LABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire
November 12, 2014

Howard Kurman: Okay, my clock says 9:02 a.m., and since my clock is the one that counts, we're going to get started. So, good morning to everybody. It's Howard Kurman. Our twice a month telebrief, and hard to believe that we're into November, that's for sure, and the next telebrief is actually, I guess, the day before Thanksgiving on the 26th. So, hopefully, we'll have everybody in a festive mood for that day. Anyway, let me get started.

I wanted to comment a little on the results of the election as it pertains to labor and employment matters. Obviously, Republicans won big last week, and, as we talk about many times and have talked about on these telebriefs, there is and has been a very aggressive enforcement effort on the part of Democratic administrative agencies, whether they are the Department of Labor, most especially the National Labor Relations Board, also Equal Employment Opportunity Commission. Now, the question is what, if any, impact will the election have on these enforcement efforts, and I think probably it can go one of two ways. First of all, now the Congress in both houses is controlled by the Republicans, and since the administrative agencies are largely determined, in terms of their enforcement efforts, by the amount of funding that they get, now that we have Republican majorities in both the Senate and the House, we are in a situation where if the Republicans want to, and if they can garner their own support among their own party, they could certainly have an impact on enforcement efforts by these administrative agencies because they control the power of the pursestring. And, particularly, as it pertains, let's say, to the National Labor Relations Board, we know that even as recently as September, Senator Mitch McConnell, he of Kentucky and who will now be the expected majority leader, proposed a statute or an act called the National Labor Relations Board Reform Act that would have, among other things, limited the NLRB's general counsel's authority, it would have modified standards for certain types of board actions and cases, and it actually would have affected penalties to the National Labor Relations Board for not getting cases resolved and off their dockets. Whether any of these will be able to get traction, even with the new Congress, remains to be seen, but I think that you can probably predict that there will be a retrenchment in Congress now that it's Republican controlled with regard to funding these administrative agencies' enforcement efforts.

Now, the other viewpoint would be that since there are only two years left to the Obama administration that these agencies may very well get their hackles up and be even more aggressive in terms of enforcement efforts, even if it doesn't involve funding with regard to Congress. So, it remains to be seen … the interesting dynamic in the labor and employment field will be whether or not we see even more aggressive efforts on the part of the Department of Labor,

Equal Employment Opportunity Commission, and the National Labor Relations Board with regard to enforcement efforts.

Speaking of the EEOC, let me turn my attention a little to publicity that is coming out of the office of Chai Feldblum, who is the one of the commissioners of the Equal Employment Opportunity Commission, who recently presented statistical updates on the EEOC's handling of charges involving sexual orientation and gender identity. Just to give you a little background on this, traditionally, the viewpoint of the courts has been that Title VII of the Civil Rights Act of 1964 does not reach the issue of sexual orientation and gender identity. Many states, including Maryland, through their analog agencies, like the Maryland Commission on Civil Rights, protect, as a matter of a protected classification, gender identity and sexual orientation. But, traditionally, Title VII has not been interpreted to mean or interpreted to extend to the protection of sexual orientation and gender identity. However, the EEOC is now in a position where it is espousing that under the EEOC's prohibition on discrimination on the basis of sex covered by Title VII that that would have a broad application within the meaning of federal employment discrimination law and that, therefore, according to the EEOC and Commissioner Feldblum that sex would have the meaning of prohibiting discrimination on the basis of specific prohibitions on certain acts of sexual orientation discrimination, sexual stereotyping, and gender. And, therefore, in recent weeks, the Equal Employment Opportunity Commission has in fact filed lawsuit against, one, a funeral home in Michigan, and, two, an eye care clinic in Florida alleging that unlawful discrimination against male to female transsexual employees is actionable under sex discrimination under Title VII, even without specific reference in Title VII to gender or to transsexual individuals or stereotyping. These cases I'm sure will be ripe for appellate review not only by the courts of appeals but certainly by the Supreme Court. And, ultimately, I think it's pretty … you can confidently predict that the issue of whether or not Title VII encompasses gender discrimination and sexual orientation discrimination under Title VII will reach the Supreme Court, and who knows what they'll do with that. Just to give you some relevant statistics, from January 1st through June 30th of this year, Feldblum stated the agency has received 459 sexual orientation charges and 81 gender identity charges, and, in calendar year 2013, the agency received 834 sexual orientation and 199 gender identity charges. Those of you out there who have handbooks which cover workplace harassment and discrimination, which I would venture to say is probably the great majority of you, should, as a prophylactic matter, change your policies to include as protected classification sexual orientation, sexual identity, etc., because I have no doubt that at some point, whether through congressional action even though we have a Republican majority or through some sort of executive order or through case law, that will be the law anyway. So, just as weeks and months ago I told you that it would be a good idea to modify your handbooks and your discrimination policies to include anti-bullying provisions, so it is I think that it would be useful to modify your policies and include prohibitions on sexual orientation, gender, and sexual identity.

