LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: All right, good morning everybody. We are into the August telebrief. It's a pleasure to come up again with some developments from the last couple of weeks, so let's get started and talk about those.

Interestingly, on August the 3rd, though it is simply last week, the Acting Chair of the Equal Employment Opportunity Commission, Victoria Lipnic, was speaking to a large industry conference in San Antonio, Texas; and she noted a couple of things that I'll bring to your attention because they impact on a practical level things that may be going on in your shop now or in the future. One of the first things she talked about, was the revision to the EEO-1 Report, that we talked about in prior telebriefs, that was promulgated under the Obama Administration and if initiated and enforced would impose requirements not only to enumerate the traditional classifications that you have for employees, but would also impose obligations on you all to report on pay of individuals and include a lot of other data that would be not only burdensome in my opinion but also time consuming, and the kind of the thing that would probably expose you all to more liability than you would like. Anyway, in this conference, the Acting Chair Lipnic stated that she thought that this reporting requirement is, "The poster child for the kind of regulation that the President campaigned against." Clearly this is something that I think the Equal Employment Opportunity Commission with a Republican majority which should happen later this year. It is something that I think that they will revisit, and my best guess is that this probably will be relegated to past history and not be imposed on employers, which is good news. Now, obviously she does not speak for the entire Equal Employment Opportunity Commission, but I think her views are probably reflective of what may go on at the Equal Employment Opportunity Commission. The President, as you know, has picked Janet Dhillon to serve as the new agency chair. Victoria Lipnic was only the acting chair, and as I think I indicated to you previously, Janet Dhillon's prior background was that she worked as general counsel of Burlington Stores and as general counsel of JC Penney and she worked at US Airways, so she clearly has a management-side orientation, which did not mean that the EEOC will necessarily go easy on employers, but I do think it would be a much more employer-friendly orientation. With the Republican majority, as the Equal Employment Opportunity Commission, I think the days of this revised EEO-1 report probably will not see daylight, but we will have to keep our eyes on this and I will obviously report on it later.

She also talked about, at this conference, the difference between the position of the Equal Employment Opportunity Commission regarding sexual orientation being included under Title VII's prohibition on discrimination on the basis of sex and the Department of Justice position, which is that the Department of Justice do not believe, that it is included within the definition of sex discrimination. She indicated, at this conference, that the Equal Employment Opportunity Commission has more than 3,000 charges pending before the agency on the issue of sexual orientation, which is a lot of backlog in terms of the number of charges. You have this dichotomy between the Department of Justice on the one hand, which basically takes the position that sexual orientation is not encompassed within sex discrimination and the position of the Equal Employment

Opportunity Commission that it is. Ultimately, this will be decided I am sure in the Federal Court if not the Supreme Court down the line, but it is an interesting difference between the two agencies on board.

Let me talk a little bit since we are talking about Equal Employment Opportunity Commission stuff, about a recent case, which I think illustrates a practical point. This was a case decided in the Federal Court, case called McMullen v. Evangelical Services and it's a Federal case emanating from Philadelphia. In this case the employer Evangelical Services hired this employee McMullen to be its CFO. He, in fact, was 63 years old when he was hired. A year later Evangelical Services the employer fired him claiming that he was a poor performer and McMullen sued the employer alleging, among other things, age discrimination. What happened in this case was that the employer went ahead and filed a motion for summary judgment, which as you probably all know means that, it is a way of disposing of a case prior to it being tried either before the bench or before a jury. The Federal Court denied the motion for summary judgment on the basis of a few significant facts, which I will now relate to you, which I think have some practical significance to you. In this case, the employer, the CEO told his employees that McMullen had, in fact, resigned rather than saying that he had been fired and in a deposition the employer's CEO testified that two employees complained to him directly about McMullen's poor performance, but in sworn testimony those employees contradicted that claim and said that while they had concerns about McMullen's performance, they had not discussed this with the CEO. Thirdly, the employer hired an employee who was 12 years younger than McMullen to replace him.

