LABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire
October 25, 2017

Howard Kurman: All right, good morning everybody. It's Howard Kurman. This is the last telebrief in October. The next telebrief, as you know will be on the second Wednesday in November, which would be November 8th.

All right, I am going start off and talk about some stuff going on at the Equal Employment Opportunity Commission, lot of it wrapped up frankly in all of the workplace harassment publicity surrounding the Harvey Weinstein case and other cases that have come up in the last three, four or five weeks, which has really been a drum beat of workplace harassment stories from one woman or another coming forward and making accusations against Harvey Weinstein at the Weinstein Company and as you know there was publicity last week that Bill O'Reilly paid a woman at Fox News $32 million to settle a workplace harassment case, which to me is just inconceivable and unbelievable, but be that as it may, let me launch into some things that I think have practical value for all of you out there.

First of all, the EEOC publicizes its year end statistics at the end of its fiscal year which is September 30th and I wanted to just report on a couple of those things for you to give you an idea of where we are, so in fiscal year 2017, the EEOC filed a 184 lawsuits and out of that they filed 77 cases under the Americans with Disabilities Act. Now, a couple of those are against big companies, so there was a suit that was filed on September 28th by EEOC against Whole Foods. Many of you know Whole Foods is a chain upscale market alleging in the lawsuit that Whole Foods failed to accommodate and ultimately terminated a cashier whose name was Diane Butler who had a kidney disease, who then underwent a kidney transplant and that she requested time off, they rejected that because allegedly she had missed time off from work twice from being hospitalized and needed to visit the doctor, at least according to the allegations.

On the same day the EEOC filed suit against Volvo Group North America, complaining or alleging that Volvo violated the ADA when it refused to hire an individual applicant named Michael Files who was a recovering drug addict for a manufacturing job, right west of us in Hagerstown, Maryland, even though Mr. Files had taken in past drug test for years and what happened was he informed a company nurse at Volvo that he was taking a medically prescribed drug called Suboxone, which is sort of a synthetic kind of opiate substitute, which is much less addictive obviously than other kinds of opiates and once the company found out about that they pulled the offer. I know I have spoken about this before but under the law, it is unlawful under the ADA to take adverse action against an individual applicant or employee because of that applicant or employee's status as a recovering addict as opposed to current usage, so obviously you can refuse to hire or you can terminate pursuant to your policies and procedures an applicant or employee who is currently using and as that is

manifested in a positive drug or alcohol test, but what you can't do is terminate or refuse to hire an individual who has the status of a recovering addict or alcoholic and that's a clear distinction that is drawn in the ADA, itself or the ADA regulations that are promulgated and publicized by the Equal Employment Opportunity Commission.

Now, let me turn my attention as I indicated in the beginning to some of the sort of outgrowth and practical things having to do with the Weinstein et al harassment situations. I think that there are valuable lessons to be learned. I have mentioned some of these in the past months, but I want to go back to some of them, because I think they have practical import for you. The Equal Employment Opportunity Commission has articulated essentially five core principles in trumpeting any kind of effective workplace harassment program and I will just review these real quickly. One is a committed and engaged leadership. That's really important unless you have the support from the top of your enterprise or a company, a workplace harassment policy in a handbook or standalone policy is of very little use and as we have seen at Fox News at the Weinstein Company, the fact of the matter is that the harassers were really located at very high places in those organizations so, one, a committed and engaged leadership.

Two, consistent and demonstrated accountability, meaning that the policy that you have is enforced consistently and that those who are found to be violators of the policy are called to disciplinary action irrespective of that position that they may hold in your particular organization and politically that may be difficult for you as an HR or high level executive in the company, but that is what the Equal Employment Opportunity Commission is looking for.

Third, strong and comprehensive harassment policies so, whether your policies are stand alone or whether they are contained in your employee handbook or both, they need to be strong, they need to be comprehensive, they need to cover a multitude of situations as well as preventing any kind of retaliation against an individual who is either the alleged victim of harassment or who is a witness or participant in an investigation.

Four, trusted and accessible complaint procedures. I have dealt with this before. It is not enough simply to say that if you have an issue as an employee, talk to your supervisor or go to human resources. Generally, you want multiple avenues of complaint, which may even include a hotline that you institute for your organization.

