LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Today is Wednesday, August 10th, 2016. This is Howard Kurman, this is the first telebrief in August and as I indicated in our last telebrief because I am actually out of town today, this telebrief is being pre-recorded. So obviously if you have questions, feel free to email me at hkurman@offitkurman.com or call me, I will be back in the office on Thursday, now that's tomorrow, August 11th, at 410-209-6417. As always there is plenty to report in today's telebrief, so let's get started.

I wanted to mention that in a press release dated July 22nd, just a week and half or so ago, the Equal Employment Opportunity Commission put out a fact sheet and on the press release it's entitled EEOC Issues Resource Document Announces Plans to Improve Data Collection and Outreach on Religious Discrimination and I will quote from certain parts of this press release, which you can easily access on the EEOC's website. It states U.S. Equal Employment Opportunity Commission Chair Jenny Yang and Commissioner Charlotte Burrows participated in an interagency briefing at the White House today and announced the release of a one-page fact sheet designed to help young workers better understand their rights and responsibilities under the federal employment anti-discrimination laws prohibiting religious discrimination. They go on to say Combating Religious Discrimination Today, a community engagement initiative coordinated by the White House and the U.S. Department of Justice, Civil Rights Division, brought together EEOC and other federal agencies to promote religious freedom, challenge religious discrimination, and enhance efforts to combat religion-based hate violence and crimes. In this press release the EEOC states: "Religious discrimination remains an issue in the American workplace. In fiscal year 2015, EEOC received 3,502 charges alleging discrimination on the basis of religion, with the top issues alleged being discharge, harassment, terms and conditions of employment, and reasonable accommodation. EEOC has filed 73 lawsuits since the beginning of fiscal year 2010, including five in fiscal year 2015, involving claims of religious discrimination under Title VII of the Civil Rights Act of 1964." Obviously all of you out there know that one of the prohibited basis of discrimination under the Civil Right Act of 1964 is religion. It goes on to say during the same period, the Commission recovered approximately $4 million, as well as other important types of relief, for victims of religious discrimination. Finally, the press release announces that the Commission has also issued technical assistance publications concerning Religious Garb and Grooming in the Workplace: Rights and Responsibilities. So, you can go on the website and you can obviously access this particular press release. I wanted to point out to you that the EEOC's one-page fact sheet on religious discrimination actually is a pretty good little primer on religious discrimination and practices in the work place and because it is directed to employees, it's actually stated in language which is fairly understandable even to lay people and you may want to take a look at it, use it in your training or your explanations of religious discrimination to

your managers and supervisors. So, in relevant part, this particular one-page document states and again you can find this easily on the EEOC's website. It goes on to say "It is illegal for your employer to treat you differently or harass you because of your religious practices or beliefs or because you do not have religious practices or beliefs. You have the right to ask for certain workplace changes (called reasonable accommodations) because of your religious practices or beliefs if you need them to apply for or to do a job." And then they list certain examples, so example #1: The EEOC says John applies to work at a coffee shop during a summer break. Marcus, the manager, assigns John to work a shift that begins at 7:00 a.m. John explains that he attends Mass every Wednesday at 7:00 a.m. and asks if he can work a later shift on those days. There are other shifts available, so Marcus agrees and schedules John to work later shifts on Wednesdays, and tells other managers to do the same. Marcus responded appropriately by changing John's schedule to accommodate his religious practice. Contrast that in the second example that the EEOC gives and in this example they say Samara applies to work as a grocery store cashier after school. Samara is Muslim and wears a hijab that is a veil that covers her head for religious reasons. Tim, the store manager, offers Samara a back room job. He tells her having "someone who prays to the same God as terrorists" working at the front of the store would make customers uncomfortable. Tim discriminated against Samara by assigning her to work in the back room, away from customers, and by not hiring her for the cashier position because she is Muslim. There is another example that's given and you can read that on your own on the website. There is a useful section that says keep in mind and I will quote from this. "The law protects traditional religions, such as Buddhism, Christianity, Hinduism, Islam, and Judaism, and newer or less common religions, such as Rastafarianism. The law also protects people who do not have religious beliefs." That's a useful concept for those out there who deal with these kinds of religious issues on a regular basis. They go on to say, some religions may be associated with a certain national origin. It is illegal for an employer to discriminate against or harass employees because of their actual or perceived religion, national origin, or both. If you need a workplace change because of religious beliefs or practices, let your employer know. Your employer has to make a workplace change because of your religious beliefs or practices if it would cause little to no burden on the business, now that's a useful and an important concept as we all know as with disability when dealing with religious accommodations or request for religious accommodations in a workplace. The critical aspect, of course, is that one, there will be an interactive dialogue between the employee and the employer and, two, as a result of that interactive dialogue any request for an accommodation be reasonable and not impose an undue burden or cost on the company. So much like the situation with disabilities an employer certainly must be mindful of the fact that an employee who is requesting an accommodation is not automatically entitled to that accommodation under the law, but must need to test of it being reasonable and must not impose an unreasonable burden or cost on the employer so I would invite you to access this particular one-page fact sheet and press release on the EEOC's website and you may want to use it for training purposes with your managerial staff.

