

Rediger, McHugh & Hubbert, LLP

Representing Management in Labor, Employment and Unfair Competition Litigation

LABOR AND EMPLOYMENT LAW REPORTER

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Firm Celebrates Major Victory: Arbitrator Finds In Favor Of Company And Awards Company Its Attorneys' Fees

An Arbitrator has awarded an El Dorado Hills software company damages and attorney's fees in a case brought by a former employee for unpaid severance.

Following a 5-day hearing, the Arbitrator found that the employee, an Executive Vice President hired to head a new division, repudiated his employment contract by his actions in threatening the owners of the company by e-mail to cancel lucrative client proposals that were in the pipeline. The issue was whether the employee was discharged or voluntarily resigned; if he was discharged, as he argued, he would have been entitled to severance pay under his employment contract, but if he resigned, as the company argued, he would be disqualified from severance pay. The Arbitrator found that the employee unequivocally repudiated his employment contract by his actions and threats and, therefore, was disqualified from severance pay. The Arbitrator awarded the company its attorneys' fees.

In addition, the Arbitrator found in favor of the company on its cross-claim and ordered the employee to reimburse the company for advanced, unearned commissions.

"It is a great result for the client," says Laura C. McHugh, who represented the company.



Laura C. McHugh

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Employee Free Choice Act Introduced In Congress

By Robert L. Rediger

On February 5, 2007, HR 800, the Employee Free Choice Act of 2007 ("EFCA") was introduced in the U. S. House of Representatives with 230 sponsors. If passed, the legislation would change federal law significantly in regard to labor relations involving private sector employers and labor unions. First, the EFCA would require the National Labor Relations Board to certify a union as the exclusive bargaining agent of an employer's employees in an appropriate bargaining unit based only on authorization cards signed by a majority of said employees, dispensing with a secret ballot election where the employees could vote for or against unionization.

Second, if an employer and a newly certified union cannot agree on all terms (*Continued on page 2*)

and conditions to be included in an initial labor agreement, an arbitrator could set such for a two year period. Finally, the EFCA provides “penalties” in the form of injunction proceedings, liquidated damages, and fines in addition to the “make whole” remedies provided under current law.

E-Discovery: Electronically Stored Information Requires Heightened Diligence For Record Keeping in the Workplace

By Lori M. Sandoval

Unlike the business world of yesterday, most businesses today use some sort of electronic record-keeping system whether it be as complex as a storage system for client information and payroll data or as basic as interoffice e-mail. Although most businesses have in place their own unique system for maintenance and retention of such records, the possibility of litigation in today’s business world means that a more uniform system is necessary.

This is especially true in light of the recent amendments to the Federal Rules of Civil Procedure concerning discovery of electronically stored information (“ESI”), which became effective December 1, 2006. Under these new rules, employers faced with litigation may find themselves facing severe penalties for failure to preserve and produce requested electronic information.

The new rules address several key points with regard to the handling of ESI during litigation, including how ESI must be maintained, when it must be disclosed to the other party, and how an employer may avoid sanctions by good faith record keeping.

To comply with these new rules, and in an effort to avoid unnecessary and unwanted settlements against otherwise defensible claims, here are a few tips employers should use:

- **Create a policy and procedure** with standard capture and destruction policies to support your business needs.
- **Establish a committee of employees** from Management, Human Resources, and the IT department to develop a retention policy and survey current databases.
- **“Freeze” deletion of data** by having a committee create a process where they can “freeze” the deletion of data or databases that may be relevant once litigation has been filed or could have been reasonably anticipated.
- **Consider third party management** to help with records management. A rich source of information and help in locating such professionals is ARMA international (www.arma.org) which is a non-profit organization for information management professionals.

Electronically Stored Information: What Is It?

The following list is illustrative, but not exhaustive, of the wide range of information considered ESI that employers faced with litigation need to preserve: email and attachments, digital art and photos, word-processing documents, voicemail, faxes from a fax server, instant messages, calendars, spreadsheets, charts and graphs, scanned images, video, power point presentations, external hard drives, deleted items, archived email and other data, and tape backups.



Lori M. Sandoval

ANTI-HARASSMENT TRAINING

Employers in California that regularly employ 50 or more employees anywhere in the U.S. have a legal responsibility to provide two hours of anti-harassment training to their supervisors and managers. Assembly Bill 1825 requires covered employers to provide such training “to all new supervisory employees within six months of their assumption of a supervisory position.”

