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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.

Security Clearances: A Ray of Hope

Ever since the Supremes' 1988 decision in *Egan v. Navy,* federal agencies have been able to use the loss of a security clearance to justify almost any personnel action. The ruling in *Egan* was that, because the courts aren't "competent" to second-guess judgments on security clearances, an employee who is fired for loss of a security clearance cannot get into why he lost the clearance if he appeals to the MSPB or to arbitration. For example, he can't argue that the reasons for revoking his clearance were false, or even that the decision to revoke his clearance was based on race discrimination. The Supremes *did* say, however, that federal employees at least have the right to advance notice of the reasons they are being fired and an opportunity to respond. In *Romero v. Dept of Defense,* No. 2007-3322 (Fed. Cir. June 2, 2008), the Federal Circuit ruled it was improper for

the MSPB not to allow the employee to prove that the DOD component that revoked his clearance did not have the authority to do so.

Foreseeable Medical Recovery May Invalidate Removal for Medical Inability to Perform

In *Edwards v. Dept of Transportation,* 2008 MSPB 197 (August 6, 2008), the MSPB reaffirmed a principle it first announced in *Street v. Dept of Army,* 23 MSPR 335 (1984). Ms. Edwards suffered a number of serious injuries and illnesses and was absent from work for more than a year. The agency proposed and then carried out her removal from employment for medical inability to perform her job. However, before the decision was effective, she provided a letter from her doctor saying that she was expected to recover sufficiently to resume her regular duties in a little over 2 months. The agency fired her anyway and defended its decision when she appealed to MSPB on the basis that she *was* medically incapable of performing her job when she was fired. The MSPB reversed the Agency's decision, saying there was a foreseeable end to her absences and it did not promote the efficiency of the service to fire her in that situation.

Disability Discrimination Cases

- In *Poquiz v. Dept of Homeland Security,* EEOC No. 0720050095 (April 10, 2008), the EEOC ruled in favor of an applicant for a law enforcement officer position at DHS. He has limited vision in his right eye and so he was rejected because he did not meet the agency's vision standards. However, he had worked for a number of years as a law enforcement officer for another federal agency with no problems due to his limited vision. The EEOC ruled that DHS violated the ADA by assuming that no applicant without a certain visual acuity can qualify for the job, that DHS should have performed an "individualized assessment" of this applicant's abilities and that its failure to do so amounted to unlawful discrimination. The applicant was awarded retroactive selection to the position, with full back pay, and $9,000 in damages for emotional distress.

- The EEOC decided another case involving an employee who was "regarded as" disabled in *Dremmel v. Dept of Veterans Affairs,* EEOC No. 0720060044 (July 16, 2008). The employee was taking medication for chronic pain, but her doctor insisted this did not make it unsafe for her to drive. The VA fired her anyway, on the basis that its own doctors said that regular usage of the pain medication rendered safe driving impossible. The EEOC disagreed. First, the EEOC ruled that she qualifies as a "person with a disability" since anyone who is perceived as being unable to drive a motor vehicle is substantially limited in a broad category of jobs. Second, the EEOC decided it was a mistake to assume she could not drive because of the medication when her personal physician said she could *and* when she showed she had performed similar duties in other jobs without any problem for 10 years.

- The Ninth Circuit overturned a lower court's decision to dismiss a lawsuit by a delivery truck driver in Phoenix,

Arizona. The employee has a heart condition and claimed he was fired after he refused to work in a vehicle without air conditioning. The lower court ruled that he didn't present sufficient evidence of how he was restricted from participating in outdoor activities compared to the general population in Phoenix. The Ninth Circuit reversed and sent the case back for a jury trial, finding that the employee's own testimony and the testimony of his doctor that he experienced trouble breathing, dizziness, fatigue and trouble concentrating in hot weather was sufficient to show he is a "person with a disability" under the ADA. *Gribben v. United Parcel Service,* 20 AD Cases 1185 (9th Cir. 2008).

Reprisal: Proving Employer "Knowledge" of Protected Activity

A common defense raised by employers to charges of reprisal for "protected activities" like union organizing or "blowing the whistle" on fraud, waste or abuse is that the particular supervisor or manager involved in taking the challenged personnel action was unaware of the employee's activities. In *Triola v. Snow,* 2008 WL 2595100 (2nd Cir. 2008), the lower court dismissed a lawsuit by a federal employee on the basis that her supervisor didn't know she filed an EEO complaint. The Second Circuit reversed, saying that knowledge of protected activity can be "imputed" to an organization and there is no need for direct proof that a particular supervisor was aware of an EEO complaint. The Court explained that the "knowledge element" is satisfied when the employee has complained directly to another employee (in this case, an EEO counselor) whose job it is to investigate and resolve such complaints.

Employee Improperly Restricted from Proving Discrimination in RIF

The MSPB issued a rare decision reaffirming the importance of allowing circumstantial evidence of discrimination when an employee raises an EEO claim. *Garofalo v. Dept of Homeland Security,* 2008 MSPB 38 involved an employee separated by reduction in force (RIF) who alleged age discrimination. The MSPB AJ ruled that the written explanation given by the rating panel for not placing her in the RIF was sufficient and she would not be allowed to call the panel members as witnesses. MSPB HQ disagreed, saying she had been denied the opportunity to probe whether the panel's explanations were arbitrary, irrational, or a pretext for discrimination when she was not allowed to question these witnesses directly.

"Stray Remarks" Decisions

"Stray remarks" is a term courts often use to turn comments most people would call a "smoking gun" into a dud. Evidence of racist or retaliatory remarks can be downplayed or ignored if the remarks are not made by the particular manager who made the employment decision or if they are "too distant" in time. Here are two recent examples that deserve their place in the back-end of this newsletter:

- The Fourth Circuit in *McCray v. Regional Transp. Auth.,* No. 07-1201 (4th Cir. 2008), found a black employee submitted insufficient evidence that he was fired because

of his race to allow his case to go to a jury. "Isolated" statements by two white board members that "I can't stand that black son-of-a-bitch," and "the first chance we get we are going to run his ass out of town," were not "reasonably contemporaneous" with the board's decision to fire the employee.

- In *Butler v. Alabama Dept of Transp.,* 103 FEP Cases 1542 (11th Cir. 2008), the employee actually got his case to a jury and the jury ruled in her favor, but the jury's verdict was overturned on appeal. The employee, a black female, was a passenger in a white co-worker's truck as they were driving to lunch. Another car, driven by a black male, collided with the co-worker's truck. The furious co-worker exclaimed "did you see that stupid m**fng ni*** hit me?" The black female reported the remark to her employer and later claimed she'd been retaliated against for making this report. The 11th Circuit ruled that her report was not protected "opposition" to discrimination since she could not have reasonably believed her co-worker's outburst had anything to do with her job or that it affected her conditions of employment in any way.