LABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire
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Howard Kurman: Alright. Good morning everybody. Welcome to our first telebrief in August. As you know we do these on the second and fourth Wednesdays of every month and the next telebrief will be on Wednesday, August 22nd. So I think we may have some new participants this morning, so welcome to everybody, those old, those new, those in between. Okay, a bunch of stuff to talk about this morning as always.

So, the first thing I want to talk about is that the National Labor Relations Board, the other day, this was on August 1, 2018 put out a press release and very briefly what happened was this. Under the Obama administration the National Labor Relations Board decided a case called Purple Communications. I have talked about this case in the past in several telebriefs, particularly even last year. What happened in Purple Communications was the National Labor Relations Board decided that employers who allow and require their employees to use their email systems which is probably virtually every employer in the United States today and certainly all of you out there. That employers who allow and require their employees to use the network of emails would also have to allow employees on non-work time to use those same email systems to communicate with other employees regarding wages, hours and terms and conditions of employment, as well as any outside union business agent or organizer. This case was very controversial at the time that it was decided because, 1. It overruled a prior case called Register-Guard which had been decided in 2007 and really exposed employers in many ways to communications between employees and outside union representatives in a pre-organization or in organization campaign. Well there was a great hue and cry after the Purple Communications case was decided in 2014 and yet not much was done because there was still a democratic majority on the National Labor Relations Board. Remember there are five members to the National Labor Relations Board. Right now the composition of the board is three republicans and two democrats. So there is a republican majority and as I stated before, there is a movement afoot to change many of the Obama era decisions, which were onerous and which were employee friendly to the extreme. So the press release put out by the National Labor Relations Board on August 1st, stated in a notice issue today the National Labor Relations Board invites the filing of briefs on whether the board should adhere to, modify or overrule Purple Communications and I think it is a very significant move. This has been a decision that's really been an albatross for employment attorneys who represent employers and my sense is that under the republican majority at the first opportunity that they can this majority on the present National

Labor Relations Board will overrule again the Purple Communications decision and go back to the 2007 decision which basically said an employer can control if it is done in a neutral way, the use of its email systems for its employees, so that if you had a rule which stated that employees cannot use either on work time or non-work time, your email system for nonbusiness related purposes that probably would pass muster under the republican majority at the National Labor Relations Board. They have also asked for comments on whether there should be any restrictions on the use, for instance, of text which are done on employer equipment. So if you issue company phones to your employees, whether or not you can restrict the use of text messages for non-work purposes on those as well. So you will need to stay tuned for this, but again, as I always do, I always make predictions and my prediction is that the current board will revert back to the prior decision, the 2007 Register-Guard decision and as an employer, you will be able to restrict the use of your email systems even on non-work time to only business related purposes as opposed to non-business related purposes and that will put a crimp in the ability of employees to use your systems for purposes of union organization. So it is significant development, did not get a lot of play in the media, because its not something that a lot of people know about, but I want you to know about it because it is going to be decided at some point, I'm sure within the next year, so we will move on from that.

I think that it is significant to know that July 26, 2018 was the 28th anniversary of the passage of the Americans with Disabilities Act, which as you know was signed into law by the elder Bush back in 1990. That accompanied by the passage of the ADA Amendments Act in 2008 has clearly made the obligation of the employer to not only recognize disabilities under the law, but to accommodate those disabilities as well. I have spoken about the need to accommodate disabilities, I am going to mention an interesting case in a minute, but suffice it to say now headed into the 29th year of enforcement under the ADA as I talked about, I think even in the last telebrief it is really more important the big issue today is not necessarily whether any condition is deemed to be a disability or not, because frankly under the 2008 amendments most conditions are viewed as covered disabilities under the act. The main issue is whether or not an employer has an obligation to accommodate the disability and the extent of the obligation to make that accommodation and I have stated in numerous telebriefs before you as an employer need to have a system for documenting the interactive process between management and the employee regarding a request for an accommodation and whether or not the request for an accommodation or the accommodation itself is deemed to be reasonable under the law. As you know an employer is obligated to engage in that interactive process and once it engages in that interactive process, the accommodation requested by the employee has to be a reasonable one. So if it imposes an undue burden on you as an employer,

