LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Good Morning everybody it is Howard Kurman, as opposed to the last couple of telebriefs where I pre-recorded it, I guarantee you that I am as live as can be or as live as I can be this morning. Anyway, the next telebrief will be live as well on November 11th that is the second Wednesday. Okay, let us get started.

I wanted to report on a couple of National Labor Relations Board developments which obviously have practical import for you as we have talked about numerous times before. This actually is a case that was originally decided by the National Labor Relations Board and then has been appealed and affirmed by the Second Circuit, which is the circuit as you know which covers New York and Connecticut and is reported in BNA, so this is a case called 3D, LLC versus NLRB, you may have heard me talk about this when this was at the board level a couple of years ago. What happened was, as reported in BNA, Connecticut Sports Bar illegally fired two employees who criticized their employer during an online Facebook discussion. The US Court of Appeals for the Second Circuit ruled October 21st, only a week ago, affirming a National Labor Relations Board decision. So, in this case the employer which was doing business as a sports bar fired the workers after one commented on Facebook that the company had mismanaged payroll tax withholdings and a second employee added a Facebook like to the posting. At the board, the board found that these two employees were engaged in concerted protected activity under Section 7 of the NLRA. The employer appealed to the Second Circuit and the Second Circuit lo and behold affirmed the decision of the National Labor Relations Board. So, what had happened was this bartender named Vincent Spinella, a good name for a bartender probably, used the Facebook like feature to endorse the status update and he later told Triple Play owners that he stood behind the comments employees made during the Facebook discussion and waitress, Jillian Sanzone posted I O too, such an asshole. So, she was commenting on the company and the supervisor. What the employer had argued in this case both at the board and at the Second Circuit was that these comments were unprotected, that they may have been concerted, that is they may have been made together but they were unprotected by Section 7 of the NLRA. And what the Second Circuit said was they would not engage in chilling employee speech online and that, therefore, they upheld the National Labor Relations Board decision that these two firings were illegal under Section 7 of the National Labor Relations Act. So, I know that I have spoken about this numerous times in the past with regard to social media policies and the need to be very prudent if you are contemplating disciplinary action or even a discharge of an employee based upon a post particularly where the posting by an individual employee has been liked or has been joined by another employee. So, I would say to you its very, very important if you are contemplating the termination of an employee based upon a Facebook post to talk it over with a skilled labor lawyer

before you do it because there are nuances that are involved, more and more of these cases are coming down really on a weekly basis. So, again word to the wise, have your social media policy perused, examined and analyzed and also when you enforce it make sure that you are not interfering with the Section 7 rights of employees under the National Labor Relations Act.

Speaking of the NLRB, there was a very recent case called Boeing which was decided in the last few weeks where an employer was found to have unlawfully maintained and routinely distributed a confidentiality policy says BNA, that prohibited employees from discussing human resources investigations with their co-workers despite the contention that the policy was necessary to protect witnesses, victims or employees under investigation from retaliation or harassment. Because in this case the board found that the employer's generalized policy and generalized concern about protecting the integrity of all its investigations was insufficient to justify this sweeping policy.

I know in one of my prior telebriefs about a month ago I talked about a board case, which was similar where the board said in the context of an investigation that you undergo as an employer that it will no longer permit employers to raise as a justification for confidentiality the fact that they will prohibit employees from discussing with other employees the nature of the investigation or anything that was disclosed during that investigation unless there is a particularized finding by the employer that a witness could be intimidated or there was a real threat of destruction of evidence, etc., this is another in this line of cases and so those of you who have handbook policies out there, which talk about maintaining the confidentiality of information during an investigation or guaranteeing to an employee confidentiality during an investigation need to re-examine those policies because at least under current board laws it stands now a generalized policy, which would prohibit employees from discussing with other employees, the nature of an investigation or any facts or circumstances surrounding the investigation would be found to be afoul of the National Labor Relations Act unless there are specific findings that would justify warning an employee not to discuss certain facts and circumstances with other employees.

