LABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire
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Howard Kurman: Good morning. Today is October 14, 2015. It is time for our biweekly telebrief and this will be pre-recorded because I am out of town doing some Labor and Employment Seminars with a partner of mine. However, if you have questions as before, please feel free to submit them via email at hkurman@offitkurman.com or via my direct telephone line of 410-209-6417; I will be back in the office on Thursday, tomorrow.

There is plenty to talk about this morning as usual. The first thing I wanted to mention is a case which is upcoming and will be decided by the Supreme Court in the October term. The case called Green versus Donahue. In this case a former postmaster in Colorado claimed that he was constructively discharged when he was passed over for a promotion. And the question before the Supreme Court will resolve a circuit split and that is when does a clock begin ticking for purposes of the statute of limitation. That is, does it begin ticking for the statute of limitations purposes when the worker or employee resigns, that is his last day of employment, or when the employer allegedly commits the last discriminatory act which precipitates his constructive discharge. Obviously, it makes a difference with regard to when the statute of limitations would begin to run and as I said there is a split of circuits and the Supreme Court will have to decide essentially when this statute begins to run, we will probably get a decision as you know the way the Supreme Court works around June 2016.

Let me spend some time on legislative developments, which I think have some real practical value for everybody as well. As you know, I have previously in a telebrief talked about the Labor Board's decision in the Browning-Ferris case and in that Browning-Ferris case in a 3:2 decision, the Labor Board held that two employers could be held to be joint employers of workers even if one of those employers never exercise direct control over the employees but merely reserved the right to do so or exercised indirect control; a very significant decision. On September the 29th, the House Subcommittee on Health, Employment, Labor, and Pensions sought a hearing at which the so-called Protecting Local Business Opportunity Act or H.R. 3459 was introduced. A corollary bill was introduced in the Senate, Senate Bill 2015. These bills would require "that two or more employers may be considered joint employers for purposes of this act only if each shares and exercises control over essential terms and conditions of an employment and such control over these matters is actual, direct and immediate." This introduction of these bills obviously is in an intent to turn back or to rescind or reverse the Board's decision in the case of Browning-Ferris decision, which we talked about in the last telebrief. Whether either of the Senate or House bills have an opportunity to really be passed is opened to question. However, it does signal the fact that both with regard to subcontractors and with regard to franchisors or

franchisees and staffing companies, this is an issue of great interest and there was a great outcry after the Browning-Ferris decision by the Board that the Board had overstepped its bounds in determining joint employer status and that, therefore, these were attempts in Congress to reverse or rescind that particular ruling.

In another sort of legislative development, this happened in early October, at which in a summit, at a White House Summit on so-called Worker Voice, President Obama urged Congress to pass legislation which was pending in both houses that would amend the National Labor Relations Act to let workers who were disciplined for union organizing or other protected activity collect treble damages from their employers. As reported by the Bureau of National Affairs in its report "Speaking at the White House Summit on Worker Voice, Obama said Labor Unions were "the driving force for progress" in establishing basic benefits such as the 40-hour work week, overtime pay and retirement plans for American workers "the middle class, itself was built on a union label" he said. As he further indicated "not all Americans have shared in the economic progress that have occurred since he took office and that is what this Summit is about making sure that as our economy continues to evolve working Americans do not get lost in the shuffle. Now, it is interesting to note that the audience of this particular Summit included Labor Secretary Thomas Perez and AFL-CIO President Richard Trumka as well as other labor union leaders and worker advocates. Obama went on to say that the biggest challenge America continues to have is making sure that everybody in this new economy is participating and everybody who works hard is getting paid a decent wage with decent benefits. As he indicated, wages need to rise more quickly, we need jobs to offer the kind of pay and benefits that let people raise a family and in order to do that workers need a voice. They need the voice and the leverage that guarantees this kind of middle-class security. Now again, this is indicative of the Obama initiatives during his first and second administration in which they have taken up the mantle, which has been very much consistent with the mantle of the labor unions and the philosophy of labor unions, which is to impose penalties on employers as much as possible when you are dealing with union organizational attempts and it began with the Labor Board pushing its quickie election rules, so-called ambush election rules, and now we have the President who is indicating that there should be penalties up the treble damages for employers who take disciplinary action against employees during union organization campaigns. Whether or not any of this will gain traction, I tend to doubt it with a Republican Congress, but it significant that it's once again an initiative which is ultra-employee friendly and ultra-employer unfriendly.