The case is significant in that it goes to the point that when you are terminating an employee, it really is significant and it is really critical in my opinion and based on my experience to be truthful about the reasons under which the termination is taking place, both with regard to the outside and with regard to the inside as well unless there is a good reason for spinning it in a certain way. The problem is that if you lie or if you spin it in an untruthful way, it often comes back to bite you when an employee files some sort of adversary action against you. From my perspective, this case is instructive with regard to how to impose a termination and what you need to say or don't say when you implement the termination because the things that you do say with regard to the termination are on record, and if you are in a situation where an employee files a charge, it often can and will come back to haunt you and I have seen it too many times in my practice where an employer would say that an employee resigned when in fact the employee was terminated or the employer would say that the position was eliminated when in fact the employee was terminated for poor performance. Pay particularly close attention to how you communicate the termination, and if you are in doubt, obviously get advice from Employment Council as to how to manage the message.

While we are talking about termination, and we are talking about potential EEO charges let me remind you I saw a case in the Fifth Circuit which was recently communicated and published, regarding an employee who filed a charge against his employer contending that he was made fun of and harassed on the basis of a disability. He stuttered and claimed that the employer did not either ameliorate the harassment that was going on or accommodate his disability. What the Fifth Circuit said significantly was that he unreasonably failed to take advantage of the corrective opportunities provided by the employer. That is, the employee never complained about the issues that were troubling him. From my standpoint, the lesson to be learned from this is that one of the

important parts of your handbook is that you need to have a comprehensive complaint procedure that employees can use. The comprehensive complaint procedure should detail in very specific ways the fact that the employee can go to the human resources department, the employee can call an executive, may even want to have a hotline, a discrimination or harassment hotline, but make sure that employees know how and when the, you know, the issue can be brought to the employer's attention, and in this case, the Fifth Circuit said, look despite the fact that the employee may have had issues and claims that he was subjected to harassment or discrimination, he never bothered to use the comprehensive procedures that were set out in the employer's handbook. So, when you talk about important provisions in a handbook, you know, we often talk about workplace harassment provisions, we often talk about employment at will provisions, etc., but I would offer to you that one of the most critical provisions is having a comprehensive provision in your handbook and even in a standalone policy, which explains in detail what the provisions are for an employee to bring about or to complain about any kind of workplace harassment or discrimination.

Finally, on the sort of discrimination mode issue, let me bring to your attention a recent Third Circuit case where a woman who had multiple sclerosis claimed that she had been terminated in retaliation for a prior complaint that she had filed against the company and for an alleged failure of the company to accommodate her alleged disability. The case was dismissed below in a trial court and the dismissal was upheld by the Third Circuit on the basis that the company had demonstrated and had well documented her performance problems regarding her patient medication errors and also her performance mistakes. While I know it sounds elementary, I think that it is critical to know, particularly in a retaliation claim, that if you are dealing with an employee who has filed a charge of discrimination or has even filed a lawsuit, the question often comes up. Well, does that charge or does that lawsuit immunize that person from future discipline or even termination, and the short answer to that is no it doesn't, but you have to be very careful and you need to have good documentation, which demonstrates that the employee was treated no differently than other similarly situated employees and that you have used either progressive discipline or even severe discipline if the issue is serious enough to warrant it. What I would tell you is if you are in a situation where you are contemplating severe discipline or even termination of an employee who has filed a charge, you need to make sure that your documentation is very clear and obviously the more that you have, the better off you are and if you are questioning whether or not, you really have enough to terminate an employee who has filed that charge then obviously again check with employment counsel because retaliation claims as you know are often accompanying a substantive charge of discrimination today, whether it is at the Equal Employment Opportunity Commission or a state agency.

