LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Good morning to everybody, hard to believe this is the first telebrief post Labor Day but the year is moving along whether we like it or we don't. Plenty to talk about this morning as usual.

I wanted to talk a little bit about a case obviously that has been in the news a great deal involving Fox. As you know, Roger Ailes was forced to resign over a sexual harassment complaint by Gretchen Carlson. In the midst of that particular case, they did an internal investigation and as a result of that internal investigation what they decided to do, and this was announced on September 6, 2016, was to pay Gretchen Carlson $20 million to settle this harassment suit. In addition, it was reported in the Times that Fox News also paid at least two other women who had come forward and complained against Fox New. There are several things I think that are noteworthy about this besides simply the amount of money that was paid out to Gretchen Carlson, along with the payment to Carlson, Fox News issued an apology which is a little unusual in these cases. The apology read as follows, "We sincerely regret and apologize for the fact that Gretchen was not treated with the respect and dignity that she and all of her colleagues deserve." That is about as close to an admission by a company that the atmosphere and the work environment at Fox News was polluted and if you read any of the Internet dialogue on this particular case and in particular the long article in New York Magazine about this, you will see that Fox News was permeated with this kind of a Mad Men atmosphere and the reason I bring it up is because of a couple of things. One, if you are unfortunate enough to have one of these harassment cases hit you, you do your internal investigation and the internal investigation reflects that, in fact, the harassment which is alleged did occur, it often times is well worth it to try and resolve the case at the earliest stage possible because what happens in many of these cases is that they go on and on and on for weeks, months and sometimes even years and during that period of time the cost involved for getting legal cost are quite heavy in terms of administrative time, interview time and time away from more productive pursuits. So if you ask in this case why Fox would have paid such an exorbitant sum of money to Gretchen Carlson, know that, a) they could afford to pay it obviously, otherwise they would not have paid it and b) they wanted to get this thing behind them rather than having it constantly be in the rearview mirror and be the constant source of attention, media and otherwise. So when you are dealing with internal investigations of harassment, there are a couple possibilities obviously that come about, one is the investigation demonstrates that the allegations do not have merit in which case you may be compelled to fight such a case. The second alternative is the investigation may prove that they do have merit in which case like Fox News, you may want to hold your nose and just settle the case and get it behind you. Those of you have employment practices liability insurance, EPLI insurance; also will have to be in touch with your carrier. Frequently, the carriers in these kinds of cases will compel you pursuant to the terms of the policy to resolve the case even if you do not want to. So there is more to this Fox case that meets the eye, as you know there was another Fox News reporter, Andrea Tantaros who has also filed a lawsuit against Fox News. We will have to wait and see whether that case gets settled in a way that is

comparable to the Gretchen Carlson case but it would not surprise me at all if Fox News paid her a lot of money as well and at the end of the day, you have a major, major employer at the helm of which with someone who can in the best words be termed piggish and broodish and certainly somebody who does not reflect what a modern work place should be in an executive and Fox News has paid dearly for that, not only with regard to the money it paid out but with regard to its reputational value and obviously those of you who out there who have ever had a harassment case or God forbid may face one in the future, always think about the potential reputational hurt that you have in addition to the monetary damage that you may incur as a result of these cases. All of which again harkens back to something I said in a prior telebrief a few weeks ago which is the Equal Employment Opportunity Commission's white paper on harassment training and the importance of that harassment training in the workplace and how it should be conducted and how frequently it should be conducted. So again keep that in mind. I do not know how many of you out there do regular harassment training but you ought to give it a thought if you have not done it for while about instituting that, it is a good time in the fall to do it sort of as an end of the year retrospective and a look-forward to the new year as well.

