LABOR & EMPLOYMENT TELEBRIEF
By
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September 10, 2014

Howard Kurman: Okay, we are going to get started. Good Morning everybody, its Howard Kurman. And this is the first post Labor Day Telebrief 2014. The next telebrief will be on the 24th as you know we do these on the second and fourth Wednesday of every month. So there is plenty to talk about this morning as there usually is on all of these.

Let me start out by bringing up a topic that I am sure is probably made you all sick to your stomachs in the last three days. And that is all the business about Ray Rice. My purpose in bringing out today is not necessarily to revisit the issue of domestic abuse and all the statements pro, con and indifferent that have gone around and about that. What I wanted to bring up here are two aspects of the Ray Rice situation that I think are interesting for human resources and labor relations professionals. And the two issues in my opinion are: #1) how and if at all can you discipline an employee for off premises and off duty misconduct and; #2: the nature of investigation into misconduct that occurs with an employee particularly a high notoriety employee such as a professional athlete.

Let me address the first point which is the issue of being able to discipline an employee for off premises conduct. Because after all whatever happened here, we have a pretty good idea by virtue obviously of the video, so whatever happened here, happened when Ray Rice was not on a football field he was not on a practice field, he was not in a classroom with his coaches, this obviously occurred off-premises, off-work time and the question is can an employer discipline an employee for off premises misconduct assuming of course that there is a good faith belief that the proof that the employee engaged in that misconduct. The answer of course is yes, but generally its held by labor arbitrators as well as by courts that an employer certainly can discipline an employee for off-premises and off-duty misconduct particularly where the off-premises or off duty misconduct reflects poorly or detrimentally on the reputation of the company or the employer at issue. Here, of course, certainly Ray Rice's misconduct reflected poorly on both the NFL and the Baltimore Ravens. But even if it had not reflected poorly on the NFL in general, f it had reflected poorly on the Ravens as an employer they certainly would have had the right the discipline Ray Rice for that.

However, going back to as I usually do to your policies and procedures it would be helpful if in your handbook or if in your collective bargaining agreement there is a statement particularly in your policy where you may lift items or issues that will lead to termination that is a list of serious offenses. That one of those would include a terminable offense for those actions or misconduct, which reflect poorly or reflect detrimentally on the reputation or the business of

the employer, which is certainly the case and the situation involving Ray Rice, so go back and look at your policies. If you have a litany of offences for which termination would be appropriate it certainly would behoove you to add or to modify that policy to include a statement that in addition to the offenses that you list that an employee can also be disciplined or terminated for any action whether its on duty or not, which would reflect poorly or detrimentally on the reputation of your business.

There is lesson #1 seems to me from the Ray Rice situation. Lesson #2 has to do with the quality of an investigation into the act of misconduct. I think that it is salient here that the NFL says that it never saw the second video that came out until it came out obviously on Monday. The interesting thing is that the criminal case involving Ray Rice was resolved in May and he was not suspended by the NFL until July and certainly the NFL with all its power and all its resources could have very well gone directly to the casino, which is the Revel in this case, saying we would like a copy of the video. The Revel did not have any problem giving it up to the police or the prosecutor and while the NFL may have had a problem getting the video during the time that the prosecution was active I doubt very much they would have had a problem getting the video with all its resources after the prosecution and after the state's case ended in May and yet the NFL never did that, which again brings up the question of what is the quality of the investigation that occurs. And I can tell you it is rather odd in a situation involving particularly a unionized employee as Ray Lewis is, excuse me as Ray Rice was. Not Ray Lewis, Ray Lewis had his own legal troubles years ago as we all know. But, so Ray Rice was disciplined by the league and disciplined by the Ravens. He was disciplined by the Ravens and by the league of having a suspension of two games, which were unpaid and which to him was certainly a substantial amount of money. The NFL could have it seems to me gotten a hold of the video between the time that the state's prosecution ended and the time that the TMZ brought out the second video. Clearly, whether or not in this case the union files a grievance or may file a grievance and say wait a minute you subjected Ray Rice to double jeopardy for the same offense. That even though you say that you did not know about the second video or what the second video showed nevertheless you could have with some reasonable amount of due diligence acquired information about what the second video showed. And, therefore, you cannot go back and re-discipline the employee for the same offense, which again brings in the question of how thorough the investigation either by the Ravens or by the NFL was. So, I bring this out not in terms of judgment of right, wrong or indifference concerning the action of Ray Rice as a matter of domestic violence. I leave that to all the other pundits who have certainly ad nauseam thrown their weight around about the significance from a societal stand point of what Ray Rice did or did not do but I bring it up as an HR professional with you all saying that from an investigatory stage and an investigatory analysis this whole thing leaves a lot to be desired and as I said to you on numerous occasions in the past when conducting workplace investigations particularly either involving an employee of notoriety or a high level employee or where there is a termination that is contemplated it certainly behooves you to move heaven and earth with regard to actions in an