One other National Labor Relations Board development; this is really from about a week and half ago October 19th, where the NLRB put out a press release saying that its office of General Counsel has issued a consolidated complaint against Community Health Systems, Inc., the parent company of a nationwide chain of hospitals. The press release goes on to say that the consolidated complaint alleges that CHS and seven wholly-owned subsidiary hospitals comprise a single integrated employer that is violated the National Labor Relations Act by engaging in a series of unfair labor practices. Specifically, it is alleged that CHS has violated employee rights by among other things maintaining rules that infringe on employees rights to discuss wages, hours and working conditions with one another and to advocate for better treatment. So, there are two aspects to this press release, which I think we have to know; one is as I said in a prior telebrief

and in a very recent case called Browning Ferris, the National Labor Relations Board found two entities, two different corporate entities to be a single employer where Browning Ferris merely subcontracted employees from another vendor, and what the board found in that case was that where there is even indirect as opposed to direct control exercised over by these subcontracted employees or temporary employees, the board would find both of these entities to be a single employer, which, of course, means that if there is any liability under the National Labor Relations Act, the company that hires the temporary employees or utilizes them or the subcontracted employees would be found to be equally liable with the real employer under a dual employer theory. As well the board in this case obviously has stressed, as I just mentioned, that any kind of rule or regulation, which impinges on the rights of employees to discuss wages, hours, and terms and conditions of employment will be prima facie deemed to be, and presumptively found to be, inappropriate and violative of Section 7 of the National Labor Relations Act.

Turning away from the National Labor Relations Board and the National Labor Relations Act really to the realm of EEO, there was an interesting case decided by the Ninth Circuit a couple of months ago, which was reported by BNA and I wanted to bring it to your attention because I think it stands for an important proposition. So, in this case a welder, and this is a case called Mayo versus PCC Structural Inc. by the way, a Ninth Circuit case. In this case a welder who was fired for repeatedly threatening to kill supervisors and managers at a metal casting plant was found not to be a qualified individual with a disability who could challenge his discharge under an Oregon Antidiscrimination Law the US Court of Appeals for the Ninth Circuit held. So, in this case this guy had been treated with medications and therapy for 11 years and was apparently copacetic on a pretty decent work plan. However, in January 2011 as reported in this case he became upset and threatening after a meeting in which he and a coworker met with human resources officials to discuss their claims that they were being bullied by a supervisor. Shortly after this meeting, the case discloses, this employee named Mayo talked to other employees about bringing a shotgun to kill the supervisor and another manager. He also made comments about planning to "take out management." What happened was his co-workers reported his threats to the management and a senior human resources manager questioned this guy and then suspended him when he said he could not guarantee that he would not carry out his threats. Lo and behold, as sometimes happens in these weird cases, he consented to a six day hospital stay after which some psychiatrist cleared him for a return to work. And the psychiatrist gives an opinion, which is stated in the court's decision that Mayo is not a "violent person" but he recommended a change of the supervisor. When the employer would not accede to this and instead terminated him, the guy sues under both the Family and Medical Leave Act in an Oregon law and it's removed to Federal Court where the employer wins on a summary judgment motion and it's appealed by the employee to the Ninth Circuit. And what happens in the Ninth Circuit is that the Ninth Circuit affirms the proposition that Mayo's credible detailed and unwavering plan to kill his

supervisors more than adequately demonstrated that he lacked the ability to appropriately handle stress and interact with others. As BNA reports the Appeals Court rejected Mayo's argument that the employer should have accommodated his depressive disorder by allowing him to return to work with a new supervisor and this is a quote from the court, "giving Mayo a different supervisor," the court said, "would not have changed this inappropriate response to stress. It would have just removed one potential stressor and possibly added another name to the hit list. We join several other courts in holding that an employee whose stress leads to violent threats is not a qualified individual".

Now, I bring this case to your attention because there are more and more cases where the alleged disability and failure to accommodate are predicated upon and employees either mental illness or instability or emotional illness and as I said many, many times before, when in doubt as an employer and as a practical matter you should always err on the side of safety and health of your employees. The legal issues can be sorted out later, but you certainly do not want to be in a position where as a result of a decision where you are permitting an employee who you have bona fide doubts about the safety or health of other employees you are allowing that employee to continue to work. And this is an important decision because it recognizes the proposition that somebody who has made threats or continuing to make threats even in the context of a medical doctor's opinion that maybe he will not do something in the future is not sufficient either to make him a qualified individual or to impose an obligation on the part of the employer to accommodate that individual even if it were a disability under the ADA. So, if your faced with situations where you have a good faith doubt about the health or safety of other employees because of the threats or perceived threats by an employee, always err on the side of safety and health and let the legal issues get sorted out down the road.

