LABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire

Howard Kurman: Okay. It is 9:02. We are going to get started and hopefully nobody had any serious technological problems in getting in. If you do, when we take this off of mute, then let us know and certainly we will look into it and I apologize in advance if anybody did have those questions. All right, so there is plenty as always to report on today. I want to start off with Congress and not necessarily with the Michael Cohen hearing today, and a proposed statute which is being reintroduced into Congress and it has been the subject of a lot of discussion and we will have to wait and see what happens with it but it is called the Paycheck Fairness Act. This was introduced into the Congress on January 30. It has been introduced before namely in the Obama administration but never got much traction. So, this is HR7 for those of you who have a technical bent again called the Paycheck Fairness Act. The introduction of the act states that women have entered the workforce in record numbers over the past 50 years. Despite the enactment of the Equal Pay Act of 1963 many women continue to earn significantly lower pay than men for equal work. These pay disparities exist in both the private and governmental sectors. In many instances, the pay disparities can only be due to continued intentional discrimination or the lingering effects of past discrimination. So, the major elements of this proposed legislation are the following. One, it would enact a wage history band. In other words, employers, as is the case in some states, now would be prohibited from requesting or relying on the wages history of a prospective employee. So, the theory is that if an employer is allowed to ask this kind of question on an application or a job interview, it would perpetuate the effects of past wage discrimination. Two, an employer would have to show under the statute that a disparity in pay between males and females was due to a bona fide factor other than sex and that the factor one was not based upon or derived from a sex-based differential in compensation; two, was job related; three, was consistent with business necessity; and four, accounts for the entire differential in compensation. In a sort of draconian kind of measure, there would be penalties for violations of this statute including punitive damages, if employers were found to act with malice or reckless indifference. Just yesterday the House Labor Committee, so this was yesterday, February 26, cleared this proposal, setting up a floor vote in Congress on this particular statute. So, what happened was in the committee, they voted along party lines 27 to 19 to send it to the house floor. Who knows really what will happen with the statute. I would think given the composition of Congress or the House of Representatives, that this may pass in the House of Representatives. When it gets to the Senate, I doubt that it would pass. But I do think it is indicative of a trend in many cases involving state statutes at least with part of this particular statute that

it may become law down the road, and certainly in 2020, if there were a democratic president and a democratic Senate there would be a good chance that something like this would pass at least in this iteration or in some other iteration. There has been great emphasis both at the Department of Labor and at the Equal Employment Opportunity Commission on pay disparities between females and males, and I think the takeaway for you all is that as you do analysis of your own pay structure, that you take a look at whether or not you have gender gaps with regard to pay for females as opposed to males, and if there are such gaps, that you try and ascertain whether there are valid bona fide reasons for that or if you need to do some adjustments along the way, because certainly the Equal Employment Opportunity Commission and the Department of Labor irrespective of whether this statute gets passed or not or looking at these kinds of disparities and those of you who have government contracts and are governed by the OSCCP need to pay particular attention to this either because you may be subject to audit as a result of a complaint by female or a random audit by the OSCCP. So, a word to the wise, take a look at your salary structure, your pay grades, and make sure that if there are gender gaps, that it is defensible as opposed to something that just has been in a historical carryover from one year to another. I think you need to pay particular attention to that.

Another aspect sort of in the government realm that I wanted to point out is that we have talked before about the Department of Labor's rule or proposed rule on the amendment having to do with the white collar exemptions. So, there has been a lot written recently as to when this may drop. Again,–I think I have mentioned this in prior telebriefs–I would think sometime in 2019, we will have a new proposed rule by the Department of Labor. There has been some talk about the fact that in addition to a salary adjustment. Remember the old salary exempt level was about 24,000 bucks. Under the Obama proposal, it was completely doubled to about $47,000, and my own prediction has been between $30,000 and $35,000 as to where this would wind up, but there has also been some talk in sort of professional circles about whether or not there will be a further adjustment depending on the particular exemption. So, you know, it would be a sophisticated division between the administrative exemption, the professional exemption, and the executive exemption as to whether there may be different salary levels for each of those exemptions. I doubt that that will happen. That is a pretty high level of sophistication. There has also been some talk about whether or not there will be automatic COLA increases to the salary exemptions along the way. I do not think that that is going to happen either. I think there has been enough internal dissension within the ranks of the Department of Labor about how to go about enacting this proposal, and I just from a prediction standpoint, I do think what is going to happen is if you have one salary level without a COLA increase somewhere between $30,000 and $35,000. So, stay tuned for that. I do think we are headed into a period sometime in the second quarter when this proposed rule will drop and I also think that you will

have an enacted rule prior to the 2020 presidential campaign. So stay tuned and, of course, I will keep you updated on that.