Okay, I wanted to bring to your attention a relatively recent case, it was a Maryland Federal case decided by Magistrate Judge Jillyn Schulze. This was decided June 28, 2016, just a couple of months ago and it is a wage and hour case which offers some lessons for those of you out there who have faced overtime issues and complaints by employees. In this case there was a supply technician who was employed by the Montgomery County Department of Corrections and this employee followed an FLSA claim against Montgomery County and in the lawsuit indicated that the County refused or failed to pay him overtime when he worked more than 40 hours in a particular work week. The case went to trial and he was able to factually prove a trial that he worked 192 hours of unpaid overtime over the course of three years and the total amount of money that was awarded to him in terms of his unpaid overtime seems relatively small. It was $7,344. Now what happens in a Fair Labor Standards Act case, as some of you may know or some of you who may be unfortunate enough to be in the position of having had one of these through an audit or a lawsuit, is that any time there is an award of overtime or wages due, the court has the discretion to award what are called liquidated damages. Liquidated damages are simply an amount of damages which are equal to the amount of the unpaid wages to the employee. So in this case, the unpaid wages amounted to $7,344, however, the plaintiff in this case petitioned for liquidated damages in an equal amount to $7,344. Under the Fair Labor Standards Act the court has discretion to award that but a defense by the employer is that if the employer shows that it acted in good faith and had reasonable grounds to believe that the conduct was not contrary to the statutory requirements of the Fair Labor Standards Act the court has the discretion to deny those particular benefits. What came out in this case was that this person who brought the lawsuit was repeatedly told not to work overtime, he ignored the repeated instructions and orders of his supervisors not to do so and that he was supposed to call a supervisor if he wanted authorization to work overtime, which he did not do. For those of you out there who have overtime policies in your handbook or standalone policies should obviously indicate to your employees that nobody has the right to work overtime unless authorized by a supervisor. The problem under the Fair Labor Standards Act is that the standard for payment of overtime if

somebody works more than 40 even if that person has been prohibited from working more than 40 is whether or not that person has been suffered or permitted to work. Meaning then under the Fair Labors Standards Act even if you have a prohibition on the working of overtime and you know or you should have known that the person is working overtime anyway, you are going to get stuck under the statute paying that employee overtime. Now that does not mean that you cannot discipline the employee for having disobeyed an instruction but you cannot refuse to pay the overtime because the person has actually worked it. In this case that was decided by a Magistrate Judge in the district of Maryland the petition for liquidated damages was denied and the reason was is because the judge decided that the employee was really guilty of insubordination in having worked this unauthorized overtime. But that was not the end of the inquiry because in Fair Labor Standards Act cases as you know, if the employee prevails then the employee can also get attorney's fees and interestingly in this case although the employee only got a verdict of over $7,000, the judge awarded the plaintiff's counsel over $30,000 in counsel fees, in fact it was more than $32,000 in attorney's fees and costs. A multiple certainly of the $7,000 in unpaid overtime that the employer was liable for and therein lies the problem in trying to resolve these Fair Labor Standards Act cases if you get hit with a complaint by an employee or an ex-employee and there is an attorney involved representing the employee. Because frequently what happens is even though the amount of money in terms of unpaid wages or overtime may be relatively small to the employee or employees the petition or the request for attorney's fees always outdistances the actual amount that you may owe in wages and that makes it a lot more difficult to settle these cases in the long term. So sometimes when the employee leaves your employ and you get a claim for unpaid wages, it may be easier just to pay that particular employee before there is a lot of attorney's fees that are accumulated because EPLI policies typically do not cover unpaid wages or overtime and if the case goes to suit and you have a relatively small verdict or settlement in terms of unpaid wages or overtime, frequently the request for attorney's fees will outdistance those unpaid wages by a multiple; so keep that in mind when you have claims for unpaid wages or overtime.

The other day I had a client call me and asked about policies that they could implement to prohibit tattoos or body piercings in the workplace. And just to make sure everybody understands what the law is, this has nothing to do with accommodations for dress in a religious accommodation issue. So that employers do have the right to outlaw tattoos or piercings in the workplace or to have a policy, which indicates that employees are obligated to cover their piercings and tattoos and even if they do not have a policy which says that they need to be covered that it would prohibit the exhibition of any tattoo, which would have some sort of violent overtone to it or promote any kind of violent or hostile or harassing kind of a statement. I mean today we live in an age when particularly younger people, the percentage of tattoos among those people is ever growing, it seems to me and as an employer, you may want to maintain a certain image and there is nothing that would prohibit you from having a policy which prohibits body piercings or tattoos as a matter of image in your company and/or a policy, which mandates that employees cover them up at least while at work.

