LABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire
October 8, 2014

Howard Kurman: All right, well my official clock says 9:02 a.m. and since we go by my official clock we are going to get started. Good morning to everybody. Welcome to our twice a month telebrief. It is hard to believe that it really is October. The year seems to be flying by and the next telebrief will be obviously two weeks from today or October 22nd.

I wanted to go over probably a few what I think are significant cases out there and stand for different propositions and hopefully some practical advice to everybody on some of the things that are contained in there.

The first case that I really wanted to mention just came out from the Utah Court of Appeals. Utah is not being known of course for being the center of litigation particularly in employment law but this was an interesting case and it involves a well-known employer, Target. So, Target stores one that we all frequent I am sure. And it had to do with the termination of an employee named Susan Nelson. What happened in this case was that Susan Nelson was actually an employee of Target who was became off-duty and then was shopping herself and when she was checking out some groceries and stuff that she had bought she noticed a wallet that was laying on the place near where you use your credit card, you know one of those things where you run your credit card through. She looked around to make sure nobody was looking including the cashier and she put that wallet in her pocketbook. Unbeknownst to her, there were video cameras that Target had installed to observe all kinds of things going on within the store and somebody, a third-party, had indicated to Target that they thought that a wallet had been stolen and they went back and they checked the videos and low and behold they saw that this particular employee, Ms. Nelson, had indeed put this wallet in her pocketbook. And as a result, she was interviewed and after the interview she was terminated. She then turned around and she sued Target on the basis of three causes of action, one was on the basis of a breach of contract having to do with Target not necessarily following its prescribed disciplinary processes and procedures. The second was an intentional infliction or a negligent infliction of emotional distress, and the third was defamation on the basis that she alleged that Target had disseminated information about her to both employees within Target and external sources as well. And the reason I think that this case although rather mundane in terms of the facts is important because I think there are a few principles to keep in mind as you go about your normal business within your own particular company.

First, the handbook that was at issue with Target stated that all employees were at will, which they went on to explain means the team members can terminate the employment relationship at any time for any and no reason and Target

reserves the same. The issues that became apparent and that I just mentioned in this particular situation were that she first said that she had a cause of action because there was a 90 day learning period, which is probably equivalent to some of you who may have a probationary period and that after which Target did not adhere to their progressive policies and procedures in terminating her. She pointed to several statements; one of which in the handbook said we treat each other with respect so our guests always get a good feeling when they show up at Target. She pointed to Target's open door policy which expresses Target's belief in two-way communication and fair dealing and then she pointed to Target's counseling and correction action policies.

However, what the court said was Utah law presumes, and this is very similar to Maryland law and most state laws, that all employment relationships entered into for an indefinite period of time are at will. Which means that an employer may terminate the employment for any reason or no reason except where prohibited by law. And they went on to say that the first page of Target's handbook provides that "all Target team members are at will team members, which means that team members can terminate their employment for any or no reason. I think that this is an important point and it is really stated in several Maryland appellate cases that even if you may have an at will statement in your handbook you really need to have it prominently displayed and I usually recommend to my clients that it be displayed on the first page of the handbook and set out in bold or italics because it gets the attention of the employee and it certainly gets the attention of a review in court. So, those of you who may have at will statements that are not prominently displayed in your handbook may want to go back and amend or modify your handbook to include that. The court goes on to say Target may provide a 90 day learning period to make sure that an employee has demonstrated some indication of intent to stay with the company beyond the short-term before she is eligible for benefits or it may hold new employees to lower performance standards for a few months until supervisors have had enough time to provide adequate training. I think that those are good explanations that you may want to incorporate in your statement on either an orientation period or learning period or as I prefer probationary period. I generally like the term probationary period and although some labor and employment attorneys do not because I think that courts give special credence and special deference to the term probationary period and I think that is a valuable thing.