investigation that will be as thorough as you possibly can and in terms of due diligence to do everything you can to acquire information that may or may not be relevant to your decision and here knowing that there was one video because we all saw the first video where Ray Rice dragged his wife, Janay, out of the elevator. It stands to reason that why would not there have been a first video and if there was why wouldn't you have done everything possible to get your hands on that first video before making a decision in suspending him for two games and then re-visiting that decision after the second video comes out. So, despite everything that has been written and stated about the Ray Rice situation from the domestic violence issue, I bring it to your attention because as HR professionals I think it gives us pause in either looking at our policies concerning the termination of employees for actions that will bear some sort of serious damage on your employer or company reputation and secondly whether or not you conducted a thorough investigation as you possibly can under the circumstances prior to terminating an employee. So, anyway enough about the Ray Rice situation but I thought it was a particularly cogent one with regard to HR situation.

Secondly, I want to bring up a case that I know that I have stated or brought to your attention before which is the case of Mach Mining v. Equal Employment Opportunity Commission. This is a case which is pending presently before the Supreme Court and the issue in the Supreme Court's case is the extent to which the Equal Employment Opportunity Commission has to demonstrate that it engaged in good faith conciliation prior to bringing a lawsuit for discrimination against an employer. Title VII of the Civil Rights Act of 1964 prohibits the EEOC from suing an employer unless the commission has been unable to procure a conciliation agreement with the employer. So when Congress set up the statutory scheme in Title VII what they did was that if the EEOC finds that there has been probable cause to believe that discrimination has occurred they have to engage on what is called the conciliation process with an employer which means an attempt to settle the case. This is an important step, in my opinion, because there is a great difference between finding probable cause on the one hand and the EEOC being able to prove discrimination on the other hand.

In the Mach Mining case, all the EEOC did was to verbally tell the employer certain things with regard to the conciliation process but they never engaged in a detailed conciliation process and Mach Mining has brought to the attention of the Supreme Court in this case the extent to which the Equal Employment Opportunity Commission must engage in good faith conciliation efforts prior to bringing the lawsuit against an employer. And I can tell you from years of experience and dozens of cases in the conciliation process that there is a great divergence of thoroughness and good faith, which is exhibited by the EEOC in the conciliation process itself. Sometimes, its very thorough and sometimes, its very arbitrary and what Mach Mining has brought to the attention of the Supreme Court in its brief which was just filed a couple of days ago and which is public knowledge are issues that always come up in the EEOC for instance they write in their brief. Accordingly to engage in genuine conciliation the commission must provide an outline of the factual and legal basis for the claims.

Because in this case all the EEOC did was they said there was probable cause to believe that discrimination had occurred but they never set forth the detailed legal or factual basis upon which they drew that conclusion. So Mach Mining goes on in its brief and it says, "In addition at least when asked it must explain the basis of its remedial demands," for example, when the EEOC asks for monetary relief it must explain how it arrived at the amount of any monetary relief demanded. It cannot simply pick an arbitrary number and state its attention to soot a Defendant if the Defendant does not pay it. I have been on the other side of that before when the EEOC does not outline in detail the rationale upon which it bases its monitory demand.

Secondly, Mach Mining states in its brief the EEOC needs to provide the employer a reasonable amount of time to review and respond to a conciliation offer. So they say, "Well it should go without saying that an employer needs time to evaluate a conciliation demand," the commission has sometimes failed even that basic standard of good faith negotiations. Which is true and I have experienced that where the EEOC may say give you a demand on a Friday and say well we need an answer on this by next Wednesday, which is ridiculous.

And lastly, what Mach Mining says in its brief is that although the EEOC retains discretion to decide what constitutes an acceptable conciliation agreement. Conciliation necessarily implies a process of communication and negotiation. It cannot simply make an initial take it or leave it offer and declare conciliation a failure if the defendant does not simply acquiesce.

