LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay, Good Morning everybody. It is Howard Kurman and it's hard to believe that we are one day pre-Thanksgiving nevertheless here we are even on a pretty lousy day at least in Maryland. Those of you who are calling in from elsewhere I hope it is a little better. The next telebrief will be the second Wednesday in December or December 10th. So between now and then hope everybody has a terrific Thanksgiving.

A few different things to talk about today I had a client that called the other day and it's an issue that comes up I think with some degree of frequency and I wanted to make sure everybody understands it. And that is the intersection or potential intersection between the Family and Medical Leave Act and the Americans with Disabilities Act. As you know the FMLA gives a person 12 weeks of protected leave assuming that all conditions for the leave are met and then that person is supposed to or employee is supposed to come back to work upon the expiration of that 12 weeks leave. However, there are some conditions that, or some situations that, call into question whether even at the end of that 12 week FMLA period that the person who has taken that FMLA leave may be entitled to additional leave under the ADA. And the situation, a common situation, could be a person goes out for a bypass surgery, heart surgery and is expected to be out under the FMLA for 12 weeks. Week 11 the person calls the HR person or supervisor and says I have had some complications as a result of my surgery and therefore I need to be out another three weeks. Now under the FMLA that person would not get additional leave because as you know the maximum is 12 weeks. However, if the person qualifies as having a disability under the Americans with Disabilities Act and as you know under the amendment to that act, there are very few things that probably do not classify as a disability, then the employer is obligated to enter into an interactive dialogue with the employee to ascertain whether the additional leave is reasonable or reasonable accommodation under that particular act. So while the EEOC's guidance says that indefinite leave is not a reasonable accommodation, something less than indefinite leave may very well be a reasonable accommodation. So, if that employee said to you as an employer and produced medical evidence to substantiate the fact that he or she only needed three weeks of additional leave you would be hard-pressed to indicate that the employee cannot take that three weeks of additional leave unless you can prove that would be an undue burden on the company to do so, which in most cases will probably be hard to do. So those of you who have sort of an absolutist policy that would basically say upon the expiration of 12 weeks that the person does not come back to work, the person would be automatically terminated under the expiration of his rights of the FMLA, be aware of the fact that there can be this intersection of the ADA with the FMLA. I have had some cases in the last couple of years in invoking this very intersection and the EEOC

takes a dim view of the employer who absolutely shuts the door on the employee who has extinguished his 12 weeks of FMLA leave but nevertheless indicates that he or she needs more in terms of a particular extension. Now the extension really needs to be predicated upon how long that extension will be. After all if the person says that I do not know when I am going to be able to return to work that's not satisfactory. But if the person produces medical evidence that says because of a complication Joe or Mary is expected to come back in the next three to four or five weeks you may be hard-pressed to reject that extension not because of the FMLA, but because of the ADA. So keep in mind the EEOC looks at these very carefully and there should be some interactive dialogue between you as the employer and the employee and perhaps the employee's physician with regard to the perceived needs for additional leave whether it is paid or unpaid.

Two things that came up in a conference that I was participating in at the Chamber of Commerce last week were two separate issues that I think are worth noting this morning. A question came up and this was a conference on hiring and the legal issues associated therewith. One person asked whether it's okay to look at Facebook and social media in making hiring decisions. Now I will tell you that the EEOC and the NLRB takes a dim view of making any kind of a search on Facebook or social media to ascertain whether or not you think that a person is fit for hiring. My view is much more aggressive. My view is that if an applicant has posted things publicly not privately but publicly on Facebook or any other kind of social media I think its fair game to look at that person or Google that person to see what information you can glean about that particular applicant. It is no surprise probably to any of you out there that there is no limitation probably on some of the stupidity and stupid actions by applicants in posting ridiculous statements or pictures or comments that may even be of a racial nature or some of them being more offensive in other ways and you have to ask yourself the question of whether that a person that you really want working at your company. Now the fact that you look at those pictures or you check out somebody on Google does not mean that you would cite that reason to that applicant as the reason that you would not hire him. Obviously, the articulated reason for not hiring that person would be somebody was hired who was more qualified than the particular applicant that we are talking about. But I think it's naïve to think in this day and age that you would not avail yourself social media that is publicly out there in order to make a decision on whether you are going to hire somebody or not. And I just think that you know from the standpoint of due diligence when something is so available to you it does not make sense not to avail yourself of that particular opportunity but you just have to be careful in saying or articulating to the particular applicant that the reason for his or her rejection had nothing to do with social media postings but all to do with that person's qualifications and experience or lack thereof. So that was one question that came up during this hiring conference at the Chamber of Commerce last week. Another question that came up was the extent to which I would recommend that employers utilize exit interviews. Now while this did not necessarily bear on hiring it did come up and I am going to talk a little bit about it and then indicate to you a case which I think is significant reflective of

the fact that it is important to keep good notes at least from the HR standpoint in talking to employees.