Finally in dealing with an issue that some of you and I know that I have faced with clients on numerous occasions about defamation. And here there was a finding by the court, the lower court, and then affirmed by the Ohio Court of Appeal that any defamatory statements were shielded by a conditional privilege and that is a very, very important concept for those of you have any reticence or hesitancy about notification of other employees or publication of other employees about the situation or circumstances under which an employee may have been terminated. Virtually, all states give employers what is called a conditional privilege to communicate regarding the circumstances under which an employee has been terminated. The reason for that is that as a matter of

public policy whether the aspect of or the circumstances of an employee's termination are being communicated internally or even perhaps externally to a prospective employer. The law recognizes that as a matter of public policy it is a good thing for employers to be able to disclose verified and true information without running afoul of defamation claims, and the exception to this would be a statement that is both false and maliciously made in order to really injure the departing employee. But outside of that an employer does have a right to communicate to his employees that there were legitimate reasons why an employee has departed. Sometimes, this comes up when you have a company and some of you may have faced this situation before where you have an executive who has been let go for various reasons and I know many of my clients in that situation may be skittish about saying anything other than simply Mr. X left the company to pursue alternative opportunities. Which again leads to all kinds of speculation by employees and all kinds of rumors and under the appropriate circumstances frequently I would advise clients to be able to fashion a statement, which does not go beyond the truth but does nevertheless indicate that there were circumstances to justify the termination of a particular employee and in Maryland, Virginia, Washington DC and most other states there is a conditional privilege under which an employer should feel free to communicate regarding the circumstances under which an employee left as long as the statements are not false and maliciously made about the employee.

So I bring this case up out of Utah because I think that it has several sort of learning lessons for all of us and the formal name of the case by the way is Susan Nelson versus Target Corporation it was filed on August 28, 2014 by the Utah Court of Appeals.

The second case that I wanted to mention to you is a case that has been brought by the Equal Employment Opportunity Commission against the Wisconsin Energy Company. And in this case, which has to do with the firing of an employee. I will just read from the EEOC's press release which came out on August 30th. Its press release reads as follows: "EEOC lawsuit challenges Orion Energy Wellness program and related firing of employee and it reads as follows: Wisconsin based Orion Energy Systems violated federal law by requiring an employee to submit to medical exams and inquiries that were not job-related and consistent with business necessity as part of the so-called wellness program, which was not voluntary and then by firing the employee when she objected to the program." The filed that lawsuit in Federal Court. In the lawsuit filed in Green Bay, Wisconsin today, and then again this goes back to the end of August, the federal agency contends that Orion instituted a wellness program that required medical examinations and made disability related inquiries. When employee, Wendy Schobert, declined to participate in the program Orion shifted responsibility for payment of the entire program for her employee health benefits from Orion to Schobert. Shortly thereafter, Orion fired Schobert. The EEOC maintains that Orion's wellness program violated the Americans with Disabilities Act as it was applied to Schobert and that Orion retaliated against Schobert because of her good faith objections to the wellness program. The EEOC further asserts that Orion interfered with Schobert's

exercise of her federally protected right to not be subjected to unlawful medical exams and disability related inquiries. The EEOC brought the suit under title I of the ADA, which prohibits disability discrimination in employment after first attempting to reach a pre-litigation settlement through its conciliation process. The EEOC goes on to say in its press release the most recent lawsuit is EEOC's first to directly challenge a wellness program under the ADA. Earlier hearings by the EEOC on wellness programs revealed that a majority of employers now offer some sort of wellness program; 94% of employers with over 200 employees and 63% of smaller ones. Employers certainly may have voluntarily wellness programs says the EEOC. There is no dispute about that and many see such programs as a positive development said John Hendrickson regional attorney for the EEOC's Chicago office. But they have to actually be voluntary, they can not compel participation by imposing enormous penalties such as shifting 100% of the premium cost for health benefits onto the back of the employee or by just firing the employee who chooses not to participate. Having to choose between responding to medical exams and inquiries, which are not job-related in a wellness program on the one hand or being fired on the other hand is no choice at all.

So, I will pay attention to this case but those of you out there who utilize corporate wellness programs, and they are a good idea, need to understand however, that there is a major difference, certainly according to at least the Equal Employment Opportunity Commission, a major difference between those programs, which are voluntary in nature and those which are compelled by the employer at the expense of or at the risk of having an employee pay more in health care premiums or even worse be terminated if he or she chooses not to participate in the program. So, if you have a wellness program of any kind make sure that it is voluntary and I would follow that up with a statement that is signed by the employee affirming that the program is voluntary and that he or she understands that there is absolutely no negative ramification that will come about as a result of the employee choosing not to participate in such a wellness program.

