who made this decision remembers it the next time he's accelerating onto the freeway in heavy, fast-moving traffic and hears a loud horn blaring behind him. . . or is it in front of him? File this decision away with the cases that say that activities like being able to commute to work, being able to get along with others, being able to travel in commercial airliners and being able to get a full night's sleep are not "major life activities." The ADA may well be amended after the next election, but it will come too late for people like Ms. Walton.