LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Good morning. Today is Wednesday, June 8, 2016. It's Howard Kurman and this telebrief is being pre-recorded because I am presently in a board meeting for my law school and unable to conduct this sort of in live format, however, if anybody has any questions I always indicate that you can certainly call me at my direct number 410-209-6417 or my email hkurman@offitkurman.com. Also our marketing assistant Michelle Correnti is on the phone and if you have any questions please direct them to her and she can in turn direct them to me as well. So lets get started and we will review some of the important goings on in the labor and employment world in the last two weeks.

Let's get started and deal with a couple Supreme Court decisions of note. The first is a case called CRST Van Expedited, Inc. v. EEOC. Essentially what the Supreme Court decided in this case is that a Federal Court can hold the Equal Employment Opportunity Commission liable for employer's attorney's fees under certain circumstances where the employer is found to be the so called prevailing party in an action where the Equal Employment Opportunity Commission did not adhere to pre-trial procedural processes of investigation and/or conciliation in a meaningful way. Obviously in most cases involving the Equal Employment Opportunity Commission or in private Plaintiff action, the question is whether or not the employer is going to be liable for attorney's fees which would be paid to the Plaintiff. This sort of turns that issue on its head and deals with a situation where the allegation by the employer, in this case CRST Van Expedited alleged in the lower courts that the Equal Employment Opportunity Commission did not engage in sufficient acts of conciliation and/or investigation and the Supreme Court in a decision remanded the case for determination of whether the Equal Employment Opportunity Commission could defeat the employer's claim for attorney's fees by demonstrating that its actions were not "frivolous, unreasonable, or groundless." I think the case is significant in that you have Supreme Court pronouncement indicating that in certain cases, and some of you may have even faced this, in certain cases where the Equal Employment Opportunity Commission acts in a perfunctory manner or acts in a manner which would indicate that it is being totally unreasonable with regard to its conciliation demand. As you know when there is a probable cost finding in a discrimination case, the Equal Employment Opportunity Commission is bound to engage in conciliation with the employer to attempt to resolve the case so that it will not go to court or not go to trial. In the Supreme Court's case here is a followup on a prior decision from 2015 called Mach Mining. Again, in which court ruled that the EEOC's conciliation efforts are subject to minor judicial review but nevertheless subject to judicial review and so what we have as a takeaway is that if you are unfortunate enough to be involved in a case or charge with Equal Employment Opportunity Commission. They still can be held to certain

procedural standards involving good faith efforts of conciliation and good faith investigation of the merits of the charge. So again this was the case that was decided really about two weeks ago by the Supreme Court.

There is a second Supreme Court case of some note as well that was decided on May 26, 2016. It's a Supreme Court case called Green v. Brennan and in the Green v. Brennan case in a 7-1 decision and as you know now there are only eight Supreme Court justices on the court, Justice Sotomayor wrote for the majority in this case dealing with a postal service employee who claimed that he was the subject of a constructive discharge. Now, those of you out there who have ever dealt with constructive discharges know that a claim for constructive discharge is viable when the Plaintiff can demonstrate that the working conditions caused by the employer were so intolerable that a reasonable person would have no choice but to resign his or her employment, so it doesn't involve an actual discharge by the employer, but it involves the situation where the employee contends or alleges that through actions by the employer they were so onerous and created such onerous working conditions that the employee had no option but to resign. The question decided by the Supreme Court in the Green v. Brennan case is an issue of process or procedure or statute of limitations, which is when does the time limit begin running, does it begin running when the last act of so called discrimination occurred which would compel the employee to resign or does it only begin to run when the employee actually tenders his resignation even when he actually does not resign on that same particular day and what the Supreme Court held in this 8:1 decision was that relevant statute of limitations runs or begins to run on the day that the employee tenders his resignation, so if the employee tenders his resignation on June 1st indicating that he is going to resign on June 15th the relevant statute of limitations will begin to run on June 1st that is the day on which he tenders his resignation not on the day that he actually resigns and not on the day that he claims was the last act of discrimination, which of course may have been lets say on May 1st. So, again a significant decision when you are dealing with claims of constructive discharge in the Federal sphere, again Justice Sotomayor writing for the majority decides that the relevant statute of limitations begins to run on the day that the employee tenders his resignation not on the last day that the discriminatory acts supposedly occurred and not on the day in which he actually resigned.