So, first with regard to exit interview to me there is no downside in conducting a very good and almost formulaic exit interview with an employee. I say it because I think that there are two benefits to it. Benefit #1 is that if you have made a termination decision, its not out of the realm of possibility that that employee may tell you something during the exit interview which while may not change your mind with regard to the termination decision, it may be an additional fact that you may want to take a look at in terms of whether the supervisor acted correctly or whether in fact the decision to terminate was questionable at all. Some things come out in exit interviews which really were not known prior to the time that the decision to terminate was made. Second and almost more important is that in a problematic termination one where you believe that there could be litigation as a result. Exit interviews are useful because if you can get an employee to articulate and lay down specific statements or reasons for the terminations often times they will come in handy should that employee file an EEOC charge or a lawsuit or some other form of challenge so that if an employee is speaking spontaneously and without a great deal of thought as opposed to when that employee may be filing a charge or a lawsuit its often very helpful to take careful notes about what the employee is saying.

And a case that was just decided November 14th, so just about a week ago or week and half ago, comes out of the United States District Court for the Eastern District of Missouri, and in this case a plaintiff the employee was denied a promotion and she claimed that the denial was based on her race. And she was interviewed by the person who would be in a position to grant that promotion and this supervisor testified or gave an affidavit that in an interview with the employee, the employee stated that the position she was seeking was not "rocket science" and that the employee tried to avoid or ignore rules that she believed were tedious or unimportant and that the supervisor stated in her affidavit that these reasons contributed to her decision not to promote the plaintiff. The question was whether these notes would be admissible if the case were to go to court because the case was decided on summary judgment and the court basically stated that yes they were admissible on the basis that they were an admission by the employee who was bringing lawsuit without getting into technical legal hearsay rules, any time a plaintiff or a party to a lawsuit makes a statement that statement can be used as an exception to the hearsay rule in evidence. So I point out these things with regard to not only exit interviews but anytime you are interviewing an employee during the course of a decision that has been made on a promotion or demotion or discipline, or termination make sure that those notes are carefully kept, carefully taken, carefully scrutinized so that in the future if the employee claims something which would be adverse or in effect opposite to what that employee said to you during the course of the interview those notes become probative and important to a decision maker.

So whether it is in the course of an exit interview which I would recommend and I think that if you have exit interviews you should make sure that the person who is conducting them is well-trained how to do them. That there is sort of a standard protocol and how the exit interviews are conducted and that notes are carefully written and that even if they are from the standpoint written down spontaneously that it be your practice to make sure that if they are not real readable that you type them up and be able to say that they were typed almost spontaneously right after the interview was completed.

So again those of you who have any questions about possibly using an exit interview my recommendation is that there are very few reasons not to conduct them. Unless they are being done by someone who is unskilled or inexperienced at doing them.

Another thing that has come up recently by a couple of clients of mine is the issue of the benefit or lack thereof of early mediation in an employment dispute. You know oftentimes and this will come up in a termination where you may have an employee who has terminated and then very soon after termination retains an attorney to represent that particular employee and the question comes up about whether or not if it is recommended that the employer engage in early mediation of a dispute. I do not always recommend it and I do not always agree to it on behalf of a client but there are occasions when early mediation would be advisable and probably successful. One is where you know that the litigation if it ensues will be protracted it will be expensive because most employment litigation is very, very expensive today and where you think that there may be some chance of an early resolution which would cut down on your legal costs and get a case sort of out of your hair that may be administratively burdensome as well as costly in the ensuing months if not years. So there are some benefits to early mediation one is that you can certainly control who the mediator will be as opposed to a court case where you are assigned a Judge and do not have any say in who that judge would be but in mediation you certainly do have a say in who would be the mediator and generally you are going to want a mediator who is skilled in employment law as opposed to some general litigation mediator with very little employment experience.

Another benefit as I said is that it will save you if it is successful a ton of money. Generally early mediation before both sides hunker down in their postured positions will enable you to be a little more flexible and be able to probably see the forest for the trees, which is 95% of all cases settle anyway so sometimes its beneficial to settle earlier rather than on the courthouse steps. And another major benefit mediation particularly if it's a messy case it involves perhaps sexual harassment or some other very kind of exotic fact pattern which may implicate one or more senior managers is that mediation is frequently confidential. As opposed to a lawsuit which is public and where documents in a public lawsuit can be perused by the press or by any other member of the public a mediation it's private so it is simply a dispute resolution technique where you have the employee and the employee's attorney, the company and its attorney

generally and an outside mediator and that's it. And therefore the proceedings in the mediation and what is said is very confidential kept quiet and that's the benefit in any kind of employment litigation because the last thing that you want is a situation where there is a great deal of publicity attended to any particular dispute.