Five, and extremely important and I have talked about this before, regular interactive training tailored to the audience and the organization. I'm going to hold off because I'm going to deal with this in a couple of minutes after I talk about an interview with the acting head of the Equal Employment Opportunity Commission when it comes to interactive and vigorous training. One thing I would say and I do recommend to all of my clients, is that its not enough simply to have your policy in a handbook where it sits because as I have written in a

recent article and blog, some of you may have read it, I'm not sure; employees very rarely read employee handbooks and for that reason I think it is necessary and probably critical that you have a statement, which is republished at least on an annual basis from your CEO, which sets forth your organization's policy on workplace harassment, on retaliation and how the company will react if a complaint is registered. I not only think that this is the right thing to do. I also think from a self-interested standpoint it has a prophylactic effect. My experience with EEOC in dozens and dozens of cases for client is that they are very interested to see how the organization has publicized its policy, how it's communicated to all employees and with what degree of regularity, and it's not a big deal and it's certainly not costly to disseminate this on at least an annual basis.

Now, in today's Law360, which is a professional journal that I get online as a management employment attorney, there is an article which has interview with the acting EEOC chair, her name is Victoria Lipnic, she happens to be a Republican, and it's a very kind of telling interview, very, I think in some respects, helpful and she's talking about the fallout from the Weinstein case. She says and I quote "we see this everywhere. This happens to women in workplaces all over the place. You look at the companies that just last year where the EEOC brought suits. Its food processing plants, a correctional facility, a car dealership, restaurants, agriculture, it's across industries." She says that most people, particularly in terms of sex harassment are not going to come to the EEOC and file a charge. Only about 30% of women who experience harassment ever complain internally. She goes on to say there are several steps employers can take to address harassment itself and encourage victims to come forward, not the least of which is to make combating harassment part of the workplace culture. This fix starts at the top Lipnic said. You will recall I think that in my last telebrief, I indicated that not only is it a legal issue, It's a cultural issue and we saw that both at Fox News, we saw it at the Weinstein company where the culture was to tolerate and condone this sort of behavior at the very top of the organization. She also said several times, the article says Lipnic has heard from outside attorneys brought into businesses to teach workers about sexual harassment, that leaders will often blow off training on the subject. This sends workers the wrong message. They'll expect the leader of the particular business unit to be there. Then that person will show up for 5 seconds, introduce it and leave. "Leadership has to demonstrate a commitment both in terms of their own time and leadership to addressing this." I can personally tell you I've conducted workplace harassment training for dozens and dozens of companies over the last 5 to 10 years. I can tell you that it has much more of an effect if the CEO of the organization is there for the training, not only to introduce me as the trainer but to sit there along with other co-employees. It gives the right signal, it gives the right vibe, that this is something important both to the organization and to the creation and maintenance of a culture of inclusion in the company. I think that if you're going to invest in workplace harassment training, which I would advise you to do, because I think it pays dividends in many, many ways then, I also think that it makes sense to have your CEO become part of that training. After all, this is not something that's

done on a weekly basis and I think that from the standpoint of buy in, from the standpoint of credibility, and from the standpoint of defending a case down the road, it is very, very helpful to have your CEO sit in on that training. I really believe that the Weinstein case, etc. are creating a sea change of attention paid to this issue in the workplace. There probably will be more complaints registered down the road and as HR professionals and as executives, its our job to make sure that we create a culture, which is welcoming and which really has zero tolerance for the kind of brutish, impolitic, and illegal behavior that has been manifested in the news having to do with high-level executives in these industries in the last month to or even several months that we've heard about this in various media reports.

I also think that if you have employment agreements with any individuals whether they are mid level managers, upper level managers, or even your CEO, you ought to indicate in your employment agreement or have a clause, which indicates that violation of the company's workplace harassment policies or discrimination policies will constitute just cause for termination. Often times you will have just cause provisions in employment agreements, but it won't mention workplace harassment policies. I think it is helpful to make sure in your employment agreements that if you have just cause provisions, that just cause will be manifested by the violation of any of your workplace harassment policies.

