

Employment Telebrief-012716

Howard Kurman: Okay. Good morning to everybody. Brian, if you are on the phone would you mute it, if not we will do without muting. Everybody is a little war-weary from the snow, but nevertheless, we have plenty to talk about this morning, so we will get started.

I thought I would start out with something both humorous and it seems to be sad at the same time in terms of a commentary on our society. This was an article in the Corporate Counsel, which I get online and I will just review it with you real quickly. It says nearly 10% of college graduates in the United States, think that TV host Judge Judy Sheindlin, sits on the Supreme Court according to a recent study. It says when the survey sample was expanded to the general American public the results were even worse with 13% saying that Sheindlin is a member of the Supreme Court. To me, I thought that was both humorous as I said and sad at the same time and sort of points out the fact that those of you who are in the labor relations and HR field have a huge task in educating your managers and supervisors sometimes with sophisticated concepts in Labor and Employment Law. So if you have 10% of college graduates who think that Judge Judy is on the Supreme Court. We know that we have work ahead of us in trying to educate the general population.

That being said I wanted to talk about an issue that I think is really at the intersection of politics and Employment Law. As you know in the very recent political debates, particularly I think within the Republican party it has been a great deal of attention paid to the issue of Muslims in this country. Some people, including Donald Trump, have advocated as you know a complete bar of Muslims coming into this country and the intersection with this in the work place caused the Equal Employment Opportunity Commission on December 23, 2015, you can read this on their website if you like, to issue a statement regarding work place discrimination against individuals who are or are perceived to be Muslim or Middle Eastern. So in this press release again dated December 23, 2015, EEOC Chair, Jenny Yang, released the following statement: "America was founded on the principle of religious freedom. As a nation, we must continue to seek the fair treatment of all, even as we grapple with the concerns raised by the recent terrorist attacks. When people come to work and are unfairly harassed or otherwise targeted based on their religion or national origin, it undermines our shared and longstanding values of tolerance and equality for all," which I happen to agree with. I don't often agree with everything the Equal Employment Opportunity Commission says or does as you well know, but with this I do agree and what they did was along with the statement by the EEOC commissioner, the same day EEOC published a document entitled "Questions and Answers for Employers: Responsibilities Concerning the Employment of Individuals Who Are, or Are Perceived to Be, Muslim or Middle Eastern." At the beginning of this document, it states that the attacks in Paris and San Bernardino, California, in late 2015 and other recent world events have heightened concerns about workplace protections for all employees, including individuals who are, or are perceived to be, Muslim or Middle Eastern. Discrimination in the workplace based on religion, national origin, or race is strictly prohibited by Federal and State laws. They go on to say as you all know out there Title VII of the Civil Rights Act of 1964 prohibits work place discrimination based on religion, ethnicity, country of origin, race or color. Now, in this document there are many practical examples that the EEOC gives in different categories.

So one category that they review is the hiring and other employment decisions and in each of these categories, which I will quickly sort of describe in general they go through a number of hypothetical examples, which I think gives you a good example of what you can do and what you cannot do in a work place when confronted with an issue of accommodation of religious practice; whether it is of course a Muslim individual or any other individual and other kinds of employment situations, so the first category is hiring and other employment decisions and they give again very practical hypothetical so one is the first example I give is a Aliyah, a Muslim woman who wears a hijab applies for a position as a cashier at XYZ Discount Goods and XYZ assistant store manager fears that Aliyah's religious attire will make customers uncomfortable. What should XYZ do? And then EEOC goes on to describe their hypothetical answer, which is XYZ should not deny Aliyah the job due to customer preferences about religious attire, this would be the same as refusing to hire her because she is a Muslim, it would be against the law. It would also be unlawful for XYZ to assign Aliyah to a position with no interaction with customers because she wears a hijab. XYZ Discount Goods should consider proactive measures for preventing discrimination in hiring. XYZ should remind its managers and employees that discrimination based on religion or national origin is not tolerated by the company in any aspect of employment including hiring. Employers may decide to train or retrain all employees who conduct hiring and issue or re-issue hiring standards that emphasize objective job related criteria.