Again, on the legislative front on October the 6th Senator and a Congressman introduced legislation, which will not be foreign to most of you that would make it again easier for workers to form unions or to organize labor unions at their places of employment by allowing the NLRB to certify that union if the majority of eligible workers signed valid authorization cards. As most of you know, out there, in the great majority of cases, the union seeking to represent employees will only get representational rights if it wins an election certified by the National

Labor Relations Board. However, in a not unsurprising development, this is a bill sponsored by Democratic presidential candidate, Bernie Sanders and Representative, Mark Pocan, a Democrat from Wisconsin, called "The Workplace Democracy Act". It would require employers to begin negotiating with a union within 10 days after receiving a request from a union and compel binding arbitration if the parties do not reach an agreement within 90 days. The card check bill, or part of this bill, that was introduced similar to legislation, that was introduced but never gained any traction in Congress in 2010. As Sanders said "Millions of our people who want to join unions who understand that collective bargaining will raise their wages and income are unable to do so because of the courses and often illegal behavior of their employers." He says that has got to change, if workers in this country want to exercise their constitutional right to join a union they must be allowed to do that. Again, this is another one of those statutes, which is unlikely to gain any kind of successful traction in Congress because both the Senate and the House are controlled by Democrats, but again it is an indication that we have more and more pressure being placed upon, at least Democratic legislators, to make the organizational campaigns on the part of union to be much more efficacious and not have to go through the election certification program or process, which has been in effect since the 1930s when the National Labor Relations Act was enacted.

Let me spend some time discussing a very practical case, a case that I think has implications for those of you out there who faced ADA issues on a regular basis. It is reported by again Bureau of National Affairs. This is a case called Wagner versus Sherwin-Williams. It is a case decided on September 2, 2015 by a Federal Court in Kentucky and is reported by the Bureau of National Affairs in its summary. They basically indicate that a former Sherwin-Williams' company manager who lost his peripheral vision following a stroke and was placed on permanent disability leave because he could no longer drive a vehicle, is not a "qualified" individual with a disability within the meaning of Americans with Disabilities Act. In this case, the court granted summary judgment to Sherwin-Williams on the plaintiff's claims that the company failed to accommodate his disability. The judge deciding this case found that driving was an essential function of the Plaintiff's job and that he failed to show that he could perform that function with or without reasonable accommodation. As the court went on to rule, they basically stated that in order to be qualified, as we all know an employee must be able to perform the essential functions of his job with or without reasonable accommodation, the court stated that in the present case that the employee could no longer drive vehicles even with accommodation. Therefore, the question as to whether or not the driving was an essential function of the job was the core issue before the court. So as the District Court said, the driving was essential to Wagner's job based on two statutory factors namely the employer's judgment in any written job descriptions, the court examined the fact that executives for Sherwin-Williams testified about the essential nature of driving while the company's job descriptions stated that managers "must be able to drive a car or van." Also the court indicated that because the employee spent 6

to 12 hours each week or roughly 25% of his time driving, this was a major factor also in the decision. Essentially what the court said was that given that all six factors, two from the statue, four from the regulations, all point towards the same conclusion, that driving is an essential function. No reasonable jury could find otherwise the court said granting summary judgment to Sherwin-Williams.

From a practical standpoint for all of you out there who have ADA questions from time to time, it points out, as I have indicated in prior telebriefs, that you very much need to make sure that if you deem a particular act or particular function to be essential, you need a couple things in order to substantiate this in an accommodation case or in an ADA case. One is job description, itself; so hopefully whatever physical requirements you have of a particular employee with regard to certainly a particular job in question, that job description will reflect accurately the physical requirements of the particular job so that if called upon in a challenge you can substantiate that the job requirements as set forth in the job description are consistent. Secondly, it also helps, of course, that the operational management who supervised the particular employee are consistent in making sure that their testimony will corroborate, that the requirements, the physical requirements, that are set forth in the job description are consistent with the actual job functions that are performed in real life by the employee. If they are consistent and if you have a clear job description, you will go a long way towards defeating any kind of accommodation issues raised by an employee with an alleged stability.

Let me now spend a few minutes on some of the issues that all employers face when they have a situation in which a high level management employee or executive may be terminated and there are negotiations underway which would obviate the need for a termination and in lieu thereof be replaced by a separation agreement. I am frequently called by clients in these kinds of situations, and there are a number of common factors that come up which you all need to consider obviously when dealing with the proposed departure of an executive or high level employee where there is not going to be an active termination.

