LABOR & EMPLOYMENT TELEBRIEF
By
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April 27, 2016

Howard Kurman: Alright, good morning to everybody. It is Howard Kurman and we are here unbelievably almost in May, the last telebrief of April. The first telebrief in May will be Wednesday May 11th, that is the second Wednesday in May. Alright, plenty to report on today as usual.

The first thing I wanted to indicate is that last week a Republican congressman introduced a resolution into Congress to block the Department of Labor's Persuader rule. You heard me talk about the Persuader rule in the last few telebriefs which is the Department of Labor's new rule, which supposedly going to go into effect April 25th or was supposedly going to go into effect April 25th which has to do with reporting both employer and consultants in the context of a union campaign if that consultant is providing anti-union advice or consultation and according to this resolution and according to Representative Bradley he stated that "worst of all no one would be hurt more by the Persuader rule than small to medium size businesses. The rule is ultimately just another attempt by the Obama Administration to upset decades of legal precedent and put the interest of big labor bosses over what is best for American workers. Congress must act to stop this flawed rule from moving forward. I do not think that this legislation or proposed legislation will get any traction. I think the more likely result is it there are lawsuits now pending in Minnesota, Arkansas, and Texas in order to invalidate this Department of Labor rule and while the litigation process takes some time I do believe that those particular pieces of litigation have a much more likely result of either blocking or getting the Department of Labor to amend this rule because as it stands in my opinion it is very poorly drafted, it is vague, and I think it is overly broad in terms of what it intends to prevent between a company and its outside consultants including its attorneys. So stay tuned and I will let you know how this litigation proceeds.

There are a couple of sports figures that are in the news in the last week. Normally, it is not that big a deal to talk about sports figures, except that both of these situations have impact or have in my opinion some effect on employers in the employment law context. So most of you know or heard that on Monday, the Second Circuit reversed a decision having to do with Tom Brady. As you know Tom Brady was originally suspended by NFL Commissioner Goodell for four games as a result of the so-called Deflategate scandal or controversy under which it was alleged that Brady and the New England Patriots deflated footballs in the NFL Championship game in an attempt to create an advantage for the New England Patriots and that Tom Brady went beyond that and purposely destroyed his cell phone in order to hide evidence that may have been incriminating to Brady and the Patriots. When this suspension was appealed to the Federal District Court, the Federal District Court reversed and invalidated the four game

suspension. The NFL appealed that reversal to the Second Circuit, and in a 2:1 decision, which was promulgated and distributed on Monday, the Second Circuit reversed the decision below and held that Commissioner Goodell's decision and imposing that four game decision would be validated as opposed to invalidated. Now, the reason I think that it is of some use to employers out there and also some warning is that the real essence of the Second Circuit's decision was the deferral to the language in the collective bargaining agreement between the NFL and the NFL Players Association, which gave Commissioner Goodell the discretion and the power as the arbitrator to rule on disputes between the players association and the NFL. It is a little unusual because essentially it gives the commissioner the power to rule not really as a disinterested arbitrator as you would have in most arbitration decisions or in most arbitration clauses in a collective bargaining agreement or in any other kind of agreement. And the reason I think that it is useful to point out to you or to bring to your attention is that those of you out there who have arbitration decision resolutions or arbitration resolution proceedings or procedures in employment agreement or in any other kind of agreement, you need to know that courts pay particular attention and defer greatly to arbitration context and the power of an arbitrator to render a final and binding decision, and in this case essentially what the Second Circuit was saying is that whether or not Arbitrator Goodell was right or wrong concerning the substance of the dispute that they were going—they meaning the Second Circuit—were going to defer to the language of the arbitration procedure that was found in the collective bargaining agreement. So in essence, the union and Brady were hoisted on their own petard because the Second Circuit said that the grievance procedure rendered Arbitrator Goodell as the final arbiter of disputes between the players association and the NFL, and it is a little weird that Goodell was the one who was rendering the decision, but the Second Circuit said that is way they agreed and they were going to defer to Arbitrator Goodell unless there was some aspect of the decision, which was clearly egregious or clearly outside of the realm of his authority, which was not the case here. So, if you are an employer and if you are contemplating having arbitration in an agreement with an employee, you need to basically set forth that the decision-making process or the arbitration process will be a fair one and you need to make sure that if you are going to use arbitration that there is a good basis for selecting your arbitrator and that the arbitrator probably would be a member of the American Academy of Arbitrators or some such organization because you certainly do not want to put your decision involving an employee's employment status in the hands of an arbitrator who may not be qualified to render that decision because if it is final and binding a court will not disturb the decision of that arbitrator anymore than the Second Circuit disturbed the decision of NFL Commissioner Goodell in this case. Those of you who are contemplating or have arbitration provisions in your agreements with employees know that you are going to need to have a very reputable arbitrator render a decision because the chances of that decision being overturned on appeal are very remote in most cases. So, even though this is a decision of some repute involving certainly one of the most famous NFL players out there today, the lessons that we can learn from that are important when we

contemplate as employers having arbitration provisions in our agreements with employees.