Along with the issue of disability I recently was asked a question by a client as to whether or not somebody who reports to work under the influence must be given an FMLA leave because obviously that person may have an alcohol or substance abuse issue. The answer is no, the law is clear that while the status of being an alcoholic or an addict gives one protections under the ADA or even the Family and Medical Leave Act, if appropriate under the circumstances. It does not excuse one's inability to perform the job or unfitness for duty or even violation of a workplace rule on reporting to work without any kind of substance in your system be it alcohol, drugs etc., so the answer is that if somebody reports to work in an unfit condition but says I need personal leave to take care of this issue, it is really too late. That employee needs to come to an employer prior to the time when his condition is manifesting itself as behavior in the workplace. So, there is always a distinction in the law between somebody who may be perceived as an alcoholic or a drug addict in which case there are protections that attach to that person because of that status, as opposed to the conduct of a person who renders himself unfit for work in a particular situation.

I wanted to bring to your attention a case decided by the Sixth Circuit Court of Appeals on October 16th, this is in the context of an age discrimination charge filed by a pharmacist who complained that he was the victim of disparate treatment and that other people had, other younger people had been treated differently than him. And the reason I bring this to your attention is I think the discussion by the court in the Sixth Circuit is valuable in ascertaining whether or not there's disparate treatment, which is found to be valid in a particular circumstance whether the basis of discrimination is age or race, sex, etc., and I will quote from the case because I think that it is a worthwhile practical sort of pointer for you all. In this case, the employee had indicated or alleged that he was not treated as other similarly situated employees were. And what the Sixth Circuit said was to satisfy the similarly situated requirement a plaintiff must demonstrate that the comparable employee is similar "in all of the relevant aspects." They go on to say to be deemed similarly situated the individual with whom the plaintiff seeks to compare his treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. And so it is important because those of you who have the unfortunate situation of getting an EEOC complaint by an employee where the complaint is that the employee has been treated disparately from other employees, know that with regard to really Title VII or most state statutes, when someone is complaining about disparate treatment it is the burden of that employee to prove that there were other employees who under very similar circumstances, not different circumstances, very similar circumstances have been treated disparately and thus raising a presumption that the reason for the discharge or any other kind of adverse action is predicated upon the person's race or sex or religion, etc. So again, the court went on to talk about the issue of pretext and they say that when considering whether an employer's termination decision constituted a pretext we are solely concerned with whether the employer had an honest belief in a non-discriminatory reason for taking the adverse action. As they quote, "the key inquiry in assessing whether an employer holds such an honest belief is whether the employer made a reasonably informed and considered decision before the complaint of action". I think this is another important principle that you need to recognize, which is that while an employee can always complain that he or she was the victim of inappropriate discrimination. In order to prove pretext that is that the real action, or the real motive behind the employer's action, was inappropriate discrimination. It is really the burden of the employee to prove that the employer did not have a bona fide belief in the action that it took and the bona fides of that particular action. I think this is important because those of you again who get discrimination complaints or charges often are faced with a claim that either a) the employer knew that the action was violative of the person's rights under Title VII or state law or did it purposely. And this case like many other cases, this is the most recent case that articulates it, basically states that as long as you can demonstrate as an employer that you had a bona fide reason and you had

a bona fide belief in the legitimacy of the adverse action, the employee will not succeed either under title VII or under most state analog statutes.

So, those are the developments, I did want to bring up an interesting survey that I saw in BNA just a couple weeks ago, and I will quote to you. It says that bitter dose of morning caffeine is so essential, three quarters of workers surveyed by office supply company, Staples, Inc., said they would give up social media before coffee, it goes on and says, more than three quarters of the 331 workers who participated in the survey said they consume two cups or more a day and almost half the day down three or more cups. Interesting development when we talk about the prevalence of social media, it is probably not relevant or apropos to many important labor and employment things but I found it sort of comical that the number of employees said they would rather give up social media than their morning coffee. Those of you out there who provide morning coffee for employees probably will find that interesting as well.

So, those are the developments for the day Michelle you can take it off mute if you can.

Michelle: Presentation mode is now disabled.

Howard Kurman: Okay, any questions or comments from anybody out there as I always say if you rather present a question in private certainly you can call me at my number (410) 209-6417 or my email hkurman@offitkurman.com. Questions or comments? Okay, well if not hopefully everybody gleans some practical information from today and we will see each other or at least hear each other hopefully on November 11th the second Wednesday in November. Thanks everybody and have a good day.