LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay, it is 9:02 our official starting time. Michelle, can you mute the lines please? Thank you well welcome everybody hard to believe it is the last tele-brief in May as we head into June in the first half of the year time just flies. Anyway, I wanted to bring to your attention a couple of notable kinds of cases that I think are instructive for all of us in the HR/employee relations field.

The first relates to a press release that was put out by the Equal Employment Opportunity Commission on April 26th, less than a month ago and the title of this press release, you could probably check it out yourself on the EEOC's website, is "Downhole Technology to Pay $120,000 to Settle EEO Suit for Race-based Harassment and Retaliation." The press release read as follows: "a Houston manufacturer of equipment used in hydraulic fracking has agreed to pay a former employee $120,000 and provide other relief to settle a retaliatory discrimination lawsuit brought by the US Equal Employment Opportunity Commission the agency announced today, meaning April 26th." They go onto say in its lawsuit the EEOC charged Downhole Technology with violating federal law when it retaliated against employee, Kenneth Echols, after he complained that he had been racially harassed. Echols who is African-American reported that his co-workers had used a white hood evocative of the type used by the Ku Klux Klan to intimidate, ridicule and insult him. The EEOC alleged that in response to Echols complaint the company told him that the incident was meant as a joke. The company then fired Echols for refusing to sign a declaration, which is comparable to an affidavit stating that it had adequately responded to his complaint regarding the incident before reporting the incident Echols record with the company was unblemished the EEOC said. This conduct the EEOC said violated Title VII of the Civil Rights Act of 1964, which prohibits an employer from discriminating against or allowing co-workers to harass an employee because of the employees race. The act also prohibits an employer from retaliating against an employee from reporting discrimination including harassment. The EEOC it goes on to say filed its lawsuit in the Houston division of the United States District Court for the Southern District of Texas, after first attempting to reach a pre-litigation settlement through its conciliation process. Shortly after the lawsuit was filed the EEOC and the company resolved the claim which led to the two-year consent decree announced today, again meaning April 26th. Now under this consent decree the EEOC goes on to explain Downhole technology will pay Echols $120,000 in monetary relief and will provide a variety of other nonmonetary relief. For instance, the decree requires that Downhole train its employees including it supervisors on the requirements imposed by Title VII and also educate them about the history of hate groups, their symbols and the harm they cause to others. Downhole will also revamp its antidiscrimination policy and establish a toll-free telephone number through which employees will be able to report discrimination and harassment.

This case it seems to me probably was mishandled from beginning to almost end by this company. Number one, the kind of behavior that was reported in a workplace was pretty abhorrent it seems to me and reprehensible in this day and age. But even dumber with regard to the underlying conduct was the company's response saying that the company told this person that the incident was meant or intended as a joke and then winding up firing this individual for refusing to sign a statement that the company had adequately responded to the complaint regarding this particular individual. I always come back and I know we spoken many times on these calls about retaliation and how it is a prevalent adjunct to substantive discrimination claims by individuals today. Virtually every complaint or charge that you get from the Equal Employment Opportunity Commission or a state analog like the Maryland Commission on Civil Rights has a retaliation element to it and you just have to be so careful as a company when dealing with an individual who has filed a complaint, not to engage in any conduct that may be construed or perceived as retaliatory in nature like this company did which went way beyond the pale and wanted to compel the individual who had filed the charge or the complaint to assert that the company had adequately dealt with his complaint and when he refused to do so firing him. You can see the remedial aspects that the EEOC insisted upon receiving from the company as part of this consent order, which is not an uncommon thing when you get an EEOC charge that's taken through litigation particularly when it has been filed by the Equal Employment Opportunity Commission.

The other thing of note here, and I do not know how many of you out there utilize this, but as I indicated the EEOC insisted that the company set up a toll-free telephone number by which employees could or through which the employees could make complaints about discrimination. Now many of you in your policies I am sure have statements that indicate that if an employee perceives himself or herself as the victim of some active discrimination or harassment the employee can go to a supervisor or a manager or even the HR department or any senior level executive but it also helps to have write in your policy the establishment and communication of a toll-free number that persons can utilize in order to report these things. Because sometimes employees may want to do that off-hours, or they may want to do it in a way that at least according to them you know kind of maintains or keeps some semblance of non-personal contact as opposed to applying to or complaining to a person live. You just do not know how an employee is going to react and so having one of these toll-free numbers is probably a good thing to have.