There was another decision of note last week involving a former baseball player, Curt Schilling. Those of you out there who have heard of Curt Schilling know that he was a hall of fame pitcher and then he was working for ESPN as a commentator on television. Curt Schilling last week was fired by ESPN because of an alleged offensive tweet that he made about the recently enacted law in North Carolina, which required persons to use the bathroom associated with the sex of their birth as opposed to the preference that that particular transgendered employee or transgendered individual might want to use and the tweet that Curt Schilling distributed was allegedly embarrassing to ESPN. It was offensive and punitively homophobic. And what happened was that ESPN got a lot of negative commentary about Curt Schilling's tweet and wound up firing him. Curt Schilling has been in trouble before because of his right wing commentary on various social issues and in this case I think ESPN said this was the straw that broke the camel's back and they terminated him.

Now, importantly, Curt Schilling is not a member of a union, was not engaged in so-called protected concerted activity under Section 7 of the National Labor Relations Act. We know that in many cases in the last year or two and I have talked about these where employees have negatively commented about their employer on Facebook. Those Facebook comments have been "liked" by their co-employees. Employers have wound up firing the particular employee and those particular firings have been overturned by the National Labor Relations Board on the basis that the employees were engaged at the time they made these comments in protected concerted activity under Section 7 of the National Labor Relations Act. Here, Curt Schilling was neither a member of a union or engaged in protected activity and there was nothing that would have prohibited ESPN from firing him as a result of an embarrassing comment that he made on social media. So, there is a difference obviously between an employee who embarrasses his/her employer, where the employee is not engaged in so-called concerted protected activity or where the employee may not have had a just cause provision preventing termination either as a result of a collective bargaining agreement or as a result of an individual employment agreement.

The jury is still out, so to speak, on whether under either a just cause provision in a collective bargaining agreement or under an individual employment agreement that has a just cause provision, whether an employer would be free to terminate an employee or negative comments like that espoused by Curt Schilling on social media. But its clear that in the absence of concerted protected activity, a comment about an employer that would be deemed to be defamatory or about an employee that would be deemed to be defamatory or violative of the employer's workplace harassment policy, its clear that in that situation the employer would be free in its discretion to terminate an employee, whether that employee was sort of an employee of great repute like Curt Schilling or just an ordinary rank-and-file employee.

I wanted to talk a little bit about another case that was decided by the Fourth Circuit. This was decided last fall, but the reason I bring it up is because I was recently consulted by an employer, a client of mine, about implementing a mass layoff. And the mass layoff was implemented, and they came to me and they said they wanted to make sure that they complied with relevant law, so that they wouldn't be attacked peripherally by employees on the basis of either gender discrimination or age discrimination, and I advised that client on how to implement that layoff. And I think that this Fourth Circuit case, which goes back to last fall, it's a case involving an employee who attacked her employer, named Harris Corporation, and this was the case that was decided by the Fourth Circuit back in October of 2015, and in this case this employee was hired as a contract manager in the Harris Corporation's Columbia, Maryland office. Harris Corporation is a company that is based in Rochester, New York. And this employee was hired under the contemplation that she would be involved in a lot of government contracting work. And what happened was that that government contracting work failed to materialize or come to fruition, and the company experienced a great decline in sales and decided that it needed to do a significant layoff as a result of this. So what they did was they involved themselves in a process known as a banding analysis. And a banding analysis is sort of a common analysis used by companies that are considering mass layoffs. And what they do is they look at and organize employees according to their job functions and they assign objective scores associated with a plethora of criteria, and in this case the criteria were customer and program experience, job performance, skill criticality, versatility, technical and professional knowledge, leadership skills, and the anticipated contributions. And when they do this analysis, they rank the employees under this banding analysis and then do a statistical analysis to determine whether there would be any adverse effect on employees who were in protected categories, such as women, minorities, etc. This employee at Harris was one of two contract managers who were considered to be inclusion in the mass layoff. And she was the one that was laid off as opposed to the male who was deemed to have a higher banding analysis score and had a higher level of tenure with the company. She wound up suing the company contending that her termination constituted age and gender discrimination, and retaliation for a prior complaint that she had rendered to the company about gender discrimination. A summary judgment was granted in favor of Harris Corporation. She appealed that to the Fourth Circuit and the Fourth Circuit affirmed the decision of the lower court in granting summary judgment. And essentially what the Fourth Circuit looked at was that there was not any evidence that was submitted by the employer, Harris, which indicated that the financial analysis that the company had undergone was not the legitimate bona fide reason for the layoff. They looked at the process under which the company had used the banding and statistical analysis, validated that analysis and essentially said that it would not substitute its judgment or that of the company in executing the layoff. The takeaway from this is that those of you out there, who are considering not individual layoffs but mass layoff, need to know that if you do it in a structured way, if you do it in a way that is predicated upon an objective analysis, bona fide business reason and that you

