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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 through 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 do not hesitate to contact us if you would like to have one of us conduct training, meet with employees or review a case for arbitration or MSPB. We are also just a phone call or a fax away if you need help or feedback researching any legal issue on federal sector employment. We also 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 attorneys fees from the agency if we win. Check out our website at <http://minahan.wld.com>.

### ***“Second Bite” for Federal Agencies***

The D.C. Circuit has now joined the 10<sup>th</sup> Circuit in ruling that a federal employee may not file an EEO claim in federal court challenging only the sufficiency of the remedy he received in the administrative process and holding on to the finding of discrimination in his favor during that process. In *Scott v. Johanns*, 43 GERR 619 (D.C. Cir. 2005), the Court agreed with the decision in *Timmons v. White*, 314 F. 3d 1229 (10<sup>th</sup> Cir. 2003). Both cases involved federal employees where final decisions in their favor were either made by

the EEOC or accepted by their employing agencies. Both employees were dissatisfied with the remedies provided to them by the EEOC or their employing agencies and filed Federal Court lawsuits seeking what they considered to be more compensatory remedies. The D.C. Circuit, in agreement with the 10<sup>th</sup> Circuit, said that the law’s provision for a *de novo* trial in Federal Court means that both parties get a fresh start. In an effort to justify this hyper-technical reading of the law, the D.C. Circuit said “we see nothing disingenuous about an employing agency adopting an A.J.’s liability finding and then disputing liability in court, given that the decision to adopt the finding may well rest in part on the size of the remedial award.” This would be funny if it wasn’t so stupid! How many times have employees protested in an arbitration hearing or an MSPB hearing that they pled guilty to an offense in criminal court just because they couldn’t afford the expense of fighting the charge? How many times has any decision maker accepted this argument and allowed the employee to deny guilt after he admitted it in a guilty plea? To impose the same rule on federal employers is, for some incomprehensible reason, not allowed. An admission of discrimination by an agency or a finding of discrimination by the EEOC may be final, but it isn’t binding.

### **“Qualified” Person with a Disability**

The decision in *Boots v. U.S. Postal Service*, required the rare convening of a Special Panel, since the EEOC and the MSPB flatly disagreed with each other on the same case. The case involved a postal employee who was a tractor-trailer driver and, due to his disability, was unable to qualify for a DOT commercial driver’s license (CDL) because he was taking anti-seizure medication. The Postal Service argued that it was following the DOT regulations and not discriminating against him because of a disability. In agreement with the EEOC, and in disagreement with the MSPB, the Special Panel ruled that since the Postal Service was not bound by DOT’s CDL regulations but had adopted them voluntarily, those regulations could not be applied in a manner to “disqualify” the employee from his job. Instead, the Postal Service was required to perform an individualized assessment of the employee’s disability and, if his employment as a tractor-trailer driver did not pose a direct threat to his health or safety or the health or safety of others, then it was illegal for the Postal Service to remove him from his position.

### **“Conspiracy to Suppress Wages”**

Although it is not a federal employment case, the decision in *Williams v. Mohawk Industries Inc.*, 117 LRRM 2550 (11<sup>th</sup> Cir. 2005), is a rare example of the application of the Racketeer Influenced and Corrupt Organizations Act (RICO) to an employment case. In a class action, the employees alleged that the employer conspired with temporary staffing agencies and other recruiters to hire illegal workers as part of a conspiracy to suppress overall wages. The court agreed that this kind of claim was maintainable and that the employees had presented sufficient evidence to require a trial and so sent the case back to the lower court.

### **The Discipline Conundrum**

Courts, agencies and arbitrators are chronically incapable of figuring out what to do if an employee has committed misconduct but if the employer’s motivation for disciplining her is illegal. For example, there may be no question that the employee falsified a series of sick leave requests but it may also be obvious that the decision to fire her was motivated by sex discrimination. Sometimes the action against the employee is reversed; sometimes the action against the employee is upheld if the particular type of misconduct is serious enough to justify that kind of penalty; sometimes the employee’s punishment is mitigated, say to a 5-day suspension, on the basis that this is more in line with what the employer would have done to her if she were a male. Few decision-makers get it right: The question is not what some honest employer might have done or could have done if it were free of gender bias. The question is what this biased employer did. If the challenged action would not have been taken but for the existence of sex discrimination, the action must be reversed in its entirety. The NLRB got it right in *Stanford Hotel* 177 LRRM 1085 (2005), which involved an employee who was fired for insubordination for cursing and yelling at his manager because the manager ordered him to tell a union representative that he was a supervisor and not a bargaining unit employee. The NLRB agreed that the employee had been insubordinate but also found that his insubordination was the direct result of the employer’s illegal direction to the employee to tell his union representative that he was not in the bargaining unit. The NLRB ordered the employee reinstated with backpay.

### **FLRA Rulings**

- In *Social Security Administration*, 60 FLRA No. 111, the Authority ruled that it was an unfair labor practice for the agency to eliminate the use of metal

detectors at its facility without giving the union prior notice and the opportunity to bargain. The Authority ordered *status quo ante* relief.

