

# Rediger, McHugh & Hubbert, LLP

Representing Management in Labor, Employment and Unfair Competition Litigation

## LABOR AND EMPLOYMENT LAW REPORTER

Summer 2003

### Firm Moves To New Offices And Expands

**R**ediger, McHugh & Hubbert, LLP has moved from its 655 University Avenue location to more spacious offices at 555 Capitol Mall, Suite 1540. In addition to relocating its office, the firm has expanded by adding Jess Wong, an experienced labor lawyer, Lori Sandoval, a summer law clerk and Candice



Pictured from left to right are: E.A. Hubbert, Jr., Robert L. Rediger, Laura C. McHugh, Sara Mauzac, Lorraine Renfro, Jessavel Wong, Candice Rediger and Lori Sandoval.

Rediger, a summer legal assistant. We represent employers in labor and employment related matters. The firm is rated preeminently, having earned and maintained Martindale Hubbell's highest "AV" rating. For more information about our firm and our practice, visit our web site: [sacramentolaborlaw.com](http://sacramentolaborlaw.com)

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### Picketing, Handbilling And Striking On Company Property: What Are Union Organizers' Rights?

By Jessavel Y. Wong

Employers and property owners must proceed carefully when reacting to picketing, handbilling and striking activities on their property by union organizers. A union representative who is subjected to citizen's arrest for refusing to leave private property after being asked to do so may maintain a civil lawsuit for false arrest, false imprisonment, and malicious prosecution, seeking monetary damages against the property owner or employer, and file an unfair labor practice complaint with the National Labor Relations Board. *Radcliffe v. Rainbow Construction Co.*, 254 F.3d 772, 784-785 (9<sup>th</sup> Cir. 2001). The ability to prohibit *non-employee* union organizers and picketers from entering company property involves the interaction between the National Labor Relations Act ("NLRA"), state trespass laws and free speech rights. (See **Picketing**, on page 4)

# Discipline And Discharge: How To Discipline (Part 1)

By Robert L. Rediger

*Following is the first of a three part series of articles on the infamous topics of discipline and discharge. All three articles will provide employers with “nuts-and-bolts” suggestions when dealing with the uncomfortable, but necessary situation of having to administer corrective action and/or sever the employment relationship with an employee.*

*Part 1 of the series will focus on the need for discipline in the workplace, the risks an employer faces when imposing such, safeguards an employer should have in place before it disciplines an employee, and various degrees of discipline that may be imposed on an errant employee.*

An employer has an inherent right to establish rules of conduct and standards of production for its employees. To maintain order in its workplace and to ensure that its employees are performing their jobs in an acceptable manner, an employer may find it necessary to discipline or discharge employees that are unable or unwilling to comply with its work rules or production standards.

While California and many other states still acknowledge the “at-will” nature of the employment relationship, many laws restrict an employer’s ability to take any adverse action, including discipline and discharge, against an employee for numerous and varied reasons. If an employer is unionized, a labor union may have negotiated further protections (*e.g.*, just cause, progressive discipline) limiting an employer’s ability to discipline or discharge its employees. Employers may even impose restrictions on themselves through their policies and procedures.

Unfortunately, employers must also be cognizant of the scheming or devious employee who, knowing that he or she is on “thin ice,” purposely engages in activity protected by the law in an attempt to insulate him or herself from anticipated discipline and/or discharge. For example, an employee who has been repeatedly warned of the need to improve his or her attendance and threatened with discharge, may voice a concern over a health or safety issue in the workplace, request a medical-related leave of absence, state that the employer is not paying overtime wages appropriately, file a complaint or charge with one

or more administrative agencies, begin talking about the employees joining a union, allege that he or she has been “harassed,” etc.

An employer that contemplates administering discipline to an employee who has engaged in protected activity must exercise extreme caution to avoid being “set up” for litigation. Even where the nonconforming or disgruntled employee’s complaint or protest is without merit, the timing of the discipline or discharge imposed by the employer permits the employee to allege that he or she was “retaliated against because of his or her protected activity.”

Given the risks attendant to the discharge of an employee, employers should consider auditing the following aspects of its workplace environment and implementing safeguards *before* it disciplines an employee:

- **The Hiring Process** – One of an employer’s most effective means to avoid having to discipline and/or discharge an employee is to insure that it hires good employees. An employer can reduce the risk of making a bad hiring decision by accepting only completed employment applications that contain various safeguards, disclaimers, and critical policies and procedures. After conducting a thorough background check, a knowledgeable interviewer should obtain relevant information from qualified applicants and decide whether the person would be a good “fit.” An employer should audit its entire hiring process to ensure that it screens out “problem” *applicants* before they become problem *employees*. (continued on next page)

• **The Employee Handbook**- A well-written employee handbook should communicate the employer's guidelines, work rules, policies and procedures in a clear and straightforward manner. It should contain provisions that are fair to the employee without hindering the ability of management to run an efficient operation. Certain subjects that may form the basis for discipline should be included in an employee handbook, such as policies and/or procedures on absenteeism, attendance, anti-harassment, arbitration, at-will employment, evaluations and discipline. Supervisors and managers should not make exceptions to the policies and procedure because such would conflict with the informed decisions made by the decision makers of the company when drafting the Employee Handbook and may permit an otherwise properly disciplined employee to allege that a similarly situated employee was treated differently.

• **Evaluation Forms** - Employees should be given oral feedback regarding their job performance on a regular basis. In addition, an employer should give formal written evaluations at least once a year. An evaluation should provide the employee with feedback on his or her job performance, but it may be used to memorialize matters related to misconduct. All evaluations must be done timely and honestly and convey the supervisor's appraisal of the employee's ability to perform the essential functions of his or her job. The employee should be required to sign the evaluation, acknowledging only that it was performed. The form should permit the employee to respond in writing to those portions of the evaluation with which he or she agrees and disagrees.

