LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: It is 9:02. Hey Casey can you mute these lines. All right, good morning everybody. It is hard to believe that we are on the cusp of Labor Day, but nevertheless few more days and September is here. So, that is the segue into something that was announced yesterday. I think probably about a month ago I indicated that President Trump intended to nominate Eugene Scalia as the new Head of the Department of Labor, and that actually happened yesterday. So he announced that Eugene Scalia would be the, barring confirmation of course, new Head of the Department of Labor. It is interesting, now Eugene Scalia is a well known partner at white shoe law firm Gibson, Dunn & Crutcher and he is in the D.C. office and obviously he is the son of Antonin Scalia, as everybody knows very conservative Supreme Court Justice and Eugene Scalia is also very conservative in his labor views. He headed up the labor practice at Gibson, Dunn & Crutcher for many years and has already evoked the ire of many democrats in Congress because of his conservative labor views actually in a letter to the White House earlier this month many members of Congress on the democratic side called Scalia's, you know, purported nomination "extremely alarming" due in part to his "consistent" record of opposing workers rights. So I bring this to your attention, I do think he will be confirmed as you know Alex Acosta was the former secretary of labor and he had to step down in the wake of the Jeffrey Epstein sex trafficking case when he was the US attorney in Miami. So stay tuned, but you know, there are several issues as there always are before the Department of Labor right now and it will be interesting to see if Scalia is confirmed. The direction that the Department of Labor will take with regard to many of the sort of impending issues before the Department of Labor, one of which is the adjustment in the salary levels for the white collar exemptions as you know which has been subject of much literature, much litigation in the past three years which started under the Obama Administration. So we will see how it shakes out, but this was just announced yesterday.

All right, I want to turn my attention to a series of cases which have been really I think noted on the EEOC's website. Those of you whoever go on the EEOC's website can take a look at the pending litigation or the recent litigation that they have filed and you can always get sort of idea about trends that the EEOC is making in its litigation and the issues that they highlight. So I am going to go over these because I do think they all have a common trend which I will comment on after I review all of these. So the first one is in its press release dated just August the 20th, a week ago,

and its entitled Blood Bank of Hawaii to pay $175,000 to settle EEOC discrimination suit. So their press release says Blood Bank of Hawaii, a nonprofit blood collection company will pay $175,000 to settle a disability discrimination lawsuit brought by the EEOC, they announced back on the 20th. Press release goes on to say according to the EEOC's lawsuit, Blood Bank of Hawaii did not provide employees with disabilities leave beyond the required 12-weeks of leave under the Family and Medical Leave Act and required employees to return to work without limitation at the end of their medical leave. The company also fired employees who had either exhausted their medical leave or were unable to return to work without restrictions. Now this again was a settlement. So in addition to the $175,000 the Blood Bank agreed to pay, they also agreed to place in measures to prevent discrimination in the workplace including retaining an EEO consultant designing an in-house ADA coordinator and revising their current ADA policy and distributing it to employees. The EEOC went on to say and be quoted in this press release as follows: We continue to see employers not properly engaging in the interactive process. We commend Blood Bank of Hawaii for choosing to resolve this complaints or putting in place measures that will benefit all employees in the workplace. And finally they state in their news release addressing disability discrimination in the form on inflexible leave policies that discriminate against individuals with disabilities is one of six national priorities identified by the EEOC's strategic enforcement plan. Now I have commented on the EEOC's strategic enforcement plan in the past and you can see and I will go over these three other cases a major trend in EEOC litigation.

So the second press release is back in July and it is entitled EEOC sues Valley Tool for disability discrimination and retaliation, and it states a tool company operating in Water Valley, Mississippi violated federal civil rights laws when it denied an employee a reasonable accommodation for her disability, fired her and then punished her for complaining about it. According to the EEOC's lawsuit the employees worked as sorters for Valley Tool in 2016, 2017 and 2018. When one employee disclosed she had a blood disorder that caused her to miss work, Valley Tool's manager told her he would not have hired her if he had known she had a blood disorder and they thought that they were hiring a healthy individual which seems like an eminently stupid statement to make to somebody that has a known disability or a disclosed disability.

