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EMPLOYMENT ADVISORY

A NEWSLETTER FROM PLDW pldw.com

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Negative Employment Reference Could be Basis of FMLA/ADA Retaliation Claim

On June 13, 2011, a federal court ruled that negative job references by an employer given to prospective employers can be the basis of a retaliation claim under the Family and Medical Leave Act and Americans with Disabilities Act. (Male v. Tops Mkts. LLC, W.D.N.Y., No. 6:09-CV-06234 6/13/11). The plaintiff, an employee of a market, alleged that after her employment ended with the defendant, she applied for more than 100 jobs and that the defendant, in response to inquiries, told potential employers that the plaintiff had "missed and was late to work a lot because of her personal and medical issues." The court reasoned that since the absences from work were ADA and FMLA leaves, the plaintiff had at least alleged a plausible claim.

New Federal Rule Encourages Contractors to Adopt No Texting While Driving Policy

The Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council issued a final rule on July 5, 2011, in the Federal Register (76 Fed. Reg. 39240)that encourages federal contractors to prohibit their employees from texting while driving. The rule seeks to have federal contractors adopt comprehensive policies directed at texting while driving by employees.

Employee Repeatedly Called "Idiot" and "Stupid" Has Hostile Work Environment Claim

In a very recent decision, a federal district court ruled that an employee with mental disabilities could sue based on co-workers and supervisors repeatedly referring to him as "stupid," "dumb," "idiot," and "mental case" and can proceed with hostile work environment claims under the Americans with Disabilities Act. (Schwarzkopf v. Brunswick Corp. D. Minn., No. 10-CV-02774, 6/7/11). The plaintiff worked in an assembly position and was subject to depression and general anxiety. He claimed that co-workers made comments that they were worried he "might go postal" and began calling him names in 2006. Addressing the plaintiff's claims, the district court noted that the line between illegal harassment and mere unpleasantness can be "hazy" and alleged harassment is unlawful only if it is "extreme" and that "discriminatory intimidation, ridicule and insult" must permeate the workplace for an employee to have a viable claim. The court went on to conclude that the co-workers repeated comments regarding the plaintiff's mental illness over more than a year were sufficient evidence for a jury to rule in the plaintiff's favor in connection with the hostile work environment claim.

NLRB Proposed Election Rules Draw Fire from the Business Community

On June 22, 2011, the National Labor Relations Board issued a 146-page notice that would change the existing election procedure. The purpose of the changes is to speed up the election process. The proposed changes include a mandate that would require that upon the filing of an election petition by a labor union, the employer would provide a list of eligible employees including phone numbers and e-mail addresses if available. The most significant impact would be to substantially shorten the time between the union's filing of the election petition and the actual election. Under current practice, the election generally will not occur less than 25 days after the direction of the election. The proposed rule would eliminate this provision. The net impact is that elections would be much quicker. Reducing the time between when a union seeks an election and the actual election places the employer at a disadvantage because the employer will have little time to effectively respond to the union's organizing efforts. Generally a union only files an election petition when it is confident that it enjoys majority support. The employer's election campaign effort typically reduces that support and can cause the union to lose the election. Shortening the time available is going to make it more difficult for employers to mount an effective effort. While the rules have not been adopted at this point, given the current composition of the NLRB, employers should expect that the proposed rules will become final.