I wanted to pay some attention to some very recent cases having to do with harassment, discrimination, etc., because I do think they have some practical import for you all out there as professionals. So, in a recent case decided by the Fourth Circuit. This was on February 8th. Now the Fourth Circuit includes Maryland, North Carolina, South Carolina, Virginia, and West Virginia. This was the case officially titled Parker v. Reema Consulting Services, again decided couple of weeks ago. The Fourth Circuit dealt with the situation where an employee by the name of Evangeline Parker was working at this company Reema Consulting as a clerk at its warehouse facility. She had a pretty successful career being promoted six times and she eventually wound up as an assistant operations manager of the facility in March of 2016. However, two weeks after her last promotion the male employees in the facility began circulating rumors which were false that she had obtained her position because of a sexual relationship with a high ranking male manager. These rumors continued to spread and particularly were announced or repeated at a group meeting by a supervisory employee. Now what happened was she complained to HR about these rumors and eventually not too long after complaining at least for what the company says was a legitimate reason, she was terminated. But as you might imagine she filed a complaint which wound up in Federal Court asserting rights under Title 7 saying that she had been the victim of sexual harassment and retaliation under Title 7. Now when it got to Federal Court, the court granted the employer's motion to dismiss and said that the rumor was not gender based and found that there was not retaliation as a matter of law. Her attorney appealed to the Fourth Circuit. Now the Fourth Circuit reversed and significantly said the sex-based nature of the rumor and its effects plausibly invokes a deeply rooted perception, one that unfortunately still persists that generally women, not men, use sex to achieve success, and with this double standard women but not men are susceptible to being labeled as sluts or worse, prostitutes selling their bodies for gain. So, the court also noted that a male allegedly started the rumor and that all the people who spread the rumors were males and they went onto say that in this circuit, the Fourth Circuit, a plaintiff establishes a hostile work environment because of sex or that plaintiff alleges that the conduct was unwelcome, that it was based on the employees sex, that it was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere and was on some basis imputable to the employer. The Fourth Circuit concluded that there was enough of an allegation here that it was severe or pervasive based on the fact that these rumors were continuously spread over a two-month period. It is a pretty novel approach. There are many other circuits that have found that the spreading of such rumors will not amount to a hostile work environment, but in the Fourth Circuit and that is the circuit that we all face, you know, particular cases here. In the Fourth Circuit, the spreading of those rumors are found to be at least enough to create a prima

facie case of hostile work environment, and I say it as a matter of caution, as a matter of training for you all out there, that I think it is worth noting that you need to stress in your training with supervisors and managers that at least in the Fourth Circuit it is sufficient to create a hostile work environment for rumors based on sex to be disseminated and communicated within the workplace, so I think that those of you who are out there and who are planning on conducting training during 2019 should include this particular example in that training and make sure that your supervisors and managers understand that the dissemination of rumors and they may just be that - rumors, may be enough to create a hostile work environment at least within this particular circuit.

