LABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire
October 23, 2019

Howard Kurman: Good morning. This is a prerecorded telebrief on Wednesday, October 23, 2019. As I indicated previously I am away out of the country today and the next telebrief would be live that will be Wednesday, November 13, 2019.

All right, we will start with the doings of the Supreme Court. So on October 8, 2019, couple weeks ago, the US Supreme Court heard oral arguments, as I had indicated they would in prior telebriefs, on three very significant and related employment discrimination cases involving what protection that employers must afford if any under Title VII of the Civil Rights in 1964 which as you know prohibits discrimination and employment on the basis of a multiple set of factors including sex and the question is whether the word sex in the Civil Rights Act of 1964 would also prohibit discrimination on the basis of sexual orientation and gender identity based discrimination. There is really no way to predict how this will come out. Oral arguments were clear in the sense that the four liberal justices certainly will vote in favor of an expansive reading of the Civil Rights Act of 1964. It is not clear how the five conservative justices will rule, particularly the newest justices, Justice Gorsuch and Justice Kavanaugh said very little during the oral argument and Justice Gorsuch seemed to be almost on both sides of the argument, when he was questioning counsel. So, this decision will probably come out somewhere in the winter to spring 2020 and I certainly will keep you apprised of how it will be decided, but suffice it to say it will be one of those very significant decisions that the Supreme Court has promulgated in the last 5 to 10 years having to do with workplace protections under various scenarios.

The next thing I will mention is a very useful website that you all may want to utilize from time to time when you have issues of request for accommodations by employees in the workplace or questions of whether your accommodation may be reasonable. The whole panoply of issues that come up under the Americans with Disabilities Act, as you know and as I have indicated many times in the past, the issues under the ADA are much more prevalent today under the rubric of accommodations as opposed to what may or may not constitute a disability. There are very liberal interpretations today of what constitutes a disability, so now the major issues that seem to come up have to do with whether or not an employee’s request for an accommodation is reasonable or not reasonable and there is a website which has been produced by the job accommodation

network and this is abbreviated JAN, and this is an entity which is funded by the United States Department of Labor's Office of Disability Employment Policy, and they have produced what they call a workplace accommodation toolkit. So, you can go online and you can access this which is a very comprehensive document. The toolkit itself has many different aspects to it which I think you will find interesting. So, it will have content on where to find qualified applicants with disability. It has a section on tips for making applications and interviews more accessible and inclusive. It has content on accommodation process for applications and interviews. It has a section on tools for supervisors and managers. A section on accommodation process for employees and a section on accommodations for retaining and returning employees back to work which is frequently a controversial topic. So it has many other things. It is a very comprehensive document and I would highly recommend it if you have issues or questions regarding particular accommodations. It is a good resource in order for you to assess certain aspects of the Department of Labor's position and just the general literature of what may constitute a reasonable accommodation under certain circumstances. Again, it is the job accommodation network and the source itself is the JAN workplace accommodation toolkit. You can certainly Google it and it will take you right to the website.

Now speaking about accommodation issues. There was a very recent case by Judge Ellen Hollander, a federal judge here in the district of Maryland on an issue that may come up in your shop from time to time, and the name of the case was EEOC versus M&T Bank certainly a well known employer in this area and others and the issue before the court was whether or not an employee coming back from an extended FMLA absence following the birth of her child was entitled to an open position or whether she had to be the most qualified for that open position. The bank took the position that the employee who was returning had to essentially compete with others for that position and be deemed to be the most qualified. Judge Hollander indicated that it was not the case. This is a controversial topic throughout, sort of the federal judicial circuits, but Judge Hollander's opinion very well crafted as usual, was that the employee coming back from this extended absence was entitled to job protection and should have been granted the open position assuming that she was qualified to the essential functions of the job even if she were deemed to be not the most qualified for that position. So again, we run into the issues of whether or not there is a reasonable accommodation afforded to an employee under the ADA and I invite you back to the resource that I just talked about that that toolkit put out by the Department of Labor's subsidiary entity.