The third case of, I think, fairly high significance and one which was just accepted for review by the Supreme Court last week involves Abercrombie and Fitch. And I don't know if any of you have shopped in this store before, but the Supreme Court announced that it will take this case involving a woman who was wearing a hijab to a job interview with Abercrombie and Fitch and she was eventually not hired, she actually was 17 at the time that she applied for the particular position. She went to the Equal Employment Opportunity Commission and filed a charge on the basis of religious discrimination. Now, the case reaches the Supreme Court essentially on the major question of whether or not an employee must make it known to a prospective employer that he or she has a need for a religious accommodation because what happened here is that there was no discussion either by the prospective employee or by the Abercrombie and Fitch employer or interviewer of whether or not she would need to wear this during her particular tenure as an employee. Abercrombie and Fitch apparently, I did not know this, has a fairly strict dress code, does not

permit employees to wear black and they have to essentially have a certain or adopt a certain style of fashion and clothes to fit in with their culture and with their brand and so there was not a discussion here by the employee about hey, I just want to let you know that you know if I am hired I need to wear this hijab because it is consistent with my Muslim beliefs and on the other hand there were no interaction or no question from the Abercrombie and Fitch interviewer that says is it necessary that you wear the hijab when you work because that may or may not be a problem for us. Essentially, t was like ships passing in the night; the employee didn't say anything to the employer or the employer didn't say anything to the applicant and lo and behold she was not hired and she went and she filed her charge, which ultimately over a series of months and years now is ripe for oral argument in the Supreme Court and probably a decision next spring on the parameters at least hopefully some parameters within which there may be an obligation on the part of an employer to affirmatively inquire about certain religious practices if they are evident or the obligation on the prospective employee to make known to the employer or prospective employer that he or she needs a specific accommodation in order to come to work.

So, this will be an interesting case, I think that there are equities on both sides and it will be, I think, a difficult case for the court to render a decision on one way or another.

Another legislative development that I wanted to mention and some of you may have heard, and I think this may have been four or five telebriefs back, I talked about the Department of Labor at the request of President Obama coming up with new rules and regulations which would modify or update the fair labor standards act so-called white collar exemption and essentially raised the salary that would be deemed to be necessary in order to qualify for white collar exemption. And, you all know the salary right now is quite minimum $455.00 per week in order to classify an individual as an exempt administrator or executive or professional and the Department of Labor was supposed to in due time come up with regulations that would implement President Obama's fiat to modify the Department of Labor regulations which haven't been changed by the way in many, many years. In any event, the Department of Labor through Solicitor of Labor, Patricia Smith said last week that the implementing regulations on this are months away and that maybe they would be rolled out early in the new year. So something that was given fairly high priority by President Obama has not made its way in the form of even proposed regulations published in the Federal Register as yet and if they are going to be attempted to be rolled out in the early part of 2015 we know that with all the comments that will come about and all the opposition that will be raised by groups like the Chamber of Commerce, National Association of Manufacturers, etc., it will be a long time if ever into 2015 when these regulations in fact are promulgated.

And the last thing that I wanted to mention is a NLRB case last week finding that drivers for FedEx in Massachusetts were deemed to be employees rather than independent contractors as contended by the company, which actually

contrasts quite dramatically with a finding by the DC Circuit Court of Appeals in 2009 finding in a similar situation that FedEx drivers were independent contractors as opposed to employees. So, as you know when the National Labor Relations Board renders a decision those decisions can be appealed to the Court of Appeals, The Federal Court of Appeals, so it will be interesting because my guess is certainly FedEx will appeal this decision by the National Labor Relations Board and will get further guidance, I suppose, by the DC circuit I guess on the state of independent contractors at least with regard to these FedEx drivers and may even in a more broader pronouncement certainly it is possible that there could be a rebuking of the National Labor Relations Board for its findings in this case because right now as you all know the National Labor Relations Board is a very, very pro-union pro-nonunionized employee advocate and I think it is useful to understand that the Courts of Appeals, The Federal Courts of Appeals do not always give anywhere near the deference to board decision that the board would like.

And the last thing I would mention is that on October 28th, my partner Scott Kamins and I are putting on a seminar directed to those companies either who have unions or who may have unions on the horizon, those invitations have been passed out. It will be at a hotel near BWI and our marketing department can get you out an invitation if you would like to attend. It will be an all day seminar from morning until afternoon.

So, those are the developments for the day and for the two weeks looking back, I am sure the next two weeks will be just as busy and active with regard to labor and employment matters. As I always say if anybody has got any questions please feel free to ask them whether it's now or whether it is in private forum and my private email address hkurman@offitkurman.com or my direct phone, which is 410-209-6417. The next telebrief will be on October 22nd. Any questions from anybody? Okay well hearing none I hear and second a motion to adjourn and we will get back together in two weeks. Thanks everybody.