I wanted to mention a case which I think is instructive to those of you who have charges right now pending involving race discrimination or any other protected class discrimination or where you may be anticipating that something comes up where an employee will claim that he or she has been treated differently particularly in a discipline case. So this is a case called Robinson versus Volvo group decided November 4th by the Middle District of North Carolina Federal Court case. And here the plaintiff Sally Robinson sued the defendant Volvo Group of North America alleging that she was discharged because of her race. And she claimed that other non-protected employees have received favorable treatment and therefore she had made out a prima facie case of discrimination. The court in this case proceeded to talk about all the disciplines that this particular employee had amassed over a number of years. And all the negative comments that had been made in her performance evaluations. It pretty much was a textbook in terms of the court pointing out that it was well documented with regard to her performance issues. Nevertheless, she contended that she had made out a prima facie case because other Caucasian employees had not been subjected to similar discipline. The court went on to say that absent direct evidence Mrs. Robinson must present sufficient circumstantial evidence to raise an inference that she was terminated because of racial animus or discriminatory intent. The court goes on to say that Volvo contends to terminate Mrs. Robinson because of her rudeness to fellow employees and her disciplinary history. While Mrs. Robinson identified several other employees who were disciplined without termination she has failed to identify any employee with a comparable history and pattern of disciplinary issues, that is an important statement I will read it again, while Mrs. Robinson testified several other employees who were discipline without termination she has failed to identify any employee with a comparable history and pattern of disciplinary actions. Thus to be comparable to Mrs. Robinson a coworker would have a multiyear history of disciplinary problems. They go on to say Ms. Robinson has identified no coworker with such a history and in conclusion they say Ms. Robinson has failed to present any similarly situated employee who engaged in comparable conduct that is a Caucasian employee who signed a plan for performance improvement for disciplinary problems and later had problems reoccur but was not terminated. And I think the lesson to be learned by this particular case and in any situation where an employee is claiming that he or she was the victim of disciplinary treatment, meaning that other non protected employees were treated in a more favorable way, is that you often have to look at and compare very carefully the disciplinary actions that the protesting employee is making compared to the disciplinary actions or behavior of other comparators. And frequently in EEOC cases or in similar types of actions, you as the employer are going to want to demonstrate that the so-called comparotories or comparators that the plaintiff is pointing out to really are not comparators. That they are

distinguishing factors between the disciplinary actions or the actions or conduct of the protesting employee vis-à-vis the actions or non-actions of the non-protected employees. And the EEOC frequently does take a pretty careful look at this. So even if you are involved in a lawsuit with regard to protected categories make sure that you are really comparing apples to apples. Because frequently you are not, you may have an employee who says my absence record was the same as you know Joe's absence record and you look at Joe's absence record and you see that there is really no comparison. So whenever you are dealing with a claim of disciplinary treatment which by far is the greater form or the greater occurrence of discrimination cases as opposed to disparate impact, make sure that when the employee is pointing out certain name comparators that they really are comparators because frequently they are not. They are distinguished either because their behavior was different or they did not have the volume of occurrences that the protesting employee did or that the severity of the occurrences was nowhere comparable to the severity of the occurrences that the individual employee had that is making this discrimination charge. And it is the employee's burden, it is the plaintiff's burden to show as a prima facie case that there were other employees who were similarly situated, and that is the operative word similarly situated, they must be in a comparable situation and if they are not then you have a good argument that the employee has not made out a prima facie case of discrimination. Okay, as I always do if there are any questions with regard to your own situations or questions that you have regarding any of these topics feel free to bring them up here or if you would rather do it in private certainly I am happy to answer your phone calls at 410-209-6417 or e-mail hkurman@offitkurman.com. Any questions out there?

Anne: Howard, its Anne. On the issue of looking at Facebook posts of job applicants, I think one of the regions of the NLRB, not our region here but somewhere around the country, found that a company that had not hired someone who was very involved in union activity on his Facebook posts, was unlawful. I do not know where that is going further up in the board but certainly the NLRB is discontinuing its way pro-employee decisions.

Howard Kurman: And it follows on numerous decisions having to do with concerted activity that is found to be present when one employee likes another employee's statement or something like that.

Anne: Yeah, yep.

Howard Kurman: And you are right it is another indication that the board is being extremely proactive at this point and finding things to be illegal when probably predecessor board members would not. Yeah. Nevertheless, I think that unless you were to tell an applicant that you are not hiring that applicant because you saw something on his Facebook post it would be tough for that applicant to make the case that you did. So that is why I say from a practical standpoint I would certainly recommend that people peruse those and while it may not be the sole determinant if you are on the fence about somebody it may be something that sways you one way or another.

Anne: Yeah, because there is no question that important information is out there.

Howard Kurman: It very much is. And employees are not very discriminating when it comes to statements and pictures and things that they put on those different kinds of media.

Anne: Yeah. Okay, thanks.

Howard Kurman: Any other questions? Okay, well I hope that everybody has a real good Thanksgiving a safe one, do not eat or drink too much, do not watch too much football but enjoy yourself. And we will see you if not here you on December 8th.

Anne: Thank you Howard.

Howard Kurman: Thanks a lot, bye, bye.