either through cost or because of operational issues, you are not obligated to grant that accommodation, but I will tell you that the cases under the law are legion now with regard to challenges to the employer's interactive process as to whether or not it occurred, whether it was effective, and whether it was appropriately documented. Now in line with that on July 27th, so just a week and half ago the DC Circuit passed or decided a significant case, it was called Hill v. Associates for Renewal in Education. Again, decided by the DC Circuit and what happened in this Hill case was that it involved an employee named Hill who was a single-legged amputee and he was involved in an after school program for this non-profit organization and historically, the organization had granted him both an aide to help him out in the class room as they did with other assistants, as well as allowing him to be involved and teach on the first floor of a three-floor building. The three-floor building was without an elevator and because he experienced pain due to the amputation, they allowed him to be on the first floor and have an assistant. At some point he goes out on a leave of absence and when he comes back for one reason or another, the school says now you need to be on the third floor and we are not going to provide an aide for you. Eventually bad blood surfaces between him and the school and for different reasons he is terminated. After the termination, he files a law suit against the school claiming that they terminated him without accommodating the need for an assistant as well as being on the first floor that would allow him to reduce his painful condition. The important point about this case is that the DC Circuit decided in line with another circuit, the Sixth Circuit that the Americans with Disabilities Act may require an accommodation that is necessary not to allow the employee to perform the job, because he could perform the job as easily on the third floor as he could on the first floor, but that would enable him to perform the job without a degree of pain that he was experiencing in conjunction with doing the job and it is a significant decision so that you know you have employees who may be able to do the essential functions of the job with or without a reasonable accommodation, but in this case the claim was look, I can only perform my job painlessly by performing on the first floor as opposed to the third floor and in ruling on to the summary judgment which had been granted to the employer in the trial court below, in the Federal District Court below, the DC Circuit said that under the Americans with Disabilities Act, again in alignment with the prior decision of the Sixth Circuit, that the ADA may require an employer to accommodate an employee who can perform the essential functions of the job but because of pain associated with performing it may need an accommodation. So I bring this to your attention if you are in a situation where you have a job applicant or an existing employee who says, "look I can perform the essential functions with the job, but I need an accommodation because of pain associated with the performance of the job. Bear in mind that even though this case was in the DC Circuit and not in the Fourth Circuit, that governs you all, it's

certainly an influential decision and by the way the DC Circuit is the same circuit from which Judge Kavanaugh comes about and who may be the next Supreme Court justice depending on the confirmation hearings. So I wanted to bring that decision to your attention just decided a week and half ago.

There was a bill filing enacted by the Massachusetts legislature very recently due to take effect on October 1st. In the last telebrief I talked a little bit about non-competes. This is an omnibus non-compete statute passed by the Massachusetts legislature and to go into effect on October 1st. I bring this to your attention not because obviously it effects you, but because it presages and may be precursor to legislation that may go into effect or at least be proposed in Maryland and other states and is, I think indicative of trends with regard to non-competes and while it's a very complicated statute, I will just over some of the highlights and I have mentioned some of these things before in telebriefs. So one of the things that the Massachusetts statute requires is that a non-compete agreement that there be what is called a Garden Leave provision in the non-compete. The Garden Leave provision is comparable to what I have often referred to as shelf life or shelf payment to an employee who is governed by a non-compete and so what this provision requires is that if you are going to require a non-compete to be entered into by an employee there needs to a Garden Leave requirement under the statute that says if the employee for instance is being restricted by competing with your company for six months then you are going to have to make a payment to that employee for some period of that six months and the Massachusetts statute would require to be 50% of your highest compensation within the last two years. So I often advise clients particularly in situations where they want to restrict the employee for a limited period of time if you pay the employee for some period of time you have a much better opportunity and chance of a court enforcing that non-compete. The other aspects of the Massachusetts statute was that, number one, they restricted the period of any non-compete to a maximum of one year, and I think I mentioned actually in the last telebrief that I did that I often get questions by clients about how long should I restrict the employee, and I think my answer in the last telebrief was probably a year and no longer, certainly than two. The Massachusetts statute statutorily says they will not recognize any non-compete for longer than one year, and I think that that is certainly the trend nationally in terms of the enforceability of non-competes, so and in many cases, I would say, the outside limit is certainly probably a year and two years is really stretching it. The other aspect of the Massachusetts statute is that the non-compete would not be enforced in an area, geographical area that is any broader than the area in which the employee actually practiced or was engaged during the last couple of years of his/her employment, so you are not going to be able to in Massachusetts and increasingly and other non-compete statutes or other areas you are not