We are offering our clients two options to comply with the requirements of AB 1825:

OPTION A - We will offer anti-harassment training at our law firm located in downtown Sacramento on Friday, April 6, 2007 from 9:00 to 11:00 am at a total cost (including parking and materials) of \$100.00 per attendee.

OPTION B - We will present the two hour training at your Sacramento facility or at our law firm, on a convenient date at a total cost (including materials for all attendees) of \$600.00.

To schedule an anti-harassment training session, call Sara at (916) 442-0033 or email us at info@rmlaw.net.

EMPLOYEE HANDBOOK REVIEW

How long has it been since your company last updated its Employee Handbook or Personnel Manual?

By not having a well-written employee handbook, or by using one that contains contradictory, ambiguous or nonsensical provisions, an employer relinquishes its ability to run its business the way it desires and becomes an easy mark for an employment-related lawsuit.

Do an audit of your current Employee Handbook and answer “YES” or “NO” to each of the following questions to see if it is time to have your handbook reviewed:

- _____ Do policies in your handbook undermine the “at-will” employment relationship? (references to grounds for discharge, progressive discipline, probationary status)
- _____ Does a rule, policy or procedure in your handbook violate a federal or state law? (use-or-lose vacation, no moonlighting, no overtime for salaried employees, CTO)
- _____ Will your policies and procedures regarding sexual harassment help or hurt you? (no comprehensive definitions of harassment, failure to include *all* unlawful conduct, an easy to follow procedure, and/or references to required notices and brochures)
- _____ Does your handbook contain provisions that were “borrowed” from another employer’s handbook, a union contract, and/ or downloaded from the Internet?
- _____ Are appropriate forms included to ensure compliance with various laws? (the numerous leaves of absence required by law, meal periods, time cards, flex time)
- _____ Are policies in your handbook ignored when personnel decisions are made?

Creating or revising an employee handbook provides an employer with the opportunity to welcome the new employee, establish policies and procedures for the efficient running of its operations, provide guidelines to enable employees to perform their jobs in an acceptable manner, and establish safeguards to protect and defend itself in litigation. We will discuss suggested changes to your existing Employee Handbook and provide you with model policies, brochures, notices, articles, etc., to ensure that your handbook complies with the law and that it will assist, rather than hinder, your company if it finds itself in employment-related litigation.

Recent Developments

DOL May Revise FMLA Regulations

The United States Department of Labor has accepted comments from the public regarding potential revisions to its regulations interpreting the Family Medical Leave Act. The DOL is considering: 1) how an employer should administer intermittent leave, perhaps acknowledging that some employees have attempted to evade an employer's legitimate absence control policies, 2) whether a more definite definition of the phrase "serious health condition" is needed and should colds, the flu, upset stomachs, etc. qualify an employee as eligible for an FMLA leave, and 3) what information an employer may obtain in a certification from a health care provider regarding an employee's FMLA leave, given medical privacy restrictions presented by HIPPA.

Employer's Application of DOT Hearing Standards Violates ADA

On October 10, 2006, the Ninth Circuit Court of Appeal in *Bates v. United Parcel Service* upheld a judgment in favor of plaintiffs who alleged that they had been excluded from employment as drivers at UPS in violation of the American with Disabilities Act because they could not pass the United States Department of Transportation Hearing Standards test. The plaintiffs argued that they should not have been excluded from driver positions because the DOT regulations applied only to vehicles in excess of 10,001 pounds and UPS vehicles weighed less. The *Bates* court held that the plaintiffs established that they possessed other qualifications that were unrelated to the challenged standard and the employer failed to establish that its application of the standards to the plaintiffs was "job-related and consistent with business necessity."

Employees Covered By CBA May Sue in Court Over Claims Based on State Law

On September 28, 2006, a California Court of Appeal in *Cavala v. Scott Brother's Dairy* affirmed a lower court's denial of an employer's petition to compel arbitration of a class action brought by employees who alleged that they had not been provided with rest breaks and properly itemized wage statements in violation of the California Labor Code. The employer argued that the employees were covered by a collective bargaining agreement with a union that provided that "all disputes" had to proceed to arbitration. The *Cavala* court rejected the employer's contention because the rights the plaintiffs asserted were based on California law, "independent of the collective bargaining process," and were "non-negotiable, non-waiveable, minimum statutory labor standards," permitting the plaintiffs' lawsuit to proceed in court.