This publication then goes on to describe categories of harassment; that is where current employees are harassed because of their religious practices or beliefs or dress and they have many hypothetical examples in that. They have a category of religious accommodation where they talk about the need of an employer to accommodate a bona fide religious practice or belief or custom. They talk about also background investigations where you may have as an employer a legitimate concern concerning the background of a particular person whether that particular person is of the Muslim faith or any other different faith if you have a good faith belief or legitimate concern if the person's background would be problematic for your particular work place. So I invite you to certainly visit the EEOC's website, I think that in today's political climate, which I think is the best word to use it is very problematic for employers to make general assumptions about Muslim employees or any other type of employee and I think that the political rhetoric has ratcheted up these discussions to a fever pitch and it is not a very pretty picture in my opinion even as a management attorney and I think that both for purposes of morality as well as limiting your legal exposure you would be well advised to stay away from the kinds of generalizations and assumptions that have made their way into the political dialog in many quarters, particularly in the Republican Party during the last several weeks and months of this campaign.

While we are on the subject of the EEOC, the EEOC put out a press release on January 21st, just less than a week ago, and the title of the press release is "EEOC's Public Input on Draft Proposed Enforcement Guidance on Retaliation and Related Issues," and in this press release again you can find this on the EEOC's website, it stated that the US Equal Employment Opportunity Commission announced today, that is on January 21st, that it has voted to seek public input on proposed enforcement guidance addressing retaliation and related issues under Federal Employment Discrimination Laws. They go onto say the commission's last guidance update on the subject of retaliation was issued in 1998,

which of course is going on 18 years ago. Since that time, the Supreme Court and lower courts have issued numerous significant rulings regarding retaliation under Employment Discrimination Laws. They go on to say retaliation is a persistent and widespread problem in the nation's workforces that EEOC Chair, Jenny Yang, ensuring that employees are free to come forward to report violations of our Employment Discrimination Laws is a cornerstone for effective enforcement. If employees face retaliation for filing a charge it undermines the protection of our federal civil rights laws. The Commission's request for public input on this proposed enforcement guidance will promote transparency. It will also strengthen EEOC's ability to help employers prevent retaliation and to help employees understand their rights. And then they cite a significant statistic along these lines, the percentage of retaliation charges has roughly doubled since 1998 making retaliation the most frequently alleged type of violation raised with the EEOC. Nearly 43% of all private sector charges filed in fiscal year 2014 included retaliation claims, and they set a 30-day input period to end on February 24, 2016. It is my experience with my clients that those clients who receive EEOC charges frequently are in a situation where those charges, substantive charges, are coupled with retaliation charges. And the EEOC has along with this press release included a very helpful guide; it seems to me, to employers on addressing retaliation issues in the workplace.

Again, I do not often complement the EEOC, but I do this time. I think that if you want some practical guidance, you can go to the EEOC's website and I will briefly review some of these things with you. So they suggest to address retaliation issues; 1) employer should maintain a written plain language anti-retaliation policy and provide practical guidance on the employer's expectations with user-friendly examples of what to do and what not to do. The policy should include examples of retaliation that managers may not otherwise realize are actionable, including actions that would not be cognizable as discriminatory just for treatment or are actionable as retaliation because they would deter a reasonable person from engaging in protected activity. 2) Proactive steps for avoiding actual or perceived retaliation including interactions by managers and supervisors with employees who have lodged discrimination allegations against them. 3) A reporting mechanism for employee concerns about retaliation including access to a mechanism for informal resolution; and 4) a clear explanation that retaliation can be subject to discipline up to and including termination.

They also go on to recommend training for managers, supervisors, and employees on the employer's written anti-retaliation policy. They recommend sending a message from top management that retaliation will not be tolerated, providing information on policies and procedures in several different formats, and holding periodic refresher training and tailoring training to address any specific deficits in EEO knowledge and behavioral standards that have arisen in the particular workplace. They indicate that those accused of EEO violations and in particular managers and supervisors should not act on feelings of revenge or emotion, and I know this is difficult by the way, because I deal with managers and supervisors who are the object or the target of various retaliation claims and/or substantive EEOC charges and it is difficult for them emotionally because they do take it personally, and you want to make sure that because of the frequency of retaliation claims that these things are not taken personally or not taken emotionally and that are dealt with in a very substantive and reasonable way. So,

I think the EEOC really in its retaliation press release and guidance can offer some practical advice to employers in dealing with this subject because I can tell you years ago it was pretty unusual for a substantive claim of discrimination to be coupled with a claim of retaliation, but today it is very, very common, and I think the EEOC's statistics of about a half of all substantive claims being accompanied by a charge of retaliation is about right. So, again, I think that it behooves you to take a look at that and if you have questions about it, I certainly can review those with you and if you need some help on training, we can help you out with that as well.

