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LAW FIRM NEWS

November 2007

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.

Keep a Fire Burning

Dan and Martha Minahan want to express their gratitude for all the prayers and support from our clients and friends after Martha was diagnosed with a recurrence of cancer on October 31, 2007. More tests and procedures are on the way and we are hopeful and determined. We're surprised this vile batter is still at the plate, but strike 3 is on the way and he'll be outa here! Dan's travel schedule will be curtailed in the near future but Barrie Shapiro and Tiffany Malin will carry the load. Both Dan and Martha plan to keep busy rather than sit around a stew about it, so Dan will be in the office and responding to phone calls and e-mails as much as possible.

Compensatory Damages Award Increased by MSPB

That's not a misprint. And, not even a dissent from MSPB Chairman McPhie (!) The case of *Heffernan v. Dept of Health and Human Services*, came before MSPB HQ again last month. We reported an earlier decision in the *Heffernan* case in our March 2007 newsletter, describing how EEOC disagreed with MSPB's finding that the employee did not prove discrimination on the basis of his religion. The MSPB accepted EEOC's decision and sent the case back for further proceedings on compensatory damages. The MSPB AJ

awarded the employee $3,000. On appeal, and to MSPB's credit, the damage award was increased to $25,000. *Heffernan v. DHHS,* 2007 MSPB 246 (October 19, 2007).

"Last Chance Agreement" Still Requires Actual Misconduct before Employer Can Invoke It

The Federal Circuit's decision in *Malic v. Dept of Veterans Affairs,* No. 2007-3262 (October 5, 2007), is another example of the Court emphasizing that a "last chance agreement" (under which an employee agrees to serve a "probationary" term in exchange for not being removed for a particular offense) must be interpreted and enforced in a sensible manner. In that case, the employee signed a fairly typical LCA promising to obey all the employer's rules and the employer later fired him for "inappropriate behavior" because he spoke in a loud tone to a co-worker. The employee admitted he got angry at the co-worker but explained that he had been provoked and that he has a hearing impairment that and he always speaks loudly. The MSPB dismissed the employee's appeal from his removal for violating the LCA on the basis that he had obviously violated it. The Federal Circuit reversed and sent the case back for a hearing, saying the employee was entitled to an opportunity to prove that his behavior could not reasonably have been viewed as a violation of the LCA.

Age Discrimination in the Federal Sector: Won't Somebody Please Fix This Law?

The Supremes have agreed to hear a question that has divided the lower courts: does the age discrimination law that covers federal employees protect them from reprisal for filing a complaint of age discrimination? It's hard to believe this is a legitimate question, but it is- mainly because Congress has been "asleep at the switch" ever since it enacted a law in 1974 protecting federal employees from age discrimination. The problem is that Congress did not simply amend the 1967 Age Discrimination in Employment Act (ADEA) to cover federal employees, but put the protection for federal employees in a separate statute: 29 USC 633a. Over the years, this has led to decisions holding that federal employees alleging age discrimination are not entitled to jury trials, that they are not entitled to the same remedies as private sector employees for age discrimination, and that even if they win they are not entitled to attorney's fees. The case now before the Supremes is a ruling by the First Circuit that federal employees are not protected from reprisal for filing an age discrimination complaints, since section 633a says nothing about reprisal, The D.C. Circuit faced the same issue a few years ago and ruled that federal employees complaining about age discrimination are protected from reprisal because not even Congress could have intended a law that provides no protection for employees who use it: *Forman v. Small,* 271 F.3d 285 (D.C. Cir. 2001). To add the sublime to the ridiculous, the *private sector* version of the ADEA not only prohibits reprisal but has been interpreted as the only part of the ADEA that allows for recovery of compensatory and punitive damages (!) *Moskowitz v. Purdue University,* 5 F.3d 279 (7th Cir. 1993). It is unnerving to think that the current lineup of the Supremes will decide this issue. These are the same folks who struggled to a 5-3 decision last year in *Hamdan v. Rumsfeld* that the United States must follow the basic requirements of the Geneva Convention for persons imprisoned during an armed conflict. It is way past time for Congress to wake up and simply amend the law to make the protections against age discrimination work the same way as the

protections against the other forms of discrimination covered in the civil rights laws (*e.g*., race, sex, national origin).

What's Happening to the VEOA?

Congress enacted the Veterans Employment Opportunity Act (VEOA) in 1998 to put some "teeth" into the laws and regulations on veterans preference, which have been around since the 1940's. The VEOA allows for veterans preference complaints to be appealed to MSPB and provides "liquidated damages" (double the back-pay owed) for "willful" violations of veterans preference. The MSPB has been having no end of trouble applying this law the same way any other law protecting employees based on their status is applied. The MSPB continues to rule that an employee who's veterans preference was not properly taken into account when applying for a position is entitled only to a "reconstruction" of the selection, whatever that means.