Again, keeping really in mind the EEOC's major trend let me go over the third case which was posted on its website at the end of July, and this is entitled EEOC sues, I think you pronounce this, Groendyke Transport/McKenzie Tank Lines for disability discrimination. So in this case, the EEOC sued this trucking company and the reason is it says, when it applied its inflexible leave policy to fire two long-term employees with disabilities who had exhausted all medical leave. According to the suit the

two employees were terminated on July 26, 2017, and the two employees, the press release says, had worked for this trucking company for decades. One employee required leave to address a staph infection that caused nerve damage and required surgery. The other, a truck driver in Houston, required leave due to complications from pneumonia. Both were at home recovering when the company fired them. Both employees would have been able to return to work after just a few more weeks of leave. Instead the company rigidly applied its leave policy which did not allow leave beyond the 12-week period provided under the FMLA. As the press release stated such alleged conduct violates the ADA which protects employees from discrimination when they can perform the essential functions of their job with a reasonable accommodation such as additional medical leave. And finally, they quote the ADA does not permit an employer to rigidly use an internal leave policy to terminate employees whose disability requires them to take additional medical leave. Employers are obligated to make exceptions to leave policies and provide additional medical leave as a form of reasonable accommodation unless doing so would result in an undue hardship on the employer.

And finally, just from a week ago, another press release. This is entitled Minnesota based Employer Solutions Group sued by EEOC for firing employee who needed crutches. So they say that the name of this company Employer Solutions Group, a payroll servicing company in Minnesota violated federal law by firing an employee because she needed crutches after surgery. According to the suit, the employee who worked as an account manager, needed to use crutches for a short time after she returned to work following her surgery for a torn ACL. The EEOC charged that the company discriminated against the employee based on her actual and perceived disability. As they stated, the issue here was so minor. This employee needed to use crutches for a short time after returning from short-term disability leave. The employer fired her for doing it, which was inappropriate, short-sighted and unlawful. So we can see from these four cases,—they have been posted on EEOC's website—a major trend at EEOC has to do with accommodations for employees who are already probably out on FMLA or disability leave, and I know I have spoken about this previously in telebriefs, but you have to exercise some logic, some reason in determining whether or not to terminate an employee who was out on disability leave and who may have used up all of his or her FMLA leave. The question is how much more time does that employee need and as you can see from one of these cases if it is just the question of a couple of weeks, it would behoove you to say okay, we will suck it up and we will tell that employee, that is fine, take the couple of weeks and then come back. On the other hand, if you get medical information which indicates that it is indeterminate as to when that employee may be able to come back to work or simply not being able to be assessed with any degree of definiteness by either the employee or her

physician you are in a different position and in that case the cases are clear that you do not have to wait forever for an employee to recover from the disability in order to terminate that employee's employment, but be aware the EEOC has made it very, very clear now that it is a major initiative on its part and I suspect that the state EEO agencies that are the analogues of the EEOC are in a similar kind of position. So those of you out there who have leave responsibilities, be aware that you really need to look at these on an individual basis and make sure that before you pull the plug on an employee who is out on disability leave that you assess the facts and circumstances and determine whether or not as a reasonable accommodation you need to extend that person's leave a short period of time beyond the 12 weeks of FMLA leave.

Okay, last week the Department of Justice filed an appeal having to do with the District of Columbia's decision. This was a federal district court judge back in April who mandated that the second component of the EEO1 report be implemented by September 30 of this year. Those of you who have EEO1 reporting responsibilities know that there is a substantial new requirement for you when you report on your company's EEO1 report by September 30th of this year that not only do you have to file, which historically did not require, but under the Component 2 of the EEOC's requirement you have to file hours and salary data on all of your employees which could be burdensome depending on the number of employees you have. So the Department of Justice interestingly filed an appeal which I do not think will be decided by the time you are required to file your component to EEO1 statistics. So unfortunately, despite the fact that there is pending litigation at the appellate level on this, you probably are going to have to go ahead barring some quick decision and file that component to data and those of you who really need further instruction, again you can go on the EEOC's website and they have some guidance on what you need to do to file that second component to the EEO1 report.