So, this is a case which is I think of significant and important to be decided by the Supreme Court this term and it would go a long way towards I think indicating the extent to which the employer and the EEOC has to be engaged in legitimate negotiations and its really no different from a situation where those of you who are unionized out there, I know Ann this would pertain to you, where an employee under the National Labor Relations Act has an obligation to engage in good faith bargaining with the union and its not unusual for the National Labor Relations Board to pass on whether or not in a particular situation an employer has engaged in good faith bargaining. Similarly, where the EEOC is obligated to engage in the conciliation process with an employer once its found probable cause to believe that discrimination has occurred it is not unreasonable to impute or to infer in that conciliation process the requirement that the EEOC engage in good faith negotiations not simply take it or leave it or arbitrary demands upon an employer. And my feeling is that given the Supreme Court's present composition it would not surprise me at all that the Supreme Court would find that the EEOC's perfunctory negotiations here even if you can call it that or conciliation process were insufficient and if Congress created a statutory scheme of step one finding of probable cause, step two conciliation, step three actual litigation by the EEOC that when you have step two which is conciliation the EEOC would be required to demonstrate that it engaged in good faith negotiations prior to instituting a lawsuit against the employer.

Okay, another case that I wanted to bring to your attention is a case, which emanates out of the Third Circuit. It was decided basically a couple of weeks ago on August 27th in a case called Budhun v. Redding Hospital Medical Center. In this case, an employee broke a bone in her right hand in an incident which was not related to any on the job injury. Nevertheless, she went out on FMLA leave. She came back when she was ready to come back she presented to her employer a statement from her doctor authorizing her to return to work without any restrictions in other words a full and unqualified release. The employer, Redding Hospital and Medical Center, said wait a minute we are not allowing you to come back to work because a good part of your job that is 60% of your job involves typing and we do not believe as an employer that you are going to be able to do that and satisfy our requirements that it be done competently. The employer eventually terminated the employee and the employee filed a lawsuit contending that her right to FMLA leave were compromised or prejudiced by the actions of the employer. The employer prevailed on summary judgment in the first trial level the Federal District Court but the Third Circuit reversed and I think it is instructive to those out there who have frequent FMLA issues or questions. And what the Third Circuit basically said was that it would have been okay for the Redding Hospital Center at the time this employee went out on leave or around the time that she was prepared to come back to communicate with her physician and say one of the essential functions of this employee's job is that she needs to be able to type proficiently 70% of her job time constitutes the requirement that she type and type regularly and can she perform this given the fact that she had a broken bone in her right hand and that would have been okay for the employer to do but instead what the employer did in this case was essentially second judge or come up with a layman's opinion which was in effect sort of a Monday morning quarterbacking of what this employees own physician said which was that he believed that the employee could come back to work without restrictions and do the job. So had the employer, in this case, made sure that for instance it sent a copy of the job description of this particular employee and made the physician aware of the fact that an essential function of the job was typing and typing a large percentage of the time it would have been a different situation than simply second judging the opinion of the physician which was this employee was ready to come back to work on an unqualified and without any kind of restriction basis. So those of you who are big enough out there that you have employees that go out on FMLA leave make sure that if there is any question about the employee's ability to do the job that prior to the time that the employee comes back to work that you make sure that the physician knows, the treating physician knows, what the essential functions of that particular job are so that you can get a copy of that job description to this addition and then have the physician opine as to whether or not the particular employee can do the job with or without a reasonable accommodation.

The last thing that I wanted to bring to your attention was a Court of Appeals for the Second Circuit Federal Second Circuit Court of Appeal in a case called Pippins v. KPMG which was decided on July 22nd in which they found that entry level of accountants were exempt under the FLSA's learned professional

exemption. And as you know under that exemption an employee must have as his primary duty the performance of work requiring advanced knowledge in the field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and that the work must be predominantly intellectual in character and require the consistent exercise of discretion and judgment in the field of science or learning in which specialized academic training is the standard prerequisite for entrance into the profession. Those are the words directly from the DOL's regulations. The court said in this case that even though these individuals were entry level accountants nevertheless they simply did have advanced study, advanced knowledge in a field, namely accounting of advanced knowledge and study and despite the fact that the employees had stated that a lot of their training was done after they got to KVMG nevertheless it was found that these employees would be fairly characterized as professionals under the FLSA. I think it is an instructive case for those of you who struggle with the definition of professionals under the FLSA.