Another case of note that I wanted to bring to your attention falls into the category of these cases brought by so called employees who may be classified as independent contractors by their putative employer. This is another case involving Uber. As you know Uber settled a case in California for a lot of money involving the issue of whether or not so called drivers were employees as supposed to independent contractors. In this case, this case emanates from the Federal Court in Trenton, New Jersey in which the putative class members are alleging that Uber has violated New Jersey wage and hour laws and Federal laws by failing to pay its drivers overtime for working more than 40 hours a week and by failing to reimburse them for certain expenses and costs relating to the use of their vehicles. In this particular case, again the allegation is that the drivers were

required to incur and to pay for their own expenses related to vehicle expenses, gas, tolls and their cellular phones and other expenses related to their putative employment. This comes on the heels of many other cases that Uber is facing across the country in which they are claiming that rather than being classified as independent contractors, it should have been classified as employees. There are similar suits, which have been filed in Texas, Arizona, Florida, Ohio, New York and Illinois in addition to the case that I am reporting on emanating out of the state of New Jersey. Additionally, there is another class action which is pending in the State of New Jersey in which the putative class members are accusing Uber of violating the Fair Credit Reporting Act by failing to give so called job applicants a copy of their credit report and, of course, a summary of the rights under that particular statute "if they are not hired." I think that the Uber case despite it being notorious is not unique in many of the cases that are being brought across the country in which individuals are alleging that they should be classified as employees rather than independent contractors and I know that we have talked many times in the past on these telebriefs about these particular cases and I can't stress the importance enough in this era of intense scrutiny on this particular issue by the Department of Labor and the IRS as to whether individuals truly are independent contractors as opposed to employees but you need to scrutinize very carefully the use of individuals who are putatively classified as independent contractors as opposed to employee. Again from a practical stand point you should have written contract which with all of the individuals that you are contending are independent contractors, those contracts should recite that the individual is a independent contractor as opposed to an employee that they are responsible for their own cost and expenses and insurance and that they will not be treated for any reason as employees. There are many other factors or elements that should go into these contracts and I can help you out with those if you are contemplating that, but suffice it to say the mere fact that you have a contract and call these individuals independent contractors is not dispositive as to whether or not they truly are.

And in another recent misclassification case, this is a case involving the retailer Kmart in which they have agreed to pay $3.8 million in a case which emanated out of the Federal Court in Trenton on the basis of assistant managers who claim that they were wrongly classified as exempt under the Fair Labor Standards Act as opposed to non-exempt. Now, this doesn't involve independent contractors, it involved the issue of whether or not these so called assistant managers were really exempt under the Fair Labor Standards Act under the executive exemption and we have talked a lot in the past several weeks in these telebriefs about the change in the Department of Labor Salary Rules. As you know, as of December the exempt salary basis test will be increasing from around $24,000 a year to $47,000 a year and change. However, even if you meet the salary test you still have to meet the duties test, which would qualify a particular individual as being exempt under the Fair Labor Standards Act and the exempt duties test did not change under the recent Department of Labor pronouncements and new rules, but you still have to satisfy the fact that if you are an exempt executive you still have to be performing the predominant amount of your duties as an exempt executive and in this

settlement involving Kmart the suits claimed or alleged that the primary duties of the putative class members were not of the exempt character in that they were required during their job duties to operate cash registers, to engage in the stocking of shelves, cleaning the store, assisting customers and unloading trucks and that, therefore, the real duties of these individuals were non-exempt as opposed to exempt. The important point about the settlement is that many of you are concerned about the revised salary test for your individuals that you are raising their salary for and you are not really looking at the duties that these individuals may be involved in and I think along with looking at the salary test of the individuals, again you got to make sure that not only are the job descriptions reflective of exempt status under the Fair Labor Standards Act but that their actual duties are exempt either as an administrative employee that is an employee who regularly uses independent judgement and discretion in the implementation or creation of company policies and in the case of an executive that the primary duty of this person who is deemed to be an executive is supervising of a work force consisting of two or more employees that is hiring and firing and training and handling of grievances and assigning of work as opposed to the mere performance of regular work that your non-exempt employees may be doing. So it's okay for your exempt employees from time to time to be doing non-exempt work, but the primary duty must be exempt work as opposed to non-exempt work in order to satisfy the duties test of the Fair Labor Standards Act.

Another, I think, item of note which comes again out of the Equal Employment Opportunity Commission is that on June the 3rd, the Equal Employment Opportunity Commission announced another rule change that in effect doubles the fines for employers to violate the posting requirements, which are established under Title VII and under the Americans With Disabilities Act and the Genetic Information Nondiscrimination Act. As you know, of course, and most of you I am sure comply with it, the Equal Employment Opportunity Commission insists that covered employers post in prominent places notices, which announced to employees their rights under these various federal acts and of course many of you have these combined posters which include not only the federal act but relevant state statutes as well in sort of an seven-in-one or eight-in-one poster that combines federal and state notice requirement. So the Equal Employment Opportunity Commission is now almost doubling the fines, or more than doubling the fine, for the failure to adequately post from $210 per violation to $525 per violation. And I think that it is just as important where you post these things as opposed to what you are posting. Most of you, I am sure, probably do have your necessary posters, but they need to be prominently posted, which means that they cannot be posted in some little closet where employees are not going to notice them and they cannot be posted underneath other kind of posters. So go back and check your posters, make sure that they are prominently placed so that employees can readily see them. If you are ever in a situation where you have an on-site visitation by an EEOC investigator it is one the first things that they are going to be looking for. So take a look around, if you have multiple facilities, make sure that each one of your facility has a prominent poster whether it is in the kitchen or a break room or some place where employees can readily see these posters.