Okay, enough said about that. I wanted to bring your attention on a fairly significant case decided by the Third Circuit. The Third Circuit includes Pennsylvania, Philadelphia and surrounding states, which was announced a couple of Fridays ago, has to do with break time or rest periods under the Fair Labor Standards Act. What happened in this case against Progressive Business Publications was that Progressive Business Publication had a policy under which anybody who logged off of their computer and didn't log back in after 90 seconds would be not paid for that period of time. This really invokes the regulations promulgated under the Fair Labor Standards Act for break times, which I wanted to review with you in case you have those policies.

First, under the Fair Labor Standards Act, unlike some states, California and others, there is no requirement under the Fair Labor Standards Act that an employer grant rest times or break times to its employees. I know that some employers believe that they're obligated to give breaks, but they're really not obligated to do so under the Fair Labor Standards Act. However, if you do give breaks, what the Fair Labor Standards Act says is that a break or rest time, which is anywhere from 5 minutes to 20 minutes is considered to be work time. The rationale for that is that it will improve productivity; it will improve efficiency and rebound to the benefit not only of the employee but the company as well. Therefore, if you give rest breaks of anywhere from 5 to 20 minutes, you're obligated to pay that as work time. In this case, the Third Circuit dealt with the situation as I indicated where the company would not pay if the employee logged off and was off his or her computer for more than 90 seconds. The court made it a point of saying that the policy of the company

forced employees to choose between the necessity of going to the bathroom or getting paid unless the employee can "sprint from computer to bathroom, relieve him or herself while there, and then sprint back to his or her computer in less than 90 seconds." If the employee can somehow manage to do that, he or she will be paid for the intervening period. If the employee requires more than 90 seconds to get to the bathroom and back, the employee will not be paid for the period logged off and away from the employee's computer. That result was absolutely contrary to the FLSA. If you have break policies or rest policies, make sure that for that period of time from 5 to 20 minutes that the employees are paid because it is considered to be work time. Unlike, meal periods which is under a different section of the Fair Labor Standards Act, again you're not obligated to give a meal period to employees under the Fair Labor Standards Act, but if you do, it has to be an unpaid period or a period in which the employee is not working for a period of 30 minutes or more. I know I have stated on several occasions in prior telebriefs that if an employee is really tethered to his or her desk or computer during an alleged meal break, that is considered to be work time; or if the employee is answering emails or text or any other kind of phone call, that is not being relieved from his or her duty for a period of 30 minutes or more, so just a word to the wise about that.

The last thing I want to bring to your attention is we are approaching a holiday season, many of you may bring on temporary employees as a staffing kind of a move, at least until the end of the year. I want to remind you that if you do that you still are obligated to treat them as regular employees for purposes of background checks, if you do background checks, you are going to have to go through the Fair Credit Reporting Act, the mere fact that, you know, they are temporary employees, does not absolve you from that obligation nor does it absolve you of the obligation that you have for I-9. You also should make sure that they understand, again your workplace harassment and discrimination policies, you may want to give them an employee handbook or at least the policies that are critical including discrimination and workplace harassment polices and you may even want to engage in some minimal training of these employees because for purposes of many particular statutes whether they are Federal statutes, or State statutes or local statutes, despite the fact that they are only going to be there during the holiday season, you need to treat them as regular employees with all the protections that go along with that. You also want to make it clear to them that despite the fact that they are being hired may be for a particular period of time that they are nevertheless employees at will the same as your regular employees. Again, even though they are going to be there for just, you know, a fairly limited period of time, you really need to make sure that from a protective standpoint, you know, you make sure that: a) they sign the same source of documents that you would your regular employees and that you understand that they have some of the same protections as regular employees under Federal and state statutes.

Okay, those are the developments for the day.

Michelle, can you take this off from mute? All right, as I always do I invite any questions or comments you might have. Obviously, if you would rather do it in a more private forum, my phone number is 410-209-6417, my email is hkurman@offitkurman.com. Okay, any questions from anybody out there on any thing that we have covered?

Okay, well, if not, we will see you at least figuratively on the next telebrief on November 8th and in the meantime have a great next two weeks and I'm sure there will be a plenty to talk about in the next telebrief. Thanks a lot.