Second kind of interesting thing coming out of the Department of Justice is that last week the Department of Justice representing the Equal Employment Opportunity Commission filed its brief in the Supreme Court on the case that you know will be heard on October 8, 2019, having to do whether the restrictions on sex discrimination under the 1964 Title 7 Civil Rights Act extend to gender identity and sexual orientation, and interestingly, the Department of Justice has maintained its position that Title 7 does not cover discrimination on the basis of transgender status. It is interesting because the EEOC, as you know, takes the exact opposite approach. And so you have a divergence of opinion between the Department of Justice on the one hand and the Equal Employment Opportunity Commission on the other. This will be the subject of great controversy I am sure. It will be voluminous reporting on the oral argument, which is heard on October 8th and the Supreme Court's decision

on this will certainly be provocative one way or another, which will come out probably in the winter or the spring of 2020. Given the composition of the court with five conservatives and four liberals, we simply do not know how it will come down on whether or not it will determine whether or not gender identity sexual orientation are considered to be within the ambit of Title 7's prescriptions on sex discrimination. We just do not know whether it will be a five/four vote one way or another or perhaps whether the EEOC's position will sway even the conservative justices on this. Interestingly, as I have reported in prior telebriefs, the Chamber of Commerce and other business groups have supported the proposition that Title 7's prescription on sex discrimination does in fact include transgender status, sexual orientation gender identity, so what remains to be seen how the Supreme Court will deal with this even in the face of the Department of Justice's position on transgender status.

The last thing that I want to mention is that just last week the National Labor Relations Board issued a very significant decision in a case called Cordua restaurants, and the basic proposition in the labor board's decision is that employers are free to insist that applicants for employment and existing employees sign individual arbitration agreements waving their right to participate or to opt-in to class-based wage and hour cases or any other employment kind of case. This follows the Supreme Court's pretty important decision in a case called Epic Systems, and the Supreme Court decided in Epic Systems recently that under the Federal Arbitration Act, employers were free to insist and to require employees to sign arbitration agreements, but there were a couple of questions that were left unanswered, which the National Labor Relations Board answered in this Cordue case and, you know, I have spoken many times before in telebriefs that the fallacy is that the National Labor Relations Act only applies to unionized employers. In fact, it does not and it applies to all employers, and the import of this decision is that those of you out there who either utilize individual arbitration agreements with your employees or who are contemplating the use of individual arbitration agreements have now been given another green light by the National Labor Relations Board to insist even at the threat of disciplining employees or not hiring applicants that they enter into and sign individual employment arbitration agreements under which they waive their rights to participate in class-based employment litigation so a pretty significant decision again just reflective of the fact that many of the liberal kinds of decisions that were issued under the Obama board are now being modified or indeed being reversed by the present conservative National Labor Relations Board. The caveat, of course, is always that the National Labor Relations Board is a very politicized administrative agency and depending on how the election turns out in November 2020 if a Democrat were to be elected, the Democrat then would be able to put his or her imprimatur on a more liberal National Labor Relations Board that has been the cycle of the National Labor

Relations Board ever since its inception way back in the 1930s with the passage of the National Labor Relations Act.

Okay, those are the developments for the day. Casey, can you take us off of mute please. Okay thanks Casey. All right, as usual, if anybody has any questions, feel free to raise them or if you would rather do it, you know, in a more private forum, feel free to email me at hkurman@offitkurman.com or phone 410-209-6417. As always, I welcome newcomers, so welcome. Any questions? Ok well, I either was clear or everybody turned me off or knows everything that I talked about, so that is a good thing. As always, as you know, these occur on the second and fourth Wednesdays of every month. So, then the first one in September will be September 11th at 9 o'clock and in the interim hope everybody has a great and safe Labor Day. So, thanks for participating.