● In *Lodge v. Dept of Treasury,* 2007 MSPB 223 (September 24, 2007), the MSPB decided that, where a "reconstruction" of the hiring process shows the veteran would have been selected, the veteran is <u>not</u> entitled to a retroactive appointment to the position but <u>is</u> entitled to back pay. Huh? So he doesn't get the job but he gets paid as if he'd gotten the job, and keeps on getting the pay of the job he didn't get until. . . when?

● In *Weed v. Social Security Admin.,* 2007 MSPB 259 (October 30, 2007), the MSPB made it harder to prove a "willful" violation of the VEOA. The MSPB swallowed the same excuse sometimes offered by employers defending against a "willful" violation of the Age Discrimination in Employment Act (ADEA): *ignorance.* That is, the selecting official thought he was following the law and nobody in the HR office told him he was wrong. We think there is something called "institutional willfulness" and that the Seventh Circuit got it right in a decision upholding a jury's finding of a "willful" violation of the ADEA in *EEOC v. University of Wisconsin,* 288 F.3d 296 (7th Cir. 2002): "We have previously said that leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an extraordinary mistake from which a jury can infer reckless indifference."

FLRA Decisions

● The Authority reminded federal agencies that unions that are certified to represent agency employees can represent them on any matter concerning their employment. The decision in *U.S. Dept of Labor,* 62 FLRA No. 40 (September 13, 2007), involved an employee who had requested a "reasonable accommodation" for a physical disability. The employer insisted on additional medical information to support the request and the employee gave the information to a Union representative to give to the employer. The employer refused to accept the medical information from the Union representative without some sort of "waiver" from the employee. The FLRA ruled this was an unfair labor practice.

● In *Environmental Protection Agency,* 62 FLRA No. 1 (2007), the Authority found a proposal negotiable that would result in the creation of a labor-management committee to review and comment on the validity of an employee's performance plan.

● Just in case you were wondering, the Authority decided in *Federal Aviation Admin.,* 62 FLRA No. 15 (2007) what happens when a ULP charge and a grievance are filed *at the exact same time.* According to 5 USC 7116(d), the

same issue cannot be presented in both places. The Authority set aside an arbitrator's award on the grievance, saying that without proof that the grievance was filed before the ULP charge was filed, the arbitrator had no power to decide the grievance. (Wonder what happened to the ULP charge?)

EEO Decisions

● Some settlement agreements are so weak they aren't even binding contracts. The EEOC examined a settlement agreement in *Luiz v. U.S. Postal Service,* EEOC No. 01A61106 (2006), in which the agency promised "to continue to look for opportunities for details to higher level positions." The EEOC found the agreement unenforceable because it contained no substantive agency obligation, and it provided a benefit to the complainant that was illusory, at best.

● The decision of a federal judge in Washington, D.C., in *Norden v. Samper,* 19 AD Cases 982 (D.D.C. 2007), is a rare example of a federal employee winning a case of disability discrimination on "summary judgment," without even having to taking the case to a jury trial. The employee developed a serious, permanent health condition that required her to reduce her exposure to certain chemicals to which she was routinely exposed in her job as an entomologist. The judge ruled that the accommodations she sought were clearly reasonable and that the accommodations her employer (the Smithsonian Institution) offered did not even address the problem. As an example, the employer offered to give her one day off every two weeks, leaving her exposed to the chemicals all the other work days during each pay period!

Rules on Use of Employer E-Mail System

The internet and e-mail have are the break rooms and water coolers for employee chats in the 21st Century. Generally, public employees should not expect their web surfing or e-mail communications using the employer's e-mail system to be private or confidential, and public agencies may establish and enforce (not to mention, negotiate with their unions about) rules about internet and e-mail use at work. The arbitration decision in *Sycamore Board of Education,* 123 L.A. 1588 (Van Pelt, 2007), however, shows that employees are not powerless if they are disciplined unfairly. A school teacher was told repeatedly to take down what the school district considered to be "excessive" student-created material from the classroom walls. He then sent an e-mail to other teachers mocking the requirement, saying his message was intended to make them aware of the policy that "No Child Will Be Left Behind the Fire Wall of Student Work." The teacher was issued a letter of reprimand. Arbitrator Van Pelt decided that the reprimand was too harsh a punishment for the content of the teacher's e-mail, since the employer had made its e-mail system available to all employees, so he reduced the reprimand to a written warning solely because of the tone of the e-mail.