Let's turn our attention if we can to another Equal Employment Opportunity Commission sort of tangent, but this is an important case that was decided very recently back in the end of July by the Seventh Circuit and in this case the Seventh Circuit dealt with the proposition of the EEOC that sexual orientation falls within the protected classification of sex in the protected classification enumerated in the 1964 Civil Rights Act.

In this particular case, a Plaintiff named Kimberly Hively alleged that she was retaliated against and denied a permanent position at Tech Community College in Indiana because of her sexual orientation. The Seventh Circuit offered an opinion and basically stated that sexual orientation does not fall within the parameters of Title VII of the Civil Rights Act in contrast to the position that the EEOC has taken in other lawsuits and in its finding in the case of Baldwin v. Foxx, back in 2015, in which the EEOC contended that sexual orientation is protected under the 1964 Civil Rights Act. The Seventh Circuit again has taken the position that it is not protected, much as many people would like it to be protected under the 1964 Civil Rights Act. Now it is important to know that there are currently pending, in the Second Circuit and in the Eleventh Circuit, cases on this very point; and obviously if the Second Circuit, a very influential circuit, and the Eleventh Circuit take a position which is converse to the Seventh Circuit's decision in this case, that is concluding that sexual orientation is a branch of sex discrimination and, therefore, protected under the 1964 Civil Rights Act, it is likely that that case would wind its way up and ultimately be resolved by the Supreme Court. That is why the composition of the Supreme Court is so critical because as you know we have eight justices at the present time depending on the outcome of the election, if a Democrat were elected, or if Hillary Clinton were elected and a more liberal justice were nominated and confirmed, if you had a case that wound its way up to the Supreme Court on the issue of whether or not sexual orientation is included within the boundaries of sex as a prohibited basis for discrimination under the 1964 Civil Rights Act, it is probable, if not likely, that the Supreme Court would come down in favor of sexual orientation on the federal basis being a protected classification. On the other hand, if a Republican, Donald Trump were elected and a more conservative justice were appointed, it is also likely or probable that in a five-to-four decision, the justices would find that sexual orientation is not included within the parameters of sex under the Civil Rights Act of 1964. So we just have to wait and see what happens in the Second Circuit and the Eleventh Circuit on this point; but note that at the end of July, the Seventh Circuit decided that sexual orientation is not a protected basis.

Now, that does not mean that in states where it is protected, for instance Maryland, that the fact that the federal government does not recognize it, does afford employers protection from this particular kind of claim. To the contrary, as we know, and similar to Wage and Hour Law, if you have a State Wage and Hour Law, which is more in favor of employees than the federal law the employees get the benefit of that particular state law. Similarly, in states where sexual

orientation is a protected basis that affords employees a cause of action even though that cause of action would not exist under federal law.

Now, speaking about the EEOC and offshoots of it, I wanted to bring to your attention a case, which I find significant that was decided on July the 20th and is the case of Pullen v. Caddo Parish School Board. In this case, the employee asserted that she had been sexually harassed by her employer, and I won't go into the details of the particular claim of sexual harassment, but the defense of the employer was that it had published a comprehensive policy prohibiting sexual harassment in the workplace, and that, therefore, the mere publication of this policy and the fact that for a period of time the claimant did not take advantage of the policy would be an absolute bar to a claim of sexual harassment by this particular employee. The Fifth Circuit dealt with that claim and I think in a manner which is instructive to you all who deal with workplace harassment and in particular sexual harassment claims, noted that there were three things relevant in this case. One, that several long-term employees had indicated that they had never received information and training from the company about the sexual harassment policy that the company was contending, served as an absolute bar to any claim. Secondly, if the Plaintiff had testified that they had never received training on the sexual harassment policy or received a copy of it; and lastly, the particular sexual harassment policy that the company was contending was an absolute bar was not posted in a conspicuous location and that several employees had never noticed that particular policy; and so therefore the Fifth Circuit denied summary judgment and reinstated the claim against the company.