- The Authority continues to unleash the *de minimis* rule to find that matters of some significance to employees are too unimportant to require negotiations with their union. In *Department of Homeland Security*, 60 FLRA No. 170 (2005), the Authority concluded that a unilateral reduction of hours available to law enforcement officers for remedial firearms training was *de minimis*. The Authority said the union's claim that the reduction in training opportunities could lead to bargaining unit employees being terminated for failure to qualify on their firearms was "somewhat speculative." Amazingly, the Authority commented that evidence that non-bargaining unit employees had been terminated after receiving only 8 hours of training (the new rule) was irrelevant because they were non-unit employees!
- The decision in *Davis-Monahan Air Force Base*, 60 FLRA No. 166 (2005), shows that the two Republican appointees on the FLRA must have skipped contract law in law school. The union filed a grievance against the agency for violation of a negotiated agreement which stated that employees who test positive for drug use must report for counseling and rehabilitation and that the agency will retain employees in a duty status while they are undergoing rehabilitation. The case involved a number of employees who, after testing positive for illegal drugs, were simply fired without being allowed to complete rehabilitation. The union filed an unfair labor practice charge saying this was a clear breach of the negotiated agreement. The

Authority allowed the testimony of management negotiators who explained that they did not understand the agreement to require employees to be retained while undergoing rehabilitation. Basic contract law says that if a written agreement is clear on its face, evidence from outside the agreement (called "parol evidence") is inadmissible to vary the plain language of the agreement. The Authority found that the language of the agreement was open to interpretation and that in light of the testimony of the agency's negotiators, the agency's interpretation was a reasonable one. Without that testimony, however, the agreement would not have been open to interpretation!

### **EEO Cases**

- In *Shea v. Rice*, 43 GERR 621 (D.C. Circuit 2005), the Court reaffirmed the "continuing violation" theory for ongoing disparities in pay. A federal agency had argued that a recent Supreme Court decision meant that the employee's lawsuit was untimely because he did not file it soon after he learned he was being paid less than similarly situated minority employees. The Court disagreed, saying that the Supreme Court has not abandoned the rule that a discriminatory pay disparity is a continuing violation which gives rise to a new EEO complaint with each new paycheck.
- Three decisions involve the never ending question of whether a person with an obvious physical impairment is a "person with a disability" under the ADA. In *Kupstas v. City of Greenwood*, 16 AD Cases 808 (7<sup>th</sup> Cir. 2005), the court ruled that a maintenance employee who could no longer rake leaves or shovel snow due to a back

injury was not covered by the ADA because the inability to rake or shovel for more than 2 hours is not a significant limitation for the average person (even though it got the employee fired!). The decision in *Fiscus v. Wal-Mart Stores*, 385 F. 3d 378 (3<sup>rd</sup> Cir. 2004), involved an employee who alleged she was fired because of her need for time off to undergo kidney dialysis. The lower court, taking a page from the *Justice Scalia Book of Statutory Interpretation*, ruled that processing bodily waste and cleansing blood are not major life activities and so the employee was not a "person with a disability." The 3<sup>rd</sup> Circuit basically said, "You've got to be kidding," and ruled that any physical condition that requires such a time consuming and cumbersome process to treat, week in and week out, is a disability.

- Another positive decision was *Praseuth v. Rubbermaid Inc.*, 16 AD Cases 1197 (10<sup>th</sup> Cir. 2005). The employee had a blood condition that required her not to work with knives and the employer argued that her job on an assembly line required working with knives at least 50 percent of the time. The court noted, however, that even though 50 percent of the positions on the line necessitated the use of knives the other 50 percent of the positions did not and that it would have been a reasonable accommodation for the employer to rotate her into one of those other positions.

### ***"Laches" Defense in Arbitration***

It is not uncommon for employers to argue that a grievance should be dismissed from arbitration since the union was guilty of "laches." This is a legal doctrine under which a case may be

dismissed if the party filing the case has been dilatory in moving it forward to the point where it can be decided. Arbitrators rarely rule on these types of motions and even more rarely grant them. The "laches" defense was raised in *Cruz-Martinez v. Department of Homeland Security*, 177 LRRM 2534 (Fed. Cir. 2005), which involved an employee who had been fired from his job with the Immigration and Naturalization Service. The Arbitrator dismissed the grievance under the "laches" doctrine since the union did nothing to try to schedule the arbitration hearing for 13 months and there was a past practice by management of dismissing grievances under these circumstances, which had never been challenged by the union. The Court upheld the arbitrator's decision, relying mainly on the past practice finding.

### ***No False Doctor's Note***

In *GIW Industries Inc.*, 120 LA 1406 (Holley 2005), a company fired an employee on the basis that the employee presented a false doctor's note to excuse his absence. The note said that the employee had "been under my care" on December 23. When the company discovered the employee had not visited the doctor on that date, it fired him. The union proved that the employee called the doctor on that date to explain how he was feeling and the doctor told him to continue taking his medication. The arbitrator found that the employee did not submit a false doctor's note and ordered the employee reinstated with backpay.