I wanted to turn my attention to an article or a little blog that came out by a fellow employment attorney at DuaneMorris. His name is Michael

Cohen, which I found to be particularly prescient and useful from a practical standpoint and its entitled Successful Harassment Prevention Programs in the #MeToo era and in this the attorney has listed 10 goals for harassment prevention trainings and I would like to review those with you at this point, because I find them to be particularly practically grounded and useful, so let me get into those and explain or just actually quote from his little blog. So the 10 goals he imagines for harassment prevention trainings are: 1. To ensure that all employees feel safe at work. After all this is really the primary goal of any workplace harassment training in my opinion. 2. To educate all employees about what is and is not appropriate workplace conduct. As he indicates this absolutely increases employee respect and satisfaction, enhances efforts toward retention and recruitment and decreases the likelihood of claims. 3. To alert management that they must report to HR or the appropriate person or body all inappropriate behavior based on protected class, whether the behavior was reported to or observed by them. 4. To notify all employees about the organization's internal complaint procedure and, accordingly, their different and ideally diverse points of contact for raising complaints of inappropriate workplace conduct. I have mentioned this many times before that it behooves you as an employer. They have multiple avenues within which a complaint can be registered including hotlines which are of great utility in today's day and age. 5. To make employees more aware of, and sensitive to, the fact that other people inside the organization have perceptions far different from their own. This recognition is critical. 6. To educate management about the illegality of, and the very real business risks associated with, retaliation. I know that I have talked about in this forum as well as other forums the fact that in today's day and age retaliation is the most prevalent of all types of charges filed with the Equal Employment Opportunity Commission and obviously when an employee files a workplace harassment complaint you have to be particularly mindful of any kind of retaliatory action taken against that particular employee subsequent to the filing of the complaint. 7. To ensure that all employees understand that certain explanations are not defenses to inappropriate workplace conduct. For example, "I didn't mean any harm by the statement," secondly "I was just kidding around," thirdly "I didn't mean for her/him to hear it," so I am sure we have all been exposed to those kind of statements and you have to be particularly cognizant of the fact that perceptions of statements can differ according to the sensitivity of the employee hearing it and therefore you need to make sure that particularly your management staff is cognizant about these different perceptions of what may appear on their face to be innocuous statements. 8. To let all employees know that "what happens in Vegas" (read: outside the office) never stays in Vegas. According to the author inappropriate conduct outside the workplace unquestionably has the impact of affecting relationships inside work and therefore must be avoided. When it occurs it must be addressed immediately. 9. To notify all employees that the organization takes

extremely seriously any form of inappropriate conduct, that the organization will investigate all such issues promptly and thoroughly and that when inappropriate conduct occurs potentially severe disciplinary action will be taken. In my opinion it is extremely important for the culture which starts at the top of your organization to be very proactive and to let all employees know that it's extremely significant and important for the top of the organization to make employees known and to disseminate the communication that workplace harassment will not be tolerated. 10. To ensure that managers fully appreciate their legal obligations with respect to inappropriate workplace conduct, what we call the five Rs of supervisory or managerial responsibility. These five Rs he articulates as: 1. Refrain from inappropriate conduct broadly defined. 2. Report to HR or the designated member or department or committee of the organization, all complaints of harassment discrimination retaliation or inappropriate behavior based on protected class. 3. Respond proactively even in the absence of a complaint. 4. Remedy any inappropriate conduct making sure the remedy is focused on the wrongdoer as opposed to the complainant and lastly and certainly very critically don't retaliate. So I find this blog to be a very practically grounded and useful sort of little summary of what can be done proactively and comprehensively in the era of the #MeToo movement. Now while were talking about sexual harassment in the #MeToo movement there was an interesting case decided by the Second Circuit. The Second Circuit covers of course New York very recently. The name of the case Menaker v. Hofstra University. And a sort of the flip side of the #MeToo movement which concentrates on the victim, here the case concentrate on the alleged perpetrator. So in this case an individual who was the women's tennis coach at Hofstra University had been accused of sexual harassment by one of his team players and what happened was the University conducted investigation, but the investigation was really flawed and the claim by Mr. Menaker who sued the University was that his own sex male played a role in his termination because the University was motivated to demonstrate its commitment to protect female student athletes from alleged male harassers and deviated from its published procedures and policies regarding how it would investigate so-called workplace harassment complaints. There was according to the complaint that was filed a gross shortage of due process afforded to Mr. Menaker and a bias in favor of assuming what the allegations were that were raised by the particular female employee to be true as opposed to extending due process protections to Mr. Menaker. This is a very interesting development in the era of Me Too because as we all know there has been certainly in my observation a trend to assume that the allegations that are made by a complaining employee regarding workplace harassment are true irrespective of the fact that perhaps a full and fair investigation of those allegations has not been made, and in this case what happened procedurally was Mr. Menaker filed a federal lawsuit which was dismissed by the federal judge contending that he had not set