Now, there are several, I think, points that are instructive for those of you who deal with harassment claims out there. First, it is not enough simply to have a statement or an explanation of your sexual harassment policy or workplace harassment policy, which is some place in your handbook and which is given to employees and forgotten about. I think that it is incumbent upon any responsible employer in today's day and age not only to have the publication of the policy in the handbook but on a regular basis, and I generally recommend that my clients publish their sexual harassment policy as a standalone policy from the handbook on an annual basis where the statements from the CEO or president announcing how important and significant the policy is and that all employees will be expected to adhere to it, generally explaining the policy behind reporting these kinds of complaints or how a complaint should be processed, making sure employees understand the different avenues of approach, and periodically, probably on either an annual or every other year basis, actually having a third party do some training of both rank-and-file employees and managerial staff, on the nature of the policy, on how the policy is enforced, and how complaints are registered and processed. These are not fool proof ways of preventing claims from coming up, but they are significant in that if there is a charge that is filed and if the employer has gone out of its way not only to have a policy published in the handbook but to significantly communicate it and disseminate it, publish it, train on it, and have it posted in conspicuous places, there will be an inference in many cases that the employer has acted reasonably under the circumstances and that and

alone will serve as a significant defense against any claim of workplace harassment, particularly sexual harassment. For those of you who are out there and who obviously have workplace harassment and sexual harassment policies in your handbook, don't rest on your laurels, train your managerial staff, if you have to bring in third parties and we do training all the time with employers on workplace harassment and sexual harassment, communicate it to your employees on a regular basis, probably on a once-a-year basis, and make sure that they are posted in conspicuous places and republished and re-communicated on at least an annual basis.

There was an interesting development in Arizona, which I think is instructive for those of you who are out there and who deal with independent contractors. Arizona passed a law, which is effective on August 6th of this year, and essentially under this law they will allow employers who are utilizing independent contractors to prove the existence of the independent contractor relationship by having that independent contractor sign an affidavit or what is often called in law, a declaration, and under this new law if the putative independent contractor has signed this affidavit or declaration, the Arizona law creates a rebuttable presumption that an independent contractor relationship exists.

Now, the reason I bring this up is not necessarily because there are many of you out there who do business in Arizona, but I wanted to mention the elements that are contained in this Arizona law, which I think are useful for those of you who utilize independent contractors or those of you who would classify as independent contractors on somewhat of a regular basis, so the law in Arizona provides that in this declaration there should be, one, an acknowledgment that the contracting party does not restrict the contractor's ability to perform services for or through other parties; two, that there be an expectation that the contractor provides services for other parties and that the employer does not dictate the performance, methods, or process the contractor uses to perform services; and three, that there be an acknowledgment that the independent contractor is paid by the job and not on a salary or hourly basis and is not covered by the employee's health or workers' compensation insurance.

Now, those of you who utilize independent contractors, and I know that I have spoken about this in the past, will know that I always recommend that if you are utilizing individuals that you would otherwise classify as independent contractors, that you have a contract between yourself, that is the employer and the putative independent contractor, and as is stated in this Arizona law, it would be very helpful if in your contract that there be a direct paragraph or an acknowledgment that the contract does not restrict the contractor's ability to perform services for or through other parties, and in fact, the converse is true, that the contractor is free in all respects to perform services for other entities as long as the performance of those services do not interfere with the result contemplated under the agreement that you are entering into with that particular contractor. Secondly, that there be an expectation that the contractor is providing and can provide services for other entities, and that you as the contracting entity do not in anyway dictate the manner

in which the contractor is going to perform the services for your entity, rather you are concerned only about the result to be performed under the contract and accomplished under the contract and the manner by which those results are to be performed are dictated essentially by the contractor. And lastly obviously, you want to make sure in your contract that the contractor is responsible for all expenses related to the performance of the contract including his workers' compensation insurance, any licensing fees, etc., so that the Arizona law, which now is in effect, August 6th of this year, is reflective of those things that hopefully would establish for you as an entity, that the individual that you are contracting with is an independent contractor as opposed to an employee. We know that both the IRS, the Department of Labor, and various states including Maryland are looking very carefully at the arrangements that would otherwise be classified as independent contractor arrangements and so it behooves all of you even if you are only using an independent contractor, you know, twice a year, to make sure that you have a standard kind of written independent contractor agreement, if you have any questions you can float them by me, to make sure that an outside agency looking at this arrangement will conclude that it is much more likely that it is an independent contractor relationship as opposed to an employer-employee relationship.

Those are the developments for today. Again, I apologize for not being here in person, but the next telebrief will be scheduled on August 24th and I will be there in person, so obviously again, any questions or comments, direct them either via email or phone.