Let me turn my attention to the National Labor Relations Board for a minute as we often talk about. Last Wednesday, the United States Senate confirmed Marvin Kaplan as a Republican board member, so now we have a two to two board composition. The vote on the other Trump nominee, William Emmanuel was stalled by the Democrats, but will come up in September. I'm of the belief that that will be approved, therefore, as of September the National Labor Relations Board will have a Republican board majority of three to two on the National Labor Relations Board, which means, as I have said in prior telebriefs that I think that we will see many of the prior decisions under the Obama administration labor board, which had a democratic majority turned back, modified, rejected, etc. I think probably a reflective decision, you know, there was a decision promulgated by the Fifth Circuit involving T-Mobile very recently, involving handbook

policies of an employer and T-Mobile had handbook policies which trumpeted the need to have a positive work environment, treating co-employees with respect, prohibiting access to certain company information and other kinds of rules and the National Labor Relations Board had struck down all of these rules on the basis that they violated Section 7 of the National Labor Relations Board, which as you know prohibits an employer from interfering with protected concerted activity of the employee. The Fifth Circuit basically said from a common sense standpoint, encouraging respect for others, a positive work environment and other kinds of attitudinal changes are things that would not interfere with the theoretical Section 7 rights of employees, therefore, rejected the National Labor Relations Board's decisions having to do with this handbook revision. There are other cases that have been recently promulgated, one of them by the Eighth Circuit and along a similar vein having to do with rejection in a case called Miklin Enterprises where employees were terminated for disloyalty to their employer. The National Labor Relations Board found that those terminations were violative of Section 7, it went up on appeal to the Eighth Circuit and the Eighth Circuit ruled that disloyalty to an employer, particularly if it is intended to harm the employer's reputation in business, could not be countenance and that, therefore, the terminations would be upheld. There is a wind afoot both at the National Labor Relations Board and the Circuit Courts of Appeals to modify or to reject decisions of the National Labor Relations Board, which in many cases under the Obama administration have been counterintuitive, meaning that things that you would think are common sense and which were placed in an employer handbook, nevertheless were struck down on the basis that they were violative of Section 7 of the National Labor Relations Board. I think when you see a Republican majority at the National Labor Relations Board, which should occur in September along with decisions coming out of the Circuit Courts of Appeal it should give employers some degree of relief and coming into 2018, should be able to provide some comfort in modifying or at least putting back in employee handbooks policies that may not have passed muster under the Obama administration. I will keep an eye on this and keep you in touch with what I think may be the case in your employee handbook polices as we move into 2018.

The final thing that I will indicate is that the Fifth Circuit has scheduled argument during the week of October 2nd in the overtime rule case, which as you know emanates out of a decision in December by a Federal Court in Texas, which enjoined or prohibited the Department of Labor from enforcing its new overtime white collar rules. The oral arguments will be heard during the week of October 2nd and as I have indicated in prior telebriefs I do not believe that we will return to the Obama administration rules of a $47,000 salary test for white collar exemptions, we may not even have a salary test at all when the Department of Labor gets through with it, but if the salary test accompanies a duties test, I guess as I said before is that it will be some place in the mid 30s as opposed to the high 40s.

Those are developments for the day. Michelle, can you take this off of mute.

I had an email during the telebrief that I was breaking up and I apologize for that and if that is the case I am hoping that for the most part my message got through. Are there any questions or comments regarding any of the issues that I covered today and if you would rather bring them to my attention in a private call, you can certainly do that at (410) 209-6417 or my email at hkurman@offitkurman.com. Any questions or comments? Did everybody have a hard time hearing the presentation?

_____: Yes you were breaking up.

Howard Kurman: It was breaking up?

_____: Yeah

Howard Kurman: Alright, well Michelle will post this and transcribe this for the website. My apologies for the technical problem. We will try and correct them in the next telebrief.

Michelle: Howard, actually I spoke with our platform and I believe I know the solution, for future time, so, hopefully it will be sorted out.

Howard Kurman: Okay, okay well thank you very much everybody.

_____: Thank you Howard.

Howard Kurman: Sorry about that, bye-bye.

_____: Thank you.