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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.

Three Decisions: Worth the Wait

● The EEOC issued a decision in one of our cases on September 10, 2007: *Logan v. Dept of Interior.* Mr. Logan was not selected for a promotion in 2005 and then filed an EEO complaint, alleging that the decision not to promote him was influenced by his testimony in favor of a successful complaint of race discrimination filed by a co-worker. After he filed his own complaint, the EEO counselor asked the selecting official if he'd be willing to settle the complaint. The selecting official offered to promote Mr. Logan if he withdrew his EEO complaint and apologized to him for it (!) Yup, that was in 2005 and the agency defended this behavior for the next two years, and lost.

● On September 25, 2007, Arbitrator Vern Hauck issued an award in another one of our cases, ruling in favor of a Union representative at the VA Medical Center in Denver. The Arbitrator decided there was no basis at all to suspend the representative for 14-days, because the accusations of misconduct against him weren't true. In another example of defending the indefensible to the bitter end, this is the same Union representative who's *removal* from federal employment was reversed as completely baseless by Arbitrator Pernal, in a decision we reported in our July 2007, newsletter.

● The real shocker was the MSPB's September 21, 2007, final decision in another one of our cases: *Burch v. Dept of Homeland Security.* Mr. Burch was fired on trumped-up charges not long after he filed an EEO complaint (do you detect a common theme here?) We cringed when we realized he was limited to an MSPB appeal and could not use the EEO complaint process or the grievance/arbitration process. Fortunately, the MSPB AJ not only reversed his removal from employment but actually found it amounted to reprisal for protected EEO activity. We cringed again when the Agency marched off to MSPB HQ with the usual arguments about how no violation of any workplace rules no matter how minor deserves less than termination, or can be "excused" due to discrimination or reprisal. After almost a year, the MSPB's September 21, 2007, decision simply affirmed the AJ's decision, without comment. Not even a dissent by Chairman McPhie! The next case may account for how he got distracted. . . . . .

Kick 'Em When They're Dead

Yes, it was just 1 day before the *Burch* decision when Chairman McPhie contributed his separate concurring opinion to the MSPB's decision in *Lary v. U.S. Postal Service,* 2007 MSPB 220 (September 20, 2007). Our January and August 2007 newsletters discussed the Federal Circuit's 2006 decision in *Lary,* which reversed the MSPB's finding that the Postal Service did not violate a settlement agreement when it prevented Mr. Lary from filing a timely application for disability retirement. Mr. Lary had accepted the settlement agreement in 2002 after he appealed the Postal Service's decision to remove him from employment earlier that year. The Federal Circuit's 2006 decision ordered the MSPB to cancel Mr. Lary's original removal from employment and to carry out his removal again for medical inability, thereby giving Mr. Lary a fresh 1-year period to file his application for disability retirement with OPM. Mr. Lary passed away in February 2007. The Postal Service then filed a motion to dismiss the case as "moot," which the Federal Circuit promptly denied. Mr. Lary's father was substituted as a party so that the settlement agreement could be enforced by Mr. Lary's estate. On September 20, 2007, the MSPB, following the Court's instructions, ordered the Postal Service to comply with the Federal Circuit's order. Chairman McPhie did not join in the majority opinion, though, and offered his own opinion for concurring in the result. "Unfortunately," he said, "the Board is constrained to comply with the direction of the court, made with knowledge of the appellant's death, to order the agency to now reinstate and then remove a deceased employee." What a waste, huh?

Too Good to be True/ Too Wrong to be Right

The saga of *Murphy v. IRS* continues. This is the case at the D.C. Circuit we described last year where the Court ruled that it is unconstitutional to tax money damages for emotional distress (which are allowed in EEO cases) as income. The Court said when the 16th Amendment was passed, allowing for income tax, the word "income" was understood not to include payments designed to make a person "whole" in money terms for intangible losses like loss of health or loss of reputation. On