Let me turn my attention, if I can, to an issue that actually came up with me and a client about a week and a half ago. And, the client called me and said that an employee had left their company and had downloaded material from their computers on customer pricing and customer information, had used a thumb drive to take company documents, and uploaded files to a personal account before walking out the door, and, in fact, had erased relevant documents on a hard drive. Now, many of you may face this particular issue, and I wanted to spend a couple of minutes on because it seems to be happening with some degree of increasing frequency.

First of all, you all know that if something rises to the level of a trade secret, you obviously can bring a lawsuit against the departing employee on the basis of the violation of the trade secret. Many of you, however, may not know that there is a federal statute out there called a Computer Fraud and Abuse Act, and the Computer Fraud and Abuse Act has been in effect for many years. It has both criminal aspects to it and civil aspects to it, and the civil aspects essentially say that if an individual intentionally accesses a computer without authorization or uses it in an unauthorized way to obtain information off of what is called a protected computer that that employee can be sued in federal court, and the remedies are compensatory damages and injunctive relief. And, that means that if you have a departing employee who erases important data from your computer on the way out or downloads data, which you view as may not rising to the level of a trade secret but nevertheless puts you at a competitive disadvantage, you ought to talk to your attorney about a potential action under the Federal Computer Fraud and Abuse Act. Now, some states have analogs to that as well. But, in terms of federal court, where as an employer you're usually better off being than in state court, I would recommended that if that happens you talk to your employment attorney about that. Because, again, it does have teeth. You can get compensatory damages against the employee, you can get injunctive relief in the form of actual cease-and-desist orders, and you may have the ability to have that employee reinstate the information or return any information or, if that employee has gone to a competitive company, you may be able to even get an injunction against that competitive company on the basis of that company derivatively enjoying a competitive advantage as a result of the employee going to that employer and exploiting and using that information. So, again, the name of the statute is the Computer Fraud and Abuse Act, the acronym is CFAA, and if you're in that situation, make sure that you speak to your attorney as quickly as you can upon discovering that an accessible computer has been used by the employee to either erase information or to obtain information that may be used at a competitive disadvantage to you.

I read with interest recently that Illinois has expanded the definition of employee in its Workplace Employment Act to include unpaid interns for the purposes of sexual harassment, kind of an interesting development and one that I'm not sure may not be repeated in various states throughout the country. The obvious obligation on the part of the employer doing business in Illinois, therefore, would be that if you're using unpaid interns, and I have talked about the use of unpaid interns before with regard to wage and hour obligation, but

with regard to harassment, is that you would owe obligations, the same obligations to an unpaid intern that you would with regard to a paid employee. And, those of you, again, who have workplace harassment policies in place and who periodically, hopefully, audit them or review them, if you use any degree or any amount of unpaid interns, it may behoove you to take a look at your workplace harassment policy and appropriately amend it so that you extend your protections under your Workplace Harassment Act to unpaid interns as well as paid employees.