Now another case along those same lines. Just on February 20th, so just a week ago, the Seventh Circuit, which is not our circuit, was looking at a case called Gates v. Board of Education of the City of Chicago, and in this particular case, the plaintiff Fred Gates, he was an African American building engineer, alleged that on three separate occasions within a two year period of time, his direct supervisor made him the butt of a joke in which the supervisor called Gates the N word, that there was another instance when the supervisor threatened to write up the cases "blackass", and on the third occasion the supervisor's comment was referred saying "you people" and again using the N word. Gates asserted in the district court, the trial court - federal trial court, that those interactions spread out as they were over a two year period and constituted a hostile work environment under Title 7. The District Court dismissed the claim of Gates on summary judgment contending that he faced a high bar as the workplace that is actionable is one that is "hellish". Gates appealed to the Seventh Circuit and the Seventh Circuit reversed concluding that as a matter of law a jury could have found that the supervisory conduct alleged in Gates' testimony was sufficiently severe or pervasive to constitute a hostile work environment. Now I think that the takeaway from that case is that in my belief as an outgrowth of the MeToo movement, what we are seeing I think nationally is that there is much more sensitivity in the federal circuits with regard to what constitutes severe or pervasive conduct sufficient to create a hostile work environment. We know that there is a bifurcated standard under Title 7, so something can be a severe act and a severe act may be something egregious, which would constitute actionable hostile work environment. So for instance, if you had an employee who came in one day, an African American employee who came in one day and there was a picture and an actual news sitting on that employee's desk. That without a doubt would be deemed sufficiently severe in itself, sufficiently egregious to create a hostile work environment or over a period of time if there is a continuous course of misconduct on the part of either a co-employee or a supervisory employee, there is much more likeliness it seems to me on the part of federal district courts and particularly federal appeals courts to call something a hostile work environment where in the past it may not have passed muster, and I do believe that this is a consequence and a followup to the outgrowth of the MeToo movement. Again, as a matter of training

with your supervisors managers and rank and file employees, I think that you need to stress that what may have passed muster years ago as not sufficiently pervasive or not sufficiently egregious to constitute a hostile work environment may not pass muster now, and I think that that is noteworthy as you conduct ongoing training of your managerial and supervisory staff. So, there may be acts that occur in the workplace, which even a few years ago may not have been viewed as actionable, which today are viewed as actionable and I think you need to recognize that in your formal policies on workplace harassment and your training as well. In the realm of disability, I would point out a story that appeared in The Seattle Times on February 21st. It is entitled Fired Amazon employee with Crohn's disease files lawsuit over lack of bathroom access. This is a story by a reporter named Benjamin Romano who reports an employee at an Amazon call center in Kentucky. He asked the managers for flexibility in the company's break schedule to accommodate bathroom needs stemming from his Crohn's disease, a painful, chronic and unpredictable inflammatory bowel conditions. But instead a supervisor accused him of stealing time and he was fired he alleges in a lawsuit against the company charging discrimination under the Americans with Disability Act and Kentucky Law. The ADA complaint he says filed last week which would have been a little more than a week ago in the United States District Court in Lexington Kentucky spells out a strict and limited break schedule and an Amazon customer service center in the suburb of Winchester that employs some 900 people. He goes onto say that the employee Nicolas Stover needed to use the bathroom more frequently than the schedule allowed as a result of his disease. He asked for a flexible schedule to be moved or to be moved closer to the bathroom but he was denied those accommodations he alleges in the lawsuit. Amazon declined comment on the issue because it was pending litigation. Now it is noteworthy that when Mr. Stover disclosed this disease to Amazon when he applied for the job and during training at the company's customer service call center in Winchester, so he again reiterated at least according to the lawsuit the need to either have more frequent breaks or to have his office closer to the bathroom because of his Crohn's disease. Significantly, I want to emphasize this is his complaint. These are bare allegations without a lot of fill in and certainly without a responsive lawsuit filed by Amazon. But I think that it is noteworthy and it is indicative of the fact that in today's day and age, frequently we deal as employers with request for accommodations by employees or applicants for jobs. Assuming just for a second, that Mr. Stover's complaint has merit in that Amazon refused to either move his office closer to the bathroom or to provide more frequent breaks, the question is was his request a request for reasonable accommodation or would it have imposed an undue burden on Amazon as an employer. We can generally assume in today's day and age that most conditions that are articulated or specified by employees or candidates for employment today are going to be considered to be a covered disability under the ADA or the ADA amendments act. So the question usually revolves around is the request a reasonable one, is the accommodation

