

Rediger, McHugh & Hubbert, LLP

Representing Management in Labor, Employment and Unfair Competition Litigation

LABOR AND EMPLOYMENT LAW REPORTER

Spring 2005

Attorneys Present "Essentials 2005" Seminar For Clients

Robert L. Rediger and E. Aubrey Hubbert were presenters at the law firm's annual half-day seminar held at the Sutter Club on January 7, 2005. The attorneys lectured and answered questions regarding the new California and federal employment laws that became effective on January 1, 2005, including the new law requiring employers to provide anti-harassment



Robert L. Rediger and E. A. Hubbert, Jr. address attendees at the firm's annual half-day employment law seminar held at the Sutter Club in downtown Sacramento.

training to supervisors. During the three-hour seminar, the attorneys addressed numerous labor and employment-related subjects for the HR professionals, supervisors and managers of the firm's diverse clients. Attendees were provided with model forms, posters, notices and brochures to assist them in dealing with day-to-day personnel related matters.

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Sexual Harassment Update: California Supreme Court Reviews Whether A Jury May Consider "Creative Necessity" In Determining Hostile Work Environment

By: Jennifer L. Lippi

Last year, a California appellate court held in *Lyle v. Warner Bros. Television Prod.* (2004) 117 Cal.App.4th 1164, that "creative necessity" is not an affirmative defense to a cause of action for sexual harassment, but it is a factor a jury can consider along with other factors in determining whether a defendant's conduct created a hostile work environment for the plaintiff. In *Lyle*, a writer's assistant on the popular television show "Friends" filed suit alleging sexual harassment based on offensive comments and jokes made by the writers for the show during writers' meetings. The defendants argued that the lewd, crude, and vulgar jokes and comments in the writers' room were an indispensable means of (Continued on page 3)

U.S.D.O.L. Announces New USERRA Notice

On March 10, 2005, Elaine L. Chao, Secretary of Labor, issued a press release regarding the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment to undertake military service and prohibits employers from discriminating against members of, and applicants to, the uniformed services.

The Veterans Benefits Improvement Act requires employers to provide notice to “all persons entitled to rights and benefits under USERRA.” An employer may meet its USERRA obligation by posting the notice that the DOL has issued in a prominent place in the workplace. (A copy of the USERRA Notice is enclosed herein.)

Recent Developments

Trivial Actions Do Not Support Retaliation Claim Under FEHA

On March 18, 2005, the First Appellate District Court of Appeal in *McRae v. Department of Corrections* rejected an employee’s contention that she has been subjected to unlawful retaliation in violation of the Fair Employment and Housing Act. The *McRae* court held that the plaintiff was unable to establish that she was subjected to an “adverse employment action” because the conduct of which she complained, receiving a negative performance evaluation, a written reprimand and a transfer to another location, did not have a “detrimental and substantial affect on her employment.”

Individual May Obtain Injunction After His Employer’s Unsuccessful Attempt

On February 16, 2005, the Second Appellate District Court of Appeal in *Krell v. Gray* upheld a lower court’s grant of an injunction, requested by an assistant principal at a middle school to prevent threats of violence from a substitute teacher whom he had reprimanded. After receiving the reprimand from the assistant principal, the substitute teacher began picketing the school and passing out leaflets critical of the assistant principal. The assistant principal also began receiving death threats by telephone and mail. The *Krell* court held that the assistant principal’s application for an injunction was not prohibited by the employer’s unsuccessful attempt at obtaining a similar injunction on behalf of the assistant principal against the substitute teacher.

Charge Back Of Advanced Commissions For Cancelled Orders Is Legal

On February 7, 2005, the Second Appellate District Court in *Steinhebel v. Los Angeles Times Communications*, affirmed an order granting the employer’s motion for summary judgment, ending several employees’ lawsuits seeking unpaid commissions, waiting time penalties and remedies pursuant to the California unfair competition law. The employer’s Telesales Agreement provided that employees would be paid the minimum wage rate plus a commission upon the sale of a subscription immediately subject to a chargeback if the customer did not keep the subscription for at least 28 days. The *Steinhebel* court held that the employer’s practice in deducting commissions that had been advanced for cancelled subscriptions was valid.