First, will be of course the treatment of separation pay or severance pay, and the question is how much will that person get, how long will the severance period run. There is no standard of time. It is always negotiable between the employee and the company, but it is suffice to say that if you are dealing with a high level or executive employee that person is probably going to get an attorney to represent him or her, therefore, you probably do not want to go in and lead with your best severance offer at the outset. Give yourself room to negotiate with that person, so that if legal representation is obtained you can always manipulate the severance and negotiate some leniency in the severance after the attorney shows up and begins negotiating.

Secondly, an issue that frequently comes up is how long benefits will continue. Again, this is an issue of negotiability on the part of both the employee and the

employer. Frequently, a standard would be that benefits, particularly health benefits, would be coterminous with the severance period, so if you agree to a six-month severance period, you will also agree to a coterminous continuation of benefits for six months as well, but again there is no hard and fast rule on this, there is no law that says you have to do it in a certain way, but that is a very common kind of a term that you would have in negotiating the severance package.

Another kind of issue that comes up and frequently with executives is whether or not any existing restrictive covenants that is post termination restriction, either on solicitation or competition or confidentiality, would be continued after the particular executive departs. Now, if that executive already has an existing agreement, you may want to restate that agreement in the severance proposal or severance agreement, itself. If the executive does not have those you may want to pay a little extra severance as a quid pro quo for getting post termination restrictions. Whether they are confidentiality restrictions, non-solicitation provisions, non-pirating provision that is non-pirating of current employee provisions, etc., so those are the things that always come up with executives.

Another common provision is how is the departure of the executive going to be characterized, both internally and externally. Externally, it is frequently the case with executives that you would negotiate a mutually acceptable letter of reference. It is not mandatory of course but it is frequently done where a letter of reference is appended to the actual severance agreement and particularly with an executive who has been with the company for some period of time. It is not going to be very common for an executive to be satisfied with simply a neutral reference, therefore, do not be afraid of providing some sort of positive wordsmith reference that both sides agree on when an executive departs. Along with this, of course, you want a non-disparagement provision, which will mandate that neither the company nor the departing executive will disparage the other post termination; that is a very important provision.

Another issue that frequently comes up is how are you going to communicate the executive's departure internally to your other management and rank-and-file staff. That really is determined on a case-by-case basis depending upon the facts and circumstances under which the departing executive leaves. I have done it many different ways and frequently transparency is what is sought by the company and is able to wordsmith something that would be satisfactory to both the departing executive and to the company other than simply the executive is left to pursue other opportunities, which of course says everything and says nothing at the same time.

These are common issues that come up when any high level executive or managerial employee departs. It is something that you will want to think about obviously in any kind of situation and discuss with your employment attorney in any kind of particularly problematic situation.

Finally, I just wanted to mention from a practical standpoint an issue that I know I recently talked about but comes up with increasing frequency and I just faced this issue with a client just last week who **_____ audio cut from 23.53 to 24:25____** and many other employees move around with a great deal of more frequency than they used to. It behooves you as part of your vetting process, particularly of anybody in sales or anybody of a high-ranking executive or managerial level to enquire as to whether that person has any postemployment contractual restrictions. Whether they be restrictions on confidentiality or disclosure or use of information, whether they deal with non-solicitation of prior customers either of that particular person or of his prior employer, whether he is limited in any form of competition after he has left his prior employer or whether he is prohibited or restricted in some way from hiring or approaching the hiring of employees from his prior employer; this is very important because the last thing that you want to do is get a letter from an employer indicating that after you have invested time and money in hiring an executive or a successful salesperson that that particular person is subjected or subject to post employment restrictions and not only would it make the person's employment at issue, but it could create liability, monetary liability, for you as somebody that has hired this individual either with actual or constructive notice that that person has post employment restrictions. So, as part of your normal vetting process, whether a person is coming through a headhunter or whether you are dealing with that person directly, please make sure that you inquire about any other kind of postemployment restrictions that the person has and ask that person to produce any written document that might in any way limit his ability to freely compete in any way with his prior employer.

So, those are the developments for the day. The next telebrief, hopefully I will cover this live as opposed to being prerecorded, will be on Wednesday, October 28th. I look forward to speaking to all of you and again if you have any questions, I will be in the office tomorrow, which will be October the 15th, 410-209-6417 or you can get me by email at hkurman@offitkurman.com. Thank you very much.