PANNONE LOPES DEVEREAUX & WEST LLC

EMPLOYMENT ADVISORY

A NEWSLETTER FROM PLDW pldw.com

February 2012

Connecticut
62 LaSalle Road
West Hartford, CT
06107
Phone 860-232-1244
Fax 860-232-1035

Florida
1111 Lincoln Road
Suite 400
Miami Beach, FL
33139
Phone 866-353-3301

22 Southeast 4th
Street
Boca Raton, FL 33432
Phone 866-353-3301
Fax 866-353-5020

Massachusetts
75 Arlington Street
Suite 500
Boston, MA 02116
Phone: 866-353-3310

New York
81 Main Street
Suite 510
White Plains, NY10601
Phone: 914-898-2400

250 Park Avenue
7th Floor
New York, NY 10177
Phone: 212-791-1860

146 State Street
Mezzanine Level
Albany, NY 12207
Phone 518-465-2601

Rhode Island
317 Iron Horse Way
Suite 301
Providence, RI 02908
Phone 401-824-5100

Inability to Work Overtime is Not a Disability Under ADA

On February 10, 2012 the U.S. Court of Appeals for the Fourth Circuit held that the inability to work overtime is not a disability within the meaning of the Americans with Disabilities Act ("ADA"). (Boitnott v. Corning Inc., 4th Cir., No. 10-1769 2/10/12). The plaintiff, a maintenance engineer, had leukemia and heart problems and sought to return to work with the understanding that he would limit his work to 8 hour shifts for a total of 40 hours. His employer operated 12 hour shifts and declined to return the plaintiff to work, reasoning that since he was capable of working 8 hours per day, he was not disabled under the ADA. The plaintiff filed suit. The trial court ruled for the employer and the Court of Appeals affirmed. The Court noted that the ADA defines "disability" as "a physical or mental impairment that substantially limits one or more life activities of such individual." The Court reasoned the plaintiff was not "substantially limited" if he could work forty hours per week.

Court Dismisses EEOC Breast Milk Pumping Case

The Equal Employment Opportunity Commission filed suit against a Texas employer alleging that the employer had unlawfully fired an employee that sought to pump breast milk at work. (EEOC v. Houston Funding II Ltd., S.D. Tex. No. 11-02442 2/9/12). The plaintiff alleged that when she was ready to return from maternity leave, she contacted the employer and inquired about using a room to pump breast milk. The allegation was that the employer refused to return her to work because of her inquiry.

On February 9, 2012 the Federal District Court for the Southern District of Texas dismissed the EEOC complaint. The court reasoned that even if the employer had fired the employee because she wanted to utilize a breast pump at work - that action was lawful. The court noted that "firing someone because of lactation or breast pumping is not sex discrimination" under the federal law. As such, the complaint failed and the lawsuit was dismissed.

Lack of Medical Certification Sinks FMLA Claim

An employee that was terminated after failing to provide a requested medical certification lost his FMLA case in a very recent federal court decision. (Polling v. Core Molding Inc., S.D. Ohio No. 10-963 2/9/12). The plaintiff worked as a production employee at his employer's unionized manufacturing operation and had obtained permission to take FMLA intermittent leave for a neurological condition. The plaintiff called in sick from his vacation cabin and left a voice mail for his supervisor simply stating "FMLA" as justification. After the absence, HR sent a letter requesting a medical certification for the specific absence. The employee subsequently submitted a doctor's note that did not reference the absence. The employer requested again that the employee provide the requested documentation. When the employee failed to do so, the employer at that point treated the absence as unexcused and terminated the plaintiff. An arbitrator returned the plaintiff to work reasoning that under the union contract there was not "just cause" to support termination.

Having won at arbitration, the plaintiff filed a lawsuit claiming that the employer had violated the FMLA by terminating his employment. The federal court rejected that claim reasoning that plaintiff was required to provide the requested documentation within 15 days and since he did not do so, the employer could lawfully treat his absence as unexcused. An unexcused absence is a lawful basis to terminate his employment and as such the Court ruled that the termination was lawful.

For further information, please contact 401-824-5100 or email:

PLDW Principal William E. O'Gara at wogara@pldw.com