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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 law 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 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.

Thank You

Most of you reading this letter already know that Dan's wife, Martha, passed away on July 5, 2008, due to cancer. This has been a difficult time for Dan and for the law firm too. We want express our sincere appreciation for all the comfort and support our clients have provided. It means a lot and always will.

MSPB Appeal that was "moot" for 3 years is "moot" no more

We were pleasantly surprised to see the MSPB issue a favorable published decision in one of Dan's cases on July 30, 2008: *Moore v. Dept of Veterans Affairs,* 2008 MSPB 160. This is one of a number of cases inspired by the Supreme Court's 2001 *Buckhannon* decision, which ruled that an employer that rescinds an action taken against an employee can get the employee's case dismissed as "moot" and thereby avoid a binding court order that the employee can enforce and avoid paying attorney's fees too. Mr. Moore was removed in 2005 based on baseless charges. The Agency soon realized this, rescinded the action, got MSPB to dismiss the appeal as "moot" and proposed to remove him again. We appealed the MSPB's decision to the Federal Circuit, which remanded the case back for reconsideration. On July 30, the MSPB announced that Mr. Moore's original appeal has never been "moot" because the Agency did not grant him all the remedies he would

have obtained if he won his MSPB appeal. The MSPB returned the case to the MSPB's AJ with instructions to rule on the merits of the original appeal (which had *so* much merit, the Agency tried to rescind the action!) Once Mr. Moore (finally) obtains an enforceable decision in his favor, we hope it will lead to the Agency making him "whole" for all the negative job consequences imposed on him since 2005.

Winning on a "technicality": Good or Bad?

Depends on who wins, right? AFGE union locals in the VA will be pleased with the decision in *Dept of Veterans Affairs,* 124 LA 1609 (Feldman, 2008). The VA-AFGE labor contract provides that if management is late in responding to a grievance, the grievance shall be resolved in the employee's favor. Arbitrator Marvin J. Feldman ruled that the contract language is clear and mandatory and that it didn't matter if management had a good excuse for being late. He granted the grievance, resulting in reversal of a disciplinary suspension against an employee.

Such a strict reading of a labor contract can be an unpleasant experience, too. The decision in *BOP, Federal Prison Camp, North Carolina*, 62 FLRA 41 (2007), upheld a ruling by Arbitrator Louis M. Thompson, Jr. against the Union. The Arbitrator swallowed the "common law pleading" defense so popular with federal agencies, saying that the grievance form did not refer to the section of the labor contract allegedly violated and that the Union's notice of intent to invoke arbitration did not contain the specific reasons for this decision by the Union. Most arbitrators are reluctant to dismiss a grievance on grounds like these, but some arbitrators aren't. The FLRA decided it will not disturb an arbitrator's interpretation of a labor contract no matter how the contract is interpreted, unless it was impossible for the contract to be interpreted that way. The upshot is that the claims of an entire group of employees for unpaid overtime over a number of years remain unresolved.

"Protected Association" Claims

A series of recent decisions show how an employee can be protected from discrimination or reprisal because of his *association* with another person.

- The Sixth Circuit ruled in *Thompson v. North American Stainless LP,* 102 FEP Cases 1633 (6th Cir. 2008), that an employee who claims he was fired because his fiancée filed an EEO charge against the employer has stated a viable claim under Title VII. The employer argued that the law protects only someone who actually files an EEO charge. The Court disagreed, saying that retaliation against a person so closely related to or associated with the one who filed the charge would discourage anyone from filing a charge and is therefore unlawful.

- *Holcomb v. Iona College,* 102 FEP Cases 1844 (2nd Cir. 2008), involved a white employee who claimed discrimination because of his marriage to black woman. The Court ruled that discrimination against an employee because of the race of the person he is married to is race discrimination.

- Another case arose under the Americans with Disabilities Act (ADA). A husband and wife who were both discharged by the same employer while their son was undergoing treatment for cancer alleged disability discrimination. The employer had openly expressed misgivings about their son's increasing health care expenses, and the fact that they were both fired so soon after their son's condition worsened was enough, said the Court, to support a finding that they were discriminated against because of their son's disability. *Trujillo v. PacifiCorp,* 20 AD Cases 897 (10th Cir. 2008).

First Amendment Still Alive (Barely)

After the Supremes' *Garcetti v. Ceballos* decision last year, it is encouraging to find a public employee who still has a viable "freedom of speech" claim. In *Reilly v. City of Atlantic City,* 27 IER Cases 1511 (3rd Cir. 2008), a police officer alleged he'd been fired because of truthful testimony he gave about corruption in the police department at the trial of another police officer. The City tried to convince the Court that the police officer was simply making statements in the course of his job duties not protected by the First Amendment. The court disagreed, saying he was testifying as a citizen at a public trial.

Fourth Amendment too!

At least one appeals court still thinks the Fourth Amendment protects public employees against unreasonable searches and seizures. *Quon v. Arch Wireless Operating Co.,* 27 IER Cases 1377 (9th Cir. 2008), involved the City of Ontario, California, reviewing text messages sent and received by a police sergeant on his department-issued pager. The Court ruled that the sergeant had a reasonable expectation of privacy in his text messages because the city had never audited text messages nor had it warned employees that their messages were subject to being audited.

Comp Time and Overtime

- OPM issued regulations on May 28, 2008, implementing the amendment Congress enacted in January 2008 providing for Wage Grade employees to earn compensatory time for time in a travel status outside their normal duty hours. The regulations were published at 73 Federal Register 30455, and the Federal Register can be accessed online at www.gpo.gov.

- Time spent commuting to and from work is usually not considered "hours of work" under the Fair Labor Standards Act (FLSA). Employees *are* entitled to overtime pay, though, if they are performing some sort of "work" for the employer during this time. The Second Circuit issued a stingy decision on this topic in *Singh v. City of New York,* 13 WH Cases2d 865 (2nd Cir. 2008). The case involved city fire inspectors who are required to carry voluminous inspection documents with them each work week. The Court declared this imposed only a "minimal" burden on the inspectors and did not transform their commuting time into work. Whether a given task is a non-compensable "minimal burden" or a compensable "activity that is integral and indispensible to the job" seems to

depend on the judges who happen to decide the case. The "canine cases" are a perfect example. There have been 2 major decisions in the past 10 years from the Federal Circuit alone on whether federal law enforcement officers who care for police dogs do or don't get paid for bringing them to and from work: *Bull v. United States,* 479 F.3d 1365 (Fed. Cir. 2007) (they do); *Bobo v. United States,* 136 F.3d 1464 (Fed. Cir. 1998) (they don't).