Another notable case coming right out of the District Court of Maryland, Federal District Court of Maryland, was filed last week and in this case what happened was the Equal Employment Opportunity Commission filed a lawsuit against a company called XPO Last Mile Inc., I am hoping that nobody here on the telephone is an employee or representative of XPO Last Mile Inc., but I am going to mention it anyway because I do think that it's instructive. Again, this was filed last Tuesday in the Maryland Federal District Court, and what happened was this company had offered a position as a dispatcher in a customer service position to a male who happened to be of the Jewish faith. This was last fall just

2016. The person accepted the job but indicated that due to the Rosh Hashanah holiday he could not begin on October 3rd, which was the date of the holiday but he could begin on October 4th. At first a company representative told him that was fine. Unfortunately, another vice president called this individual from work and indicated that he needed to report to work on October 3rd. According to the lawsuit, the vice president told this employee that the company only honored federal holidays and that if it gave him some sort of religious accommodation by allowing him to take off on October 3rd that they would have to extend that same accommodation to other employees. What happened was when the employee reported for work on October 4th he was told to go home and he was subsequently terminated by the company, at least according to the allegations in the complaint. As you all know Title VII prohibits discrimination on the basis of religion among other things and does require a company to reasonably accommodate the beliefs or practices of an individual unless such accommodation would pose an undue burden on the company, which could be financial or it could be administrative, operational, etc., The statements that were promulgated and communicated by the Equal Employment Opportunity Commission included these, federal law requires employers to make reasonable adjustments to work schedules or rules that will allow an applicant or employee to practice his or her religion unless it would be an undue hardship. This was by the Philadelphia district office director Spencer Lewis. He said unfortunately XPO Last Miles intransient refusal to provide a religious accommodation cost them the services of a hard worker and led to this lawsuit and then there was this statement by the regional attorney for the Equal Employment Opportunity Commission, Deborah Lawrence who said in conjunction with this lawsuit, the employee simply asked if he could start work one day later than scheduled so he could observe Rosh Hashanah, one of the Jewish high holy days. A one day postponement of a start date is not an undue hardship. In this case, I agree with the Equal Employment Opportunity Commission. I think that it was folly on the part of a company for a new employee coming in to indicate that they could not accommodate a one day later start date and the purported rationale for its actions, which is well sort of if we have to do it for you we might have to make accommodations for other employees as well just is antithetical to what the Equal Employment Opportunity Commission requires, which is an individualistic analysis similar to the individualistic analysis that you would undergo in determining an accommodation under the Americans with Disabilities Act, as to whether there would be an undue burden placed on the company if you accommodated a purported disability or perceived disability, the same concept applies when dealing with religious beliefs or practices, and that is you have to look at these individually not in terms of a generic accommodation and that is if you accommodated this person would you have to accommodate other people, you have to look at the requested accommodation and see whether or not this requested accommodation, this individual requested accommodation would pose an undue burden to the company. Meaning that it would cost substantial amounts of money which can't be justified or it would create an operational or an administratively burdensome kind of an action. I am not surprised by this case my guess is eventually this case will get settled between the EEOC and this

particular company because I do not think the company based on the allegations really has a good defense to this lawsuit.

I wanted to mention a couple things from a practical standpoint having to do with employee applications. I got a request from a relatively new client to review its application in the last couple weeks and I noted a couple things and I have discussed it with the client and the client is fine with doing these things and I thought that I would bring them to your attention because I am sure all of you out there obviously utilize employment applications. I am not going to go over everything in detail but I did want to point out a few things that I think would be very practical and useful for your employment applications.

One is, I think it helps to have an at will disclaimer in your employment application, the same as that you would have in your handbook. It's a good policy that when applicants are applying for the job even if they have not been hired yet that they know that employment at your company, if offered, is offered on the basis of employment at will. It is a good statement to have either at the top of your application or in the acknowledgment portion of your application, which generally comes on the last portion of your particular application in question. Along with that suggestion is my suggestion that you also have an EEO statement or a non-discrimination statement probably at the top of your application form to notify applicants that you are an equal opportunity employer and that you do not discriminate on the basis of any protected basis and you can enumerate those basis both under federal law and in the particular state that you operate in along with the catchall phrase or any other protected basis under a federal state or local law. It is a good protective device to have on your employment application.

Over the years I have looked at many applications and I have seen where some companies will in their education portion of their application, where they are asking for educational background, they will have dates that the applicant attended or graduated, which really you should not have because those dates usually will be a good hint as to the age of the particular applicant so you do not want your application form to have any kind of perception of age discrimination along the way so I would if I were you remove those particular references to the dates that a person attended an educational institution or graduated from an educational institution.

Another practical hint that I think is useful is that, and I know I have reported on this in past telebriefs, under the Fair Credit Reporting Act as you know in order for the particular authorization to be valid it's got to be in a separate document and it can not have any extraneous information attached to it. Some companies will have the so-called Fair Credit Reporting Act authorization along with other aspects or other statements or acknowledgments or authorizations in their applications that really is a no-no. There have been many lawsuits, which have been recently filed with regard to the Fair Credit Reporting Act. You want to have a separately acknowledged document under the Fair Credit Reporting Act, a separate document not part of the application, not part of any other

authorization, which authorizes the company to engage in background checks pursuant to the Fair Credit Reporting Act and that's got to be in a separate document. If you have that in conjunction with or on your employment application make sure that you modify your application to remove that and just create a separate document for your Fair Credit Reporting Act authorization.