forth an adequate claim on the basis of sex discrimination that's why it went up to the Second Circuit, and the Second Circuit didn't rule on the merits of Mr. Menaker's claim. It merely said that he stated a viable claim for sex discrimination in that he was not afforded the necessary prerequisites of due process. So those of you out there who have comprehensive workplace harassment policies and procedures, it certainly behooves you in the course of any investigation to make sure that not only do you afford the complainant due process in a comprehensive investigation of allegations but also that you are fair to the alleged perpetrator and hear the perpetrator out, get his or her version of whatever the facts are according to him or to her and that make your judgment or your conclusions only after you have done a full and thorough and fair investigation which means not only hearing from the victim but also hearing from the perpetrator as well. To me that is ordinary fairness and common sense, but to some extent it has taken on less importance in this area of the Me Too era, and therefore, I think that you need to heed the warnings of the Second Circuit in this case, which would include affording that alleged perpetrator the same protections of due process that you do the complainant.

In the last topic that I'll touch on this morning is something that I spoke about when the legislature in Maryland completed its session back in April and that is that there is now a more expansive reading of the Maryland Fair Employment Practices Act, which went into effect on October 1. This has to do with workplace harassment and there are certain changes that have taken place as of October 1, which again you need to be aware of. So that we now know that under the more expansive reading of the Maryland Fair Employment Practices Act that the term "employee" has been modified for all purposes to include "an individual working as an independent contractor for an employer so not only do the protections of Maryland's Fair Employment Practices Act extend for all purposes to employees, but they also extend to independent contractors as well. Secondly, it used to be under the old version of the law that an employer was covered under the act if it had 15 or more employees. Now that's not the case in claims of workplace harassment so that an employer would be covered under the provisions of workplace harassment if it has one or more employees. Now that may not be applicable to any of you out there, but it is significant for very small employers in Maryland. Thirdly, the third change under this particular provision in the Fair Employment Practices Act is that there really is no affirmative defense for those actions which are deemed to be workplace harassment committed by a supervisor or manager. Typically, as you may know under federal law, there are affirmative defenses that an employer can raise namely having an extensive proactive workplace harassment program, which the employee has not taken advantage of, that is no longer a defense to workplace harassment claims in the State of Maryland. And last, they have extended

the statute of limitations within which charges can be filed from six months to two years, so just wanted to remind you it is a much more liberal statute today in Maryland under workplace harassment and you need to be aware of those.

Okay, those are the developments of the day. I know that I usually indicate that I can field questions. Obviously can't do that today, but would be happy to do that in the next telebrief, which will certainly be the second Wednesday of November and that will be Wednesday, November 13. So, hope everybody has a good rest of the weekend. We will talk soon. Thanks.