Significantly, I wanted to bring to your attention a new law in the state of Massachusetts, not because those of you out there may have a lot business or do

business in Massachusetts but only as an indication of what may be coming down the pipeline. So, on August 1, 2016, just a month ago, Massachusetts through its Governor Baker signed into law a statute entitled the Act to Establish Pay Equity and it has several aspects to it but the one that I want to bring to your attention is a restriction on the ability of an employer to get information having to do with past wage history of an applicant. Those of you out there who have applications, I am sure on your application you generally have questions, which relate not only to the past positions that an applicant may have held but also title and particular wages or salary. Well under this new law, which is not supposed to be effective until January 1, 2018, what the Massachusetts legislature enacted and which was signed by the governor is that Massachusetts as of January 1, 2018 will prohibit an employer from requesting or requiring as a condition of employment that an applicant disclose his or her prior wage or salary history and it would also prohibit the checking with a prior employer of that perspective employee's history unless there has been a conditional offer of employment made to the employee at the time that the request for this history of salary payments has been made. So, I am not sure how much this particular statute will be enacted or followed by other legislatures throughout the country but obviously there are good reasons for requesting salary history of a particular employee. Frequently, you want to use that as a baseline in your negotiations with a particular applicant or you want to see how the salary has progressed through the different jobs that a particular applicant has held. So, I view this as a very restrictive kind of a statute and again one that limits the ability of an employer to make a reasoned decision and a reasoned analysis of a particular applicant's salary history and qualifications.

The EEOC, I just wanted to mention, on August .29, 2016, issued its final guidance on workplace retaliation. You may remember that back in the early part of this year in my telebrief, I indicated that they had issued a draft of their retaliation policy because it had not been reviewed or revised in many years. So they asked for public comments and they got many comments and you can go to their website and you can read it, it is fairly extensive but I just wanted to mention that this was published on their website on August 29, 2016 and it behooves everybody to try and take a look at that.

I wanted to mention while we are talking about the EEOC, that they have recently filed a lawsuit on August 25, 2016, in the United States District Court for the District of Arizona and in this case, they have alleged that the employer in this case violated Title VII when it revoked a job offer to an applicant who had taken a drug test and it came up positive for a prohibited substance but the prohibited substance was a prescribed drug. It happened to be for the applicant's ADD and the employer's HR person refused to allow the applicant to have a doctor explain why this drug was needed and how, if at all, it would have any impact on the person being able to do the essential functions of the job and in the EEOC's press release, it stated that even when employers are legally permitted to conduct drug tests, they still have to accommodate actual or perceived disabilities of applicants or employees and so in this case what they are alleging, and we will have to wait and see what the court says but I think there is probably a good chance that they may prevail, that even though the employee failed the employer's prescribed drug test, the failure resulted from a prescribed drug that may or may not have affected the applicant's ability to perform the essential functions of the job with or without a reasonable accommodation. So those of you out there who utilize drug tests, I think

you got to make sure that if a person fails his particular drug test that you know the reason why and if it is a prescription by a physician, you may have to engage in an interactive dialogue with that applicant and/or the applicant's physician to ascertain whether or not it would effect the ability of the employee or the applicant to do the essential functions of the job.

The last thing I wanted to mention is that the Equal Employment Opportunity Commission has dealt with the issue of obesity in applicants or employees and a plaintiff in the Eighth Circuit has requested that the Supreme Court review this particular issue and declare that obesity in and of itself is a disability under the ADA. There is a split in the circuits on this in the Federal Circuits for instance the First Circuit found that morbid obesity is a disability under the ADA while the Second and Sixth Circuits along with the Eighth Circuit has found that obesity is only a disability when it results from an underlying physiological reason and so a plaintiff arising out of the Eighth Circuit case has petitioned the Supreme Court for review on the basis that there is a split among circuits as to whether or not obesity in and of itself is considered to be an ADA protected classification. So we will have to wait and see whether the Supreme Court accepts certification in this case.

Alright I know there are many things I covered today; if anybody has any questions or comments, feel free to bring them up now or if you would rather, you know, contact me at 410-209-6417 or my e-mail at hkurman@offitkurman.com. Any questions or comments out there that I can deal with? Well, having heard none, we will close out this session and we will see you at the end of September at the next telebrief.