The last thing that I will mention about applications is questions about citizenship. As you know, you cannot under the Immigration Reform and Control Act, you cannot discriminate against an applicant because that person is a citizen or a non-citizen. That is the purpose really of the I-9 form, itself so, rather than asking any applicant about his citizenship you simply want to ask whether that applicant is legally qualified to work in the United States.

Again, these are things that I think are important to take a look at with regard to your application form because it's really the first document that a prospective employee will see. Obviously, if the applicant is hired they get an employee handbook, but you want to make sure that statements in your application are comparable to and consistent with the statements that you have in your handbook so you would have an EEO statement, you would have the appropriate at will disclaimer's etc., so you may want to take a look at your application forms.

The last thing I want to cover from a practical standpoint this morning has to do with workplace investigations. Many of you are responsible for conducting workplace investigations whether it is due to a claim of harassment, discrimination or misconduct in the workplace and because I have conducted many of these and still do for clients, I want to just raise a couple points with you. If you are doing your own internal investigation you got to make sure that the person who is doing the investigation is really an unbiased person. You certainly do not want somebody in the supervisory chain of command, where perhaps a supervisor is accused of doing something improper, let’s say an act of harassment or discrimination, and you have somebody in that direct chain of command performing the investigation. After all in today's litigious environment, you want to make sure that somebody who is looking at your investigation from the outside can easily conclude that the investigation was undertaken in an impartial and an objective and unbiased way so make sure whoever is going to do the investigation is an unbiased party. If you really do not have anybody you certainly can use your outside labor and employment attorney to do these investigations, I have conducted hundreds of them in my career and it does interject some degree of objectivity into it. Another aspect along with this is that whoever is doing the investigation needs to make sure to talk to multiple people who may have information. It is not enough simply to talk to the alleged victim, for instance in a harassment case and the alleged perpetrator. Typically in these investigations when you talk to folks you will get a line on other people or other employees who may have relevant and material information so, you cannot shut down your investigation just in the interest of brevity or concluding it quickly. Make sure that when you're doing your investigation that you sort of track down all the leads that you can and that you

concentrate on facts and not assertions or conclusions. When you are interviewing people, you want to get who, what, where kinds of statements, observations, not necessarily conclusions from any witness because it will be your job to do the conclusions not the employees that you're interviewing.

The last thing that I will say is you obviously want to follow company policy, which may be stated in your handbook with regard to conducting the investigation. Many times the handbooks are replete with pretty full descriptions of how investigations will take place, and the last thing you want to do is to conduct an investigation, which does not adhere to or comport with the policy pronouncements that you have in your handbook because that is just fodder for a plaintiff's employment attorney or the Equal Employment Opportunity Commission that says yes you did your investigation but you didn't adhere to the processes and procedures that you articulated in your handbook. These are just practical things that have to do with your investigations and may be overlooked from time to time either in the interest of getting something done quickly or for political reasons or otherwise but, the aspects of workplace investigations are really the predicate for upholding any kind of finding that you have when there is a complaint of harassment, discrimination, misconduct etc., and it really is a critical component of how your actions will be judged by an objective third party or sometimes not an objective third party whether that is a plaintiffs employment attorney or the Equal Employment Opportunity Commission, which I find obviously from time to time not to be so objective.

Okay, Michelle can you take this off of mute? All right as always I invite any questions or comments from people in this forum or you want to contact me privately at my email, which is hkurman@offitkurman.com or my direct phone number, which is 410-209-6417. Anyway those are the developments for the day. Anybody have any questions or comments?

Mike: Howard.

Howard Kurman: Yeah Mike.

Mike: Regarding the application you did not mention the ban the box.

Howard Kurman: Sure, yeah so Mike brings up a good point, which is that you know your opportunity to ask questions about criminal background is still relevant except in those jurisdictions which have ban the box limitations, ban the box limitations being of course statutes or ordinances, which would preclude an employer from asking a prospective employee about his or her criminal background. For instance, there are many jurisdictions, Baltimore City is one of those, where it's simply unlawful now to even have that question on your application. Obviously, if you are in those jurisdictions that have those kind of statutes whether it is in Baltimore, Montgomery County, Philadelphia, New York, etc., you want to make sure that your application even if you are using it for other jurisdictions is modified to blank out that particular question and if you are asking questions about convictions where it is legal you want to make sure that you notify the

applicant that a yes answer will not necessarily bar that applicant from being considered for employment depending on the facts and circumstances of the particular conviction. Thanks Mike.

Mike: Sure.

Howard Kurman: Any other questions or comments:

Brenda Cole: I have a question. This is Brenda Cole. Concerning the ban the box you were talking about the different locations. Is that where your office is located or where your employees work?

Howard Kurman: No it is not where your office is located; it is where you employ employees. You could be based in Baltimore County, have employees in Baltimore City and be subjected to the ban the box legislation.

Brenda Cole: Got you. Thank you.

Howard Kurman: Sure. Any other questions? Okay well as always I appreciate your participation and that hard to believe but the next telebrief will be the second Tuesday in June. So talk to you all then. Thank you.