NLRB Allows Employer Work Rule Prohibiting Inappropriate Conduct

On November 19, 2004, in a 3-2 decision in *Lutheran Heritage Village-Livonia*, the National Labor Relations Board concluded that an employer’s work rules prohibiting “abusive and profane language,” “verbal, mental and physical abuse,” and “harassment...in any way,” did not interfere with employees’ Section 7 rights under the National Labor Relations Act.

ASSOCIATE ATTORNEY JENNIFER L. LIPPI

Rediger, McHugh & Hubbert is pleased to announce the addition of Jennifer L. Lippi as an associate attorney with the firm. Ms. Lippi will represent 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.

Prior to joining Rediger, McHugh & Hubbert, LLP, Ms. Lippi was an associate in the litigation department of the Sacramento office of Downey Brand LLP. She is a graduate of McGeorge School of Law, where she was a staff member and editor of the McGeorge Law Review. She graduated *cum laude* with a B.S. in International Business and a minor in Spanish from California Polytechnic State University, San Luis Obispo.



Jennifer L. Lippi

(Continued from page 1) developing gags, dialogue and story lines for “Friends,” a situation comedy about the lives of sexually active adults. They also contended that the explicit conversations among the writers were not gratuitous, but had a compelling business purpose: to generate ideas for jokes, dialogue and story ideas for the show which routinely contains sexual innuendos and adult humor, and that there was no alternative to its sexual brainstorming sessions.

Siding with the defendants, the appellate court held that the jury may consider the nature of their work in determining whether their conduct created a hostile work environment. The court found that sexually explicit conversations in the writers’ room were part of the nature of the writers’ work and the terms and conditions of the plaintiff’s job required her to be present during these conversations. The court reasoned that the defendants’ “creative necessity” argument was analogous to the “business necessity” defense recognized in disparate impact cases under the FEHA.

The California Supreme Court has agreed to review the appellate court’s decision in *Lyle*. While the appeal is pending, the appellate decision may not be relied upon or cited by counsel in pending cases. It remains to be seen whether “creative necessity” will be recognized as a defense, or even a factor, in sexual harassment cases.

Age Discrimination Update: United States Supreme Court Makes It Easier For Older Workers To Sue

On March 30, 2005, the United States Supreme Court in *Smith v. City of Jackson* (Case No. 03-116030) issued a unanimous ruling making it easier for workers over 40 to allege age discrimination under federal law. Police officers and dispatchers sued the City of Jackson, Mississippi over a pay performance plan that allegedly gave substantially larger pay raises to employees with five or less years of tenure. They argued that, although the policies appeared neutral, they had a disproportionate, unfavorable impact on employees 40 and over. The lower courts dismissed the suit, reasoning that disparate impact age discrimination claims were barred.

The United States Supreme Court disagreed with the lower courts and held that the older workers did not have to prove that the city *deliberately* tried to discriminate against them, *just that the policies disproportionately harmed them*. Nonetheless, the high court dismissed the suit, finding that the officers did not demonstrate such and that the city’s explanation that it was trying to make salaries for junior officers more competitive with similar positions was “reasonable.” Moral of the story: Although older workers now have less of a burden in age discrimination cases under federal law, ultimately it may still be hard for them to win.

Upcoming Events

Sexual Harassment Training For Supervisors - The attorneys of Rediger, McHugh & Hubbert, LLP have created a two-hour program to put your company in compliance with Assembly Bill 1825. (See Page 3). The “Sexual Harassment Training For Supervisors” program will be presented at your Sacramento facility or at our law firm, depending on your preference, for a total cost of \$600.00. For pricing outside the Sacramento area or to schedule a training session, call Sara at (916) 442-0033, or send an email to info@rmlaw.net.

April 20-23, 2005 - Robert L. Rediger will speak on “New Federal White Collar Exemptions And How Such Compare To Exemptions Under California Law” at the Catholic Cemeteries Of The West Convention and Annual Meeting that will be held at the Red Lion Hotel in Sacramento.

For additional information regarding upcoming events, please call Sara Mauzac at (916) 442-0033 or email her at swood@rmlaw.net.

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