Talking about press releases, the Department of Labor put out a press release again just a week ago on January 20th on the issue of joint employers, and according to the Department of Labor this is on their website as well; protecting workers in fissured workplaces, that is what they call them, where there is increasingly the possibility that more than one employer is benefitting from their work has been a major focus for the wage and hour division in recent years. Wage and hour division has always examined employment relationships during its investigations and [_____ **Audio Cut** _____] wage and other labor violations and the agency considers joint employment in hundreds of investigations every year. And they go on to talk about what constitutes a joint employer and they have also issued a very comprehensive guidance that you can take a look at. But they talk about the practical aspects of this, so they say last summer for example, a federal court in Seattle sided with the department in ruling that DirecTV, obviously a big entity, was a joint employer of the installers hired by its contractor, resulting in DirecTV paying \$395,000 in back wages and damages for minimum wage and overtime violations, and in October they announced, that is the Department of Labor announced, that J&J Snack Foods Corporation would pay \$2.1 million in back wages and damages to temporary production line workers hired by two staffing firms that J&J contracted with to provide labor. So, they talk about who is and who is not a joint employer. They offer comprehensive guidance on this. They are fairly, very... I think detailed and legally annotated guidance called "Administrator's Interpretation 2016-1." Again, you can get it in PDF format on the Department of Labor's Wage and Hour Division website.

I want to talk about briefly, lastly the fact that under the ADA, I want to make sure everybody understands this, not only do you have a duty to accommodate present employees but you also as an employer have a duty to accommodate those people who are applying for positions. Very recently there was a case filed against McDonald's Corporation for its alleged refusal to interview a deaf applicant as a means of that applicant trying to get into the workforce. According to the complaint, the employee named Ricky Washington who was deaf applied online for a job at McDonald's and he indicated on his application that he attended a school for the deaf, and when the restaurant manager learned that he required a sign language interpreter for his job interview, the interview was canceled, never rescheduled, therefore, the applicant did not get a chance to work at McDonald's. And it is important to know that under the enforcement guidance promulgated by the ADA, the following is stated, an employer must provide a reasonable accommodation to a qualified applicant with a disability that will enable the individual to have an equal opportunity to participate in the application process and to be considered for a job unless they can show undue hardship. Thus, individuals with disabilities who meet initial requirements to be considered for a job

should not be excluded from the application process because the employer speculates based on a request for reasonable accommodation for the application process that it will be unable to provide the individual with reasonable accommodation to perform the job. In many instances, employers will be unable to determine whether an individual needs reasonable accommodation to perform a job based solely on a request for accommodation during the application process. And even if an individual will need reasonable accommodation to perform the job, it may not be the same type or degree of accommodation that is needed for the application process. Thus, an employer should assess the need for accommodations for the application process separately from those that may be needed to perform the job. So, I remind you that those people who hire any volume of employees on a regular basis that under the ADA not only do you have an obligation to accommodate those current employees under the ADA, but you have an obligation to accommodate those people who are attempting to apply to your company and you need to weigh and request for an accommodation in the interactive process that is mandated by the EEOC in determining whether or not an accommodation can be made to allow a particular applicant to fulfill the application process. So, again the EEOC pays particular attention to this. There are more and more of these cases that are coming up on the issue of failure to accommodate during the application process.

All right, so those are the significant developments of the day. As I always do, I invite questions or comments from anybody out there. Thank you. I invite anybody to ask a question or comment and if you would rather do it in private format, you can certainly get in touch with me on my direct phone number 410-209-6417 or by my email hkurman@offitkurman.com. Any questions or comments for anybody out there? Okay, well, if there are no questions or comments, hopefully everybody understands the material that I went over today, and the next telebrief will be the second Wednesday in February, which at least on my calendar today reads February 10th. So, I will see everybody in a figurative if not literal sense on February 10th and I appreciate everybody making their way in today through the traffic and snow-covered roads and be careful out there, so see you in a couple of weeks.