going to be able to enforce it to an area any broader than the area in which the employee was engaged during the last year or two of his employment, and also significantly under the Massachusetts statute, two things: one, it would not be applicable or enforceable against any non-exempt employee. So, if you have non-exempt employees in Massachusetts that you are seeking to enforce a non-compete against, you will not be able to do it, and I often advise employers in Maryland and elsewhere, take a good look at your non-compete and really question yourself as to whether or not you really need a non-compete for a non-exempt employee, and lastly, the non-compete would not be enforced in a situation where the employee has been laid off or has been terminated without cause. So, while again this is a Massachusetts statute, obviously not applicable to you all, I bring it to your attention because I think that again as a precursor to many of the trends that we see on the enforceability of non-competes and the introduction of legislation in other states regarding the enforceability of non-competes and as I have told you there has been a legislation introduced in Congress in both houses as to the restrictions on non-competes as well.

Okay, I wanted to bring to your attention another decision, which was decided by the Fifth Circuit at the end of June, it is called Gardner v. CLC, and it had to do with a employee and a healthcare institution who was arguably harassed verbally and almost physically assaulted by a patient, and the reason I bring this to your attention, it is a case decided again by the Fifth Circuit. So, we again are in the Fourth Circuit, but this is a Fifth Circuit decision and what happened is that this employee and the healthcare institution was caring for an elderly man who had dementia and Parkinson's and who made very inappropriate comments and who actually physically hit this healthcare assistant, and she brought it to the attention of her management and the complaint that she brought, which was ultimately dismissed but then reinstituted by the Fifth Circuit, was on the basis of the healthcare institution, really not responding adequately to the complaint of this patient. Now you might say, well, why is this decision significant in healthcare institution, and I think it is significant because the Fifth Circuit recognizes that employees can be harassed and subjected to a hostile work environment not only by co-employees or management but by outsiders as well and as I have talked about before you need to be very careful that your workplace harassment policy includes prohibitions on harassment not only by co-employees but by vendors, by independent contractors, and by clients as well, and certainly with regard to workplace harassment that may take place with clients, I mean that could be a very sensitive situation, particularly where you have a client that is a source of significant revenue to your company, but nevertheless if you have an employee who complains that he or she was the victim of workplace harassment either in the form of inappropriate verbal comments or even worse, physical touching or physical assaults by a client or by an outsider,

under the law of the Fifth Circuit and other circuits as well, you are duty-bound to investigate it, and if corroborated, to take appropriate action on the part of, you know, remediating this situation, and again, with regard to a client it can be a very, very sensitive situation, but nevertheless you are obligated to investigate, you are obligated to remediate, even though this may be a sensitive or a situation where you are, you know, taking some sort of action against a client that may be a source of revenue and significant revenue to your company. So, as you ascertain or as you look at your workplace policies, take a good look, make sure that they include prohibitions that will apply to independent contractors, to vendors, and to clients as well, and I think sometimes you forget that you may expose your company to liability not only by acts of harassment by employees but by acts of harassment by these other categories of individuals as well.

Okay, those are the developments for the day. Michelle, can you take the call off of mute please? Okay, so as always, I invite any questions from anybody out there either in this forum or if you would rather, you know, privately with me on my email at hkurman@offitkurman.com or my phone which is 410-209-6417. Okay, any questions or comments from anybody?

Anne: Under Register Guard, it was really hard to be clean and not letting emails be used for anything other than work, and employees do that for all kinds of reasons, and so I think if we can get Purple Communications overturned, that would be great, but then everybody has got to really watch how the permissiveness with which they allow employees to use emails.

Howard Kurman: Yeah, I agree and but Register Guard did say and that if your policy is neutral and not directed at communications with let us say a business union, a business agent of a union…

Anne: Right, right.

Howard Kurman: …so you could you could have a policy that says under Register Guard that employees will not be allowed to use your email system or network for non-work purposes…

Anne: Right, right.

Howard Kurman: …so that is a facially neutral policy not directed at union business agents or anything else, that probably would pass muster under Register Guard. So, that is my guess as to what is going to happen. We don't know, of course, but that is my guess as to what is going to happen, and I think that employers then will be in a much better position to be able to prohibit that

kind of communications than obviously is the case now under Purple Communications.

Anne: Oh yeah, now Purple Communications is terrible.

Howard Kurman: Yeah, it really is, it really yes.

Anne: Thanks Howard.

Howard Kurman: Sure. Any other questions? Okay, well, as always I appreciate your participation and we will see you in a couple weeks thank you very much. Bye bye.