Almost more important, the Equal Employment Opportunity Commission on June the 2nd, just a week ago, put out a press release and I will read relevant parts to you. So the press release reads as follows: The U.S. Equal Employment Opportunity Commission announced today, that was June 2, 2016, that it has voted to release for public input a proposed enforcement guidance addressing national origin discrimination under Title VII of the Civil Rights Act of 1964. EEOC's enforcement guidance documents express official agency policy and explain how the laws and regulations apply to specific workplace situations. Title VII protects job applicants and employees from discrimination based on their race, color, religion, sex or national origin, as well as retaliation because a person complained about discrimination or participated in an employment investigation or lawsuit. Title VII prohibits employer actions that treat people unfavorably because of their national origin, including because they are from a particular country or part of the world, because of ethnicity, or because they appear to be of a certain ethnic background. The EEOC goes on to say in this press release, in 2002, the EEOC last comprehensively addressed national origin discrimination, and essentially they are alluding to here obviously the incident in 2001 having to do with 9/11, etc., since that time, there have been significant legal developments addressing national origin discrimination. The revised guidance addresses important issues, including job segregation, human trafficking, and intersectional discrimination. The press release goes on to say, "No person should face barriers to equal employment opportunity in America simply because of their ethnicity or country of origin," said EEOC Chair Jenny Yang. She continues, "The EEOC has identified protecting immigrant, migrant, and other vulnerable populations as a national strategic priority. The Commission looks forward to hearing public input on the proposed enforcement guidance on national origin discrimination." The press release goes on to say in fiscal year 2015, approximately 11 percent of the 89,385 private sector charges filed with EEOC alleged national origin discrimination. These charges alleged a wide variety of Title VII violations, including unlawful failure to hire, termination, language-related issues, and harassment. In the press release, the EEOC alludes to or make references to substantial guidance, which is available on their web site. So those of you out there who want to take a look at their comprehensive guidance can do so by going on the EEOC's web site. The press release goes on to say, the 30-day input period ends on July 1, 2016, and it invites public comments pertaining to the proposed guide. So I would certainly recommend to you to go on their web site and take a look at this substantial guidance policy statement that the EEOC has published because national origin discrimination has moved front and center since the developments of 2001 and thereafter, and as I have said on this telebrief in the past, in this presidential campaign we have seen again in a very public way how at least one of the major presidential candidates has made national origin a fulcrum and a focal point for his campaign in the last several weeks and months.

The last thing or case that I will mention is a Fourth Circuit decision, that is the circuit in which we sit, entitled Harbourt v. PPE Casino Resorts Maryland, and in short this involved casino workers who brought a class action against a Maryland casino alleging that a pre-employment training program or training class, which

was conducted in Anne Arundel Community College constituted work time for under purposes or under the auspices of the Fair Labors Standards Act for which they should have been compensated, and without detailing all the ins and outs of this particular case. I wanted to mention that case to you because it essentially deals with the premise that if an employer insists or preconditions employment on training even prior to employment or the official start date of employment, that time that is spent by the individuals on this training time can be considered to be work time under the Fair Labors Standards Act if the time, which is being spent by these individuals is primarily for the benefit of the putative employer as opposed to the employee, which the court said could be the case in this particular situation. So those of you who have training programs or training policies for either pre-employment or even during employment, make sure that you pay attention to the rules and regulations under the Fair Labors Standards Act which pertain to training time. It can be confusing and obviously if you are confused a skilled employment attorney can help you out with, this but this is a very recent case decided by the Fourth Circuit; and what the Fourth Circuit indicated was that in this situation they would allow the case to go to trial on the basis that there was a claim that this preemployment training constituted work time, which was primarily for the benefit of the employer as opposed to the employee.

All right, well those are the developments for the day. I am sorry that I am not here in person but hopefully you will get enough out of it, even in my personal absence, to be of some practical value and I will be live on June the 22nd at our next telebrief. So hopefully the next two weeks will be good for all of you, and I am sure we will see a lot happening in the labor employment field during that two weeks again. Any questions or comments, you know how to contact me. So, good day and I will talk to you in the next two weeks. Thanks.