requested by the employee a reasonable one. And that takes into account, you know, what are the operational impacts of the request, what are the costs and you have to really consider these on a case-by-case basis. It does not seem to me on the face of this that the request would have been in an unusual or unreasonable request, but we just don't know the facts of the particular case, and certainly as the case goes on and Amazon answers the lawsuit, we'll find out what the defense of Amazon is. But those of you out there who regularly deal with disabilities or a request for an accommodation have to take a look at these on a case-by-case basis, as opposed to some general rules that you follow in deciding whether a request for an accommodation is reasonable. It really is a multifactor analysis and you really have to engage in an interactive dialogue with the person who is making the request and to document the results of that interactive dialogue and the decision whether to grant the request is made or perhaps to modify the request. So we are in an era when these cases are very prevalent, and I think it is incumbent upon all of you to be cognizant of employees or candidates for employment who are making these requests and to document the interactive dialogue and discussion that you have with the individual as to the reasonableness of the request and whether you can grant it or whether really there is some undue burden, whether there is a huge expense or some real operational impediment that is posed by the request. Okay, those are the developments for the day. Casey, can you take this off of mute. All right, are we off of mute Casey?

Casey: Yes, you should be good to go now.

Howard Kurman: Okay, all right, as always I invite any questions or comments from anybody.

_____: _____ more relevant for him like _____.

Howard Kurman: I'm sorry, I didn't hear, you might be on a speaker phone. Could you just repeat that?

_____: _____ suggestion.

Howard Kurman: I'm sorry; I didn't hear the comment or the suggestion. Any questions from anybody?

Lauren Berk: Hi, my name is Lauren Berk. I'm the CTO of a small Aluminum business. This is my first time on the call. Thank you very much. This is very informative. I actually have a service dog so I'm very well read on a lot of ADA laws. However I have a unique question for you. There is a client that I placed into a job and he has been calling me after hiring this person about his body odor, and from my understanding, from my employment attorney, there is a very fine line on what could be considered a medical condition and what's considered, you know, not being you know well kept, lets just say, you know, in terms of hygiene. What is your

experience or do you have any hearing of anything like that in your career?

Howard Kurman: Yeah, I had dealt with that and sometimes there is a fine line because there are some medical conditions obviously that may impact on an employer's policy having to do with reasonable grooming and hygiene standards; and an employer always has the right to establish reasonable hygiene and grooming standards and if the employees medical condition, even assuming that it is a medical condition, is interfering with the comfort, lets say or the ability of other employees to function normally and to be able to perform their normally assigned duties then an employer does have a right to mandate that that employee either take care of that medical condition so that the impact does not have a negative influence on other employees or to actually be separated in some way where it does not have an impact on other employees. The simple answer to your question and it is not a, and I don't mean to demean it as a simple problem, it is not a simple problem, but the answer is, that in a situation like that and the employer has certainly an obligation to its other employees to remedy this situation and even though the employee may have a legitimate disability, that disability can interfere with the ability or opportunity of other employees to perform their task. It is analogous to the principle under the ADA which basically states that a disability of an employee is not an excuse for misconduct lets say of the particular employee. In this case we are not attributing misconduct to the employee but we are attributing a deleterious effect on other employees, so again, you deal with it.

Lauren Berg: Does the employee just _____ time schedule, so if the employee would ask for reasonable accommodations to be remote and the employer denied him then he could probably move forward with the case?

Howard Kurman: Maybe, maybe, it depends on what the operation or impediment is to that employer. He may not even have the ability to remotely place that employee, but if he can without significant expense or administrative problem, that's probably something that could be done.

Lauren Berg: Okay, so that was just a quick one. It was just a one off. Thank you.

Howard Kurman: So any other questions out there?

Jim _____: Howard, its Jim _____.

Howard Kurman: Okay.

Jim _____: Does an employer have a right to have their own doctor sort of evaluate that employee who comes to them and says that they have a particular condition.

Howard Kurman: Well, again, the simplistic answer is yes, Jim, under certain conditions either under the FMLA, the Family and Medical Leave Act, or the ADA, so the employer may have the right to have the employee assessed for his fitness for duty, but there is some. _____ Jim the employer can do that.

Jim _____: Okay, that's good, thank you.

Howard Kurman: Okay, well somebody is on hold then, all right good. Any other questions. Okay, if not, I appreciate your participation and, as always we will see you on the second Wednesday in March which is March 13th. Anybody got any other issues can certainly contact me at hkurman@offitkurman.com or my phone 410-209-6417. Thanks everybody. Have a good day.