July 3, 2007, the same 3-judge panel reversed itself and decided payment for emotional distress can be taxed. The decision proves that tax law is even stranger than civil service law! The new decision says that "income" under the tax code must definitely include damages from emotional distress or Congress would've had no reason to clarify the tax code to exclude some types of damage payments, like payments for bodily injury, from income tax. OK, fine. But what happened to the 16th Amendment? In last year's *Murphy* decision, the same 3 judges covered the same ground, saying that the tax code definitely does not allow Ms. Murphy to exclude her damages for emotional distress from her "income" within the meaning of the tax laws. But in that decision, the Court went beyond the statute and said that the meaning of "income" in the 16th Amendment did not and could not include money damages for emotional distress. As far as we can tell, the 16th Amendment doesn't matter anymore. Instead, at the Government's request, the Court turned to another part of the Constitution, Article I, section 8, which gives Congress the power to tax. OK, so why did we need a 16th amendment to the Constitution if Congress could already tax anything under the original Constitution? More to the point, the IRS didn't tax Ms. Murphy's compensatory damages award as an "excise," "impost," "duty" or "tariff." The IRS taxed her compensatory damages award as ***"income."*** Saying that Congress has the general power to tax under Article I means nothing unless Congress has gone ahead and exercised that power by enacting an Article I tax on money damages for emotional distress. As long as Congress is trying to tax this as "income" and as long as the 16th Amendment says payments for emotional distress are not "income," how the ____ does Ms. Murphy owe income tax? Ms. Murphy has vowed to appeal the decision further. We'll try to follow the case, if we can avoid getting whiplash!

Modified Schedule Can Be A Reasonable Accommodation

One of the key battlegrounds in the "ADA wars" is the "essential duty/reasonable accommodation" controversy. Those who want to limit the reach of the Americans with Disabilities Act argue that any given task an employee is unable to perform is an "essential duty" of the job, so any employee who cannot perform that task, no matter how disabled he may be, is not a "qualified person with a disability" entitled to consideration for a reasonable accommodation. Those who want to extend the protections of the ADA to all persons with disabilities are careful not to describe the duties of a job to include the particular means or methods by which the employer wants the employee to accomplish those duties. For example, an essential duty for a supply clerk is to order supplies, not to be able to enter the orders on a computer keyboard. If voice recognition technology is readily available for a supply clerk who's hands are disabled that will enable him to dictate commands to the computer by voice instead of by keyboarding, he can still perform this essential duty of his job. Two recent decisions illustrate the point. In *EEOC v. Convergys Customer Mgt. Group,* 19 ADA Cases 740 (8th Cir. 2007), the Court rejected an employer's appeal from a jury verdict in favor of a disabled employee who was often 10-15 minutes late for work because of inadequate handicapped parking and an office layout that was hard for him to

navigate. The Court agreed with the jury that, for this particular job, strict punctuality was not an essential duty and that making accommodations for the employee's tardiness by simply allowing him to extend his work shift an extra 15 minutes would not impose an "undue hardship" on the employer. . . . The EEOC issued a similar decision in favor of a federal employee in *Boozer v. U.S. Postal Service,* 45 GERR 956 (July 24, 2007). The employee suffered a stroke from which she recovered but which left her with some disabilities. Her doctor said she needed to avoid working late hours and she asked the Postal Service for a permanent assignment to the day shift. The Postal Service argued that shift work was an essential duty of the job, and that working the day shift was not an accommodation she needed in order to do her job anyway. The EEOC disagreed, saying that unless the Postal Service could prove that granting her request would be an "undue hardship" on its operations, it was obligated to accommodate her in this manner.

New OPM Regulations on FLSA Exemptions

On September 17, 2007, OPM published final regulations revising those portions of 5 CFR Part 551 that describe the kinds of positions that are exempt from the overtime pay requirements of the Fair Labor Standards Act (FLSA). 72 Federal Register 52753. OPM's regulations follow the new "FLSA-exempt regulations" issued by the Department of Labor over a year ago. They address such "FLSA-exempt" positions as "professional," "managerial" and "administrative" positions. The Federal Register is available online at www.gpo.gov.

Comic Relief

This month's comic relief is provided by a consulting firm that probably didn't think it was publishing anything funny, but somehow our law firm got on their mailing list. It's a flyer from "Jackson Lewis, LLP" touting their 2007 fall seminar on "How to Stay Union Free." It asks the desperate question, "Can your organization survive?" if a union tries to represent the company's employees. The message is driven home by pictures of a stressed-out middle aged white guy in a dress shirt and tie, a gang of union thugs holding signs that say "On Strike!" and a mob of dark-skinned people at a rally where the most prominent sign has a foreign word on it. Check out this seminar at www.jacksonlewis.com. The seminar costs only $595.00 per person and is being held in multiple locations around the country this fall, including the Holiday Inn-Chicago Mart Plaza, *a union hotel (!)* [Saving our country for real Americans is one thing, but business is business].