So those are the developments for the day. As always you know I invite comments or questions either in this form or privately at my email which is hkurman@offitkurman.com or my direct phone number which is 410-209-6417. Any comments or questions out there from anybody on what I have covered or comments about anything else that you would like to bring up.

Anne: Howard its Anne, in the Redding Hospital situation, do you think it would have been all right if the employee comes in unrestricted, if at that point the hospital had sent her back to her doctor with the job description and a requirement about the typing. Do you think that could have cured it or should it clearly be done… you think it would have?

Howard Kurman: I think it would have made a big difference Anne. After all the FMLA also gives the employer the right to have a second examination of an employee as you can see so seems to me the employer also could have said look we find this to be problematic in terms of what this return to work release says, we would like to have you examined by a hand specialist. We are going to send that hand specialist a copy of the job description and then of course if that hand specialist had said no this employee really cannot work or perform the essential functions of the job then the employee himself or herself could say well then we want a third examination that can also be done under the FMLA regulations but I just think the employer was lazy here, took the easy way out and did not do what needs to be done in terms of vetting the return to work release.

Anne Yeah I got it.

Howard Kurman: Any other questions?

Karen: This is Karen.

Howard Kurman: HI Karen.

Karen: In that situation when you are asking them I am assuming that she would have may be performed something and you saw difficulty so that you would have wanted to get more information from the doctor and also on that situation would you put her on FMLA and its not and its unpaid are you putting her back on FMLA when you get that information?

Howard Kurman: Well, what happened in this case is exactly the latter situation they put her back on FMLA leave and eventually when she could not perform after the FMLA at least according to their judgment. They terminated her. But of course the question was whether they interfered with her FMLA rights in terminating her and the Third Circuit said there is enough evidence here that this case needs to go to trial. So I think the answer to your question is if she had come back to work and if in their judgment she was not performing adequately, they could have had an interactive dialogue with her to say is there anything that we can do to either help you type you know, for instance is there a type of device or can we give you other duties during that period of time that you are recovering so that after some limited period of time you can go back to performing your normal duties but in the interim while your hand is recovering we will allow you to do x, y and z. That discussion never was held.

Karen: Okay, thank you.

Howard Kurman: Sure, okay, any other questions or comments?

Hi, I would like to ask a question if I may.

Howard Kurman: Of course.

_____: And this is _____ _____, utilizing intermitting FML five days a week four hours a day. Now this person this particular person is a sales representative and an account manager and she works in a remote location so there is no one close in proximity to her and because of the FML time that is required she is not adequately able to support the territory and we cannot put someone in there temporary because its such a remote area. So we have to post for the job and get someone in their permanently. Are we impacting her in any way based on the fact that she has the FML entitlement?

Howard Kurman: Okay, so the question is, it is really a two pronged question, is she entitled to take FMLA leave intermittent leave, the answer is under general circumstances yes. But you know the regulations are clear that if the intermittent FMLA leave would pose an unreasonable burden or hardship on the employer such that you could not accommodate that particular intermittent leave then the employer can say to the employee unfortunately look we cannot accommodate that. You are essentially almost in a single incumbent job so there is just no way that we can practically do that. It is a little different for instance then if you have ten sales people and during the time that a person is out on intermittent leave or taking some time off the other nine sales people can cover for that particular person. If you are in a situation where essentially it is a single incumbent kind of

a situation then no it may not work for the employee to be able to take intermittent leave in that situation. It is really an individual facts and circumstances analysis but you better be able to demonstrate that it is really an undue burden on your company if you do not allow that person to take intermittent leave. I am not saying it is impossible but you are going to have to be able to demonstrate by hard facts that you cannot operate in that fashion.

_____: Okay, all right thank you very much.

Howard Kurman: Okay, all right, well listen everybody thank you very much continue to pay attention to the Ray Rice thing because I am sure out of 24 hours there will only be 23 hours of coverage in the next week of this.

_____: You are so right about that, Howard.

Howard Kurman: Of this cosmic event you know which is more important than almost anything going on in the world. So enjoy the coverage and I will be back at you in a couple of weeks. Thanks.

_____: Thank you Howard.

Howard Kurman: Bye, Bye.