document that analysis and document those reasons, it is very unlikely that a court will overturn your analysis in favor of an individual complaint. On the other hand, if you institute a layoff, which is not predicated upon objective criteria, and we're talking about mass layoff not an individual layoff, but is not predicated upon objective business criteria or criteria that can be analyzed and looked at in an objective way by a court, you subject yourself to sort of second judging by a court, if the court will essentially be able to say there seems to be something going on here that wasn't an objective analysis. Those of you who are considering a mass layoff know that you need to undergo a layoff in an objective business oriented way, and generally I recommend that those be handled in consultation with an employment attorney.

The last case that I wanted to mention this morning was really one that is not unique, but nevertheless it was a case decided very recently by an appellate court in California, which basically is in keeping with, I think it a trend throughout the country that an employer can violate the Americans with Disabilities Act and State Act from terminating an employee based upon associational disability discrimination rather actual disability discrimination of the employee. So in this case, that the employer in California had actual knowledge that one of its employee's sons required daily dialysis treatment, that for several years the employer scheduled that employee so that employee could be around at night with his son in order to help with dialysis. In short what happened was a new supervisor came on, denied the employee the right to work on that particular shift, the employee was ultimately terminated and claimed that his termination was predicated upon associational discrimination and the court upheld that and cited cases not only under California law but under the ADA where an employee can realize and assert a viable claim for associational disability discrimination if that employee is subjected to an adverse action because of the employee's association with someone who has a disability. So, I bring this to your attention because not only do employers have risk when they fail to accommodate or may discriminate against an individual employee because of that individual's own disability, but nevertheless where the individual may not have that disability, but may be associated with a family member who has a disability and where there is adverse action taken. There, under the right circumstances, that can lead to an associational disability claim. So in this case and in other cases you need to pay attention if you have knowledge that there is the need for an accommodation or the employee is asserting an associational right, don't just dismiss it out of hand; because even under state law or relevant federal law, that may constitute an action that's cognizable under the ADA.

All right, those are the developments for the day. As always, I invite any questions or comments and those of you out there who don't want to ask that in this forum, can certainly contact me privately on my number 410-209-6417 or my email at hkurman@offitkurman.com. Okay, Michelle can you take this off of presentation mode.

Michelle: Presentation mode is now disabled.

Ann Barnes: Howard, did I miss you putting a definition of mass layoff and is it connected with the Warren requirement?

Howard Kurman: No, it's not connected with the Warren requirement. Mass layoff here is really intended to mean really any time you are contemplating laying off more than an individual person, so where there would be, and usually it's probably a situation where you're laying off three, four, five, six, seven people, it's a situation where you're really contemplating more than simply a one-off layoff of an individual, that you need to pay attention to these objective factors. So, a Warren layoff is a particular statutory development. Obviously, it calls for certain notice requirements, etc. My comments today are not necessarily limited to a Warren-act situation.

Ann Barnes: Got it. That means there is a great gap between the layoff of two or more and when you would trigger Warren.

Howard Kurman: Absolutely.

Ann Barnes: Okay, thanks.

Howard Kurman: Sure. Any other questions, comments? Okay, if not, I know we covered a lot of stuff today, so I appreciate your participation and we will see each other figuratively on Wednesday, May the 11th, at the first telebrief in May. Thanks very much.