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A NEWSLETTER FROM PLDW pldw.com

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Email Exchange Discussing Need of Pregnant Employee to Take Leave Did Not Demonstrate Unlawful Discrimination

A recent federal court decision highlights the increasing importance that email communications play in employment litigation. The case arose out of a request for a transfer. A pregnant Wal-Mart stock clerk sought a temporary transfer to a position that did not involve lifting after her physician advised her that she was at risk for a miscarriage. Wal-Mart refused the request reasoning that the job classification required the person to lift up to 50 pounds and it did not have a position that did not involve lifting. Wal-Mart offered the employee only an unpaid leave. The employee alleged that Wal-Mart's refusal was in retaliation for her prior EEOC charge. For evidence, the employee relied on an email exchange between HR employees:

Personnel Manager: We have an associate that has filed a law suit ... now she is pregnant again... Can we have her go on LOA now or what do we do with her?

HR Manager: Yes, she will need to take an LOA until she is able to work within the essential job functions.

The plaintiff employee argued that the communications were a "smoking gun" documenting bias. Rather than being evidence of discriminatory intent, the court ruled that the exchange was simply evidence that Wal-Mart applied its policy related to accommodation to the employee. The court reasoned that given the employee's restrictions, the email exchange was not evidence of adverse action related to the employee's prior EEOC charge. On September 22, 2011 the federal District Court for Indiana dismissed the case. Arizonaoyska v. Wal-Mart 1:09-CV-1404 (9/22/11).

Congress Considers Legislation to Mandate Use of E-Verify

The House Judiciary Committee recently held hearings on the impact of a bill (H.R. 2885) to mandate participation in the program. Under H.R. 2885 mandatory E-Verify would be phased in over six months. The legislation would also pre-empt any conflicting state or local laws. With labor unions and prominent Democrats lining up against the proposal, it is not clear that the legislation will pass the House this year but it does appear that the issue may well be a topic for the 2012 elections.

Single Racial Use of Racial Epithet Enough to Block Motion for Summary Judgment

The case arises out of the termination of a custodian following multiple disciplinary actions. The plaintiff claimed at the time he was given a ten day suspension, his supervisor called him a "spic" and told him that the employer "had plenty of money" and "good attorneys" when he complained about the suspension. Several months later the employee was involved in an altercation with another employee and fired. The employee filed suit and the employer moved for summary judgment claiming that the employee's long disciplinary record knocked out any claim of unlawful discrimination. The judge disagreed reasoning that since the manager had allegedly made the comment and was involved in the decision to terminate, a jury could conclude the decision was impacted by bias. (Diaz v. Elgin Sch. Dist., U-45 9/22/11 N.D. Ill).

Federal Contractors May be Subject to Expanded Disclosure Requirements

The Labor Department's Office of Federal Contract Compliance Program ("OFCCP") is considering a rule change that would significantly expand the type of information required to be disclosed by federal contractors. The proposed change would be effective in June 2012 and would require contractors to provide compensation data that OFCCP would use as a basis for field audits. Supporters, including unions and civil rights groups, contend that this information would help OFCCP combat pay discrimination. Opponents view this proposal as another burden for federal supply and service contractors. At this stage, OFCCP has gotten 2,400 comments and has not yet identified precisely what information it will require or if it will go forward with the proposal.