Let me spend a minute on an issue again that came to my attention by an employee a couple weeks ago, which has to do with sort of modern technology and the intersection between that technology and you as an employer. You know that many states, including Maryland, prohibit employees from using handheld phones while driving, and that is a separate traffic offense for which the employee can be stopped and actually receive a ticket with monetary penalties. But, in addition to those penalties, if you have an employee who is using a handheld phone while on company business and is involved in an accident, not only would that employee have individual liability in terms of the accident but, because that employee would be deemed to be within the scope of his or her employment, whatever actions that employee had would be imputed to you as an employer, and liability would be similarly imputed, and then, of course, in the case of a bad accident, you and/or your insurance company, your vehicle insurance company, would have liability. So, if you issue company phones to your employees, you really ought to make sure that your company policy is clear that, first of all, employees should not be using phones that are not handheld while on company time while driving; secondly, that you ought to have, or modify if you don't have, your policies, your written policies which indicate that even if an employee is using a handheld phone while driving on company business that that phone call should be limited to the extent that is no more than reasonable under the circumstances to respond. And, of course, supervisors and managers should be mindful of that. And, if they are initiating phone calls with that particular employee while the employee is on the road, those phone calls should be limited to the extent necessary to resolve whatever important issue is being considered. In no way should these phone calls be extended simply to be carrying on business that can be carried on at a time when the employee is not driving. Because, if God forbid, that employee is involved in an accident, there's no question that his actions would be imputed to you as the company. So, that if you do not have a policy in place certainly you would want to have a policy in place which would limit the amount of time that the employee is on a hands-free phone call, that you would want to indicate that employees are not permitted to read or respond to e-mails or text messages while operating a motor vehicle on company business and/or while operating a vehicle on company time, and that if an employee is driving and does not have hands-free and is using a phone that has obviously caller identification that those calls should not be answered, particularly if they're coming in from a company representative, until the individual is not driving. And, there ought to be disciplinary consequences for violation of the policy; for instance, the first time may be a warning, second time a written warning, and

third time perhaps termination. This is a serious thing involving potentially serious monetary consequences for your company, and you ought to take a look at it and make sure that your policy is in place, and, if you don't have a policy, to draft it, and, if you need some help on it, I can help you with that.

The last thing that I really wanted to mention was that there was a case recently decided in the Northern District of Illinois having to do with a non-profit corporation which got summary judgment on an employee's retaliatory discharge claim despite the contention by that employee that she was discharged less than three months after complaining to the HR department about sexual harassment and only 29 days after she filed a substantive EEOC charge. And, the reason that the retaliation claim was not credited and that the non-profit got summary judgment, even where there was only 29 days after she filed the EEOC charge, was because there were significant intervening events making it unreasonable to infer that retaliation had been the result of her protected acts, because she had repeatedly called in sick when she had no available sick time, she had been warned that she could be discharged for her conduct, and her discharge occurred immediately after she called in sick on a day that she had requested off. I raise this because many times, even with regard to a good many of my clients, get skittish when a client has filed an EEOC charge, and the fear is that somehow the employee is immunized by further disciplinary action by virtue of filing the initial substantive EEOC charge, and while, of course, you need to be careful from a temporal standpoint, now, obviously, if an employee filed an EEOC charge on November 1st and you fire that employee on November 10th, there is at least ostensibly a prima facie case that there may have been, from a temporal standpoint, a retaliatory motive on the part of the employer. However, the extent to which the employee commits various infractions which are documented gives an employer a legitimate reason to terminate an employee even in the face of an initial substantive complaint, and the courts are universal in this particular holding. So, those of you out there who have an employee who has either formally or informally filed a retaliation charge of some sort, be aware of the fact that the best weapon against any kind of retaliatory action, at least a retaliatory complaint by the employee, is to document and document and document some more any kind of performance inadequacies or deficiencies so that when you go to consider termination you can defeat the claim of the employee that the real reason for the termination was a retaliatory motive rather than any kind of legitimate business reason, and the extent to which those legitimate business reasons are documented, the more will be the case that you can certainly provide that defeat of a prima facie case on the part of the employee.

So, those are sort of the developments for the day. As always, I invite questions in this forum, that is during this call, or in a private call, you know my number is 410-209-6417 or by e-mail hkurman@offitkurman.com. Any questions from anybody with regard to any of the stuff that I have covered this morning? Okay. Well, having heard none, again, if you need to contact me, please feel free to do so, and we will talk again, hopefully, the day before Thanksgiving, on November the 26th. So, thank you everybody for participating.