Employee Was Not Retaliated Against For Taking CFRA Leave of Absence

On August 29, 2006, a California Court of Appeal in *Neisendorf v. Levi Strauss & Company* affirmed a lower court's dismissal of a plaintiff's claim that she was retaliated against for taking a medical leave of absence under the California Family Rights Act. The *Neisendorf* court held that the plaintiff could not overcome the "legitimate non-discriminatory reasons" the employer articulated to terminate her employment where it fulfilled its obligations to her related to her CFRA leave, the plaintiff had "well documented performance issues," and when she returned to work at the end of her leave, she did not commit to improving on said performance issues.

ALERT

OSHA Issues Updated "It's The Law" Poster: On February 12, 2007, the Department of Labor's Occupational Safety and Health Administration (OSHA) announced the publication of its new "It's The Law" poster. OSHA requires that its poster be displayed in every workplace in America, but employers are not required to replace their existing poster with the new version. Both posters inform employers and employees of their rights and responsibilities for a safe and healthful workplace. *The updated English version of the new OSHA poster is included with this newsletter for the convenience of our clients.*

Associate Attorney Karen L. Turner Joins RM&H

Rediger, McHugh & Hubbert, LLP is pleased to welcome **Karen L. Turner** as an associate attorney with the firm. Ms. Turner represents employers in labor, employment and unfair competition matters. She is a member of the Labor and Employment Section of the State Bar of California and the Sacramento County Bar Association.

Karen earned her J.D. from the University of Pacific, McGeorge School of Law, while clerking full-time for a national labor and employment firm. She was also an author and editor for the McGeorge Law Review. Prior to entering law school, Karen graduated with a Bachelor of Fine Arts degree from Oregon State University.



Karen L. Turner

Announcements

Laura C. McHugh successfully represented an employer in an unemployment hearing, resulting in the reversal of the initial determination of the Employment Development Department that a former employee was qualified for unemployment benefits. The employee claimed that he had good cause to resign after he refused to complete documents because he thought he was being asked to engage in unethical activity. The administrative law judge credited the testimony of the employer's witnesses and "disbelieved" the former employee. Since the employee was not disciplined for his refusal to complete documents, and never complained about being asked to sign the documents until he resigned a few months later, he did not have good cause to resign and was disqualified for unemployment benefits.

Lori M. Sandoval received a favorable ruling involving a *lis pendens* filed against the property of one of our clients. Ms. Sandoval had asked the court to remove the *lis pendens* and the court granted her motion. A *lis pendens* literally means that litigation is pending and serves to notify the public that a lawsuit affecting the property is in progress and any judgment awarded will have priority as of the date of the *lis pendens*.

Robert L. Rediger negotiated a Neutrality Agreement with the Service Employees International Union Local 2006 on behalf of five Los Angeles-based security service companies. *See L. A. Business Journal*, 1/22/07.

Robert L. Rediger prevailed at a labor arbitration on behalf of an employer who had laid off an employee "out of seniority" by showing that the grievant's skills and abilities were less than those of the employees who were retained. *A-1 Door and Building Solutions and Millmen Local 1618*, (Riker, 2007).

Robert L. Rediger obtained the dismissal of an unfair labor practice charge that had been filed by a District Council of the Glaziers' Union against an employer with the National Labor Relations Board alleging that the employer had committed unfair labor practices by withdrawing recognition from said Union (i.e. going non-union) and by discharging an employee because of his Union activities.

Robert L. Rediger and **Lori M. Sandoval** obtained the dismissal of a lawsuit filed by the Sprinkler Fitters' Union against one of our Sprinkler Fitter clients alleging that it had engaged in "unfair business practices."

Visit our website at sacramentolaborlaw.com

Upcoming Events

April 6, 2007 – Anti-Harassment Training at the law offices of Rediger, McHugh & Hubbert, LLP from 9:00 a.m. to 11:00 a.m. at a total cost (including parking and materials) of \$100.00 per attendee. Please see page 3 for more details.

April 23, 2007 – Robert L. Rediger will present a seminar on “How to Discipline and Discharge” in the afternoon session on April 23, 2007 of the Animal Care Conference that will take place in downtown Sacramento. The entire Conference will take place over three days and is sponsored by various animal care agencies. Call Shirley Ingeleston, Director of Meetings and Events at (916) 649-0599 Ext. 11 for more information.

August 2, 2007 – Lorman Education Services will present a one day seminar in Sacramento entitled “Best Practices in ADA, FMLA & Workers Compensation.” Robert L. Rediger has been asked to speak on the topic: “Accommodating Employees By Granting Leaves of Absence.” Details regarding the seminar will appear in the Summer edition of the *Labor and Employment Law Reporter*. Please contact Tobey J. Guntner with Lorman at (715) 833-3940 Ext.1243 for more information.

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