• **Disciplinary Actions** - The purpose of a disciplinary action is to document the employee's misconduct or failure to comply with an employer work rule. Any disciplinary notice should be drafted with the understanding that it may become "Exhibit A" in future litigation. Disciplinary actions include:

1. **Verbal Warnings, Constructive Criticism And Counseling**- Given some employees' proclivities to "forget" oral warnings, constructive criticisms, counseling sessions, and directives to improve, it is advisable that supervisors require employees to sign a copy of the "verbal," memorializing the conversation, while not admitting guilt. A supervisor's note or memo that documents an employee's transgression is a useful reminder and communicates the importance of improved conduct or performance in the future. The employee should be assured that the event that gave rise to the warning is being viewed as an isolated incident *provided the employee conforms his or her future conduct to the employer's expectations.*

2. **Written Reprimand** - A formal written warning, sometimes referred to as a reprimand, is intended to ensure that the offending employee will realize the severity of his or her transgression of the employer's work rules. A formal form should be completed and signed by the supervisor. It should be presented to the employee for his or her signature below the written disclaimer that the employee's signature is to acknowledge receipt, not an admission of guilt. The form should a) memorialize *the problem*, b) inform the employee that *immediate improvement* in behavior or conduct is required, and c) warn the employee that failure to comply with *any* employer work rule, policy or procedure may result in the imposition of *more severe discipline*, up to and including discharge.

3. **Suspension** - A severe transgression of the employer's work rules should result in the employee being suspended from work without pay for a specified amount of time. Non-exempt employees may receive an unpaid suspension for any number of hours or days, depending upon the severity of the offense. An employer should not impose an unpaid suspension of several hours in a workday or several days in a workweek on an exempt employee, however, since such could convert the person into a non-exempt employee. (See **Discipline**, on page 5)

(Picketing continued from page 1)

### **National Labor Relations Act**

Generally, the NLRA restricts non-employee union organizers' access to private property, unless there is no other means of reaching the employees. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

In *NLRB v. Calkins*, 187 F.3d 1080 (9<sup>th</sup> Cir. 1999), the Ninth Circuit Court of Appeal held that where state law provides union representatives with access rights to private property, excluding union picketers engaged in lawful picketing violates the NLRA. In *Calkins*, union representatives picketed and distributed leaflets at a non-union supermarket, urging patrons to stop shopping at that store. The store owner asked the police to arrest picketers who came onto store premises, and one picketer was arrested. The union filed unfair labor practice complaints against the store with the National Labor Relations Board. The Board found that the union agents' picketing and handbilling, which sought to truthfully inform consumers that the supermarket did not employ members of a labor organization, constituted conduct protected by the NLRA and that state property laws did not entitle the store owner to exclude the picketers from the private sidewalks and parking lots of the supermarket.

The Ninth Circuit recognized that under the California constitution, the nature and extent of public invitation to the property, and the nature, purposes and primary uses of the property determine whether free speech rights attach. The Court held that a large supermarket grocery outlet, open to the general public for the purpose of browsing and shopping, implicitly reflects consent by invitation to the public to come on the property. Thus, the store owner did not have a right, under California law, to exclude union handbillers engaged in lawful picketing. The Court granted enforcement of the Board's order.

Recently, in *Walmart Foods v. NLRB*, 2003 U.S.App. LEXIS 13275 (D.C.Cir. 2003), a federal Court of Appeals granted a motion to certify questions to the California Supreme Court involving the issues of trespass and union organizing activities on private property. The questions ask: (1) whether a company has a right to prevent the public from engaging in expressive activity in its parking lot and on the sidewalks next to its store; and (2) if so, whether California law permits union organizers to distribute literature because they were involved in a labor dispute with the company.

### **State Trespass Law**

In California, it is a misdemeanor to refuse or fail to leave a property or structure belonging to or lawfully occupied by another and not open to the general public upon being requested to leave by (1) a peace officer at the request of the owner, the owner's agent, or the person in lawful possession and upon being informed by the peace officer that he or she is acting at the request of the owner, the owner's agent, or the person in lawful possession, or (2) the owner, the owner's agent, or the person in lawful possession. Pen. Code, § 602(n). However, the state legislature has exempted from the application of the state's criminal trespass statute, "lawful labor union activities" carried out on the property where such activity is permitted by the California Agricultural Labor Relations Act (Labor Code sections 1140 *et seq.*) or the NLRA. Pen. Code, § 602(n).

In *In re Catalano*, 29 Cal.3d 1 (1981), the California Supreme Court held that only "lawful union activity" is exempt from prosecution for trespass. Thus, activity that interferes with the construction work or damages property is not protected by the exemption for "lawful union activity." (See **Picketing**, on page 6)

## Announcements

**Jessavel Y. Wong** has joined the firm. Prior to joining Rediger, McHugh & Hubbert, LLP, Ms. Wong was a partner in the Sacramento office of Cook Brown, LLP where she represented management in the litigation of wage and hour, prevailing wage, employment discrimination and labor law issues. Ms. Wong also worked for the Sacramento County Public Defender's Major Crimes division. She is a graduate of the University of California, Davis School of Law where she was a member, staff editor and articles selection committee member of the U.C. Davis Law Review. She graduated *magna cum laude* with a B.A. degree in English from the University of California, Los Angeles.

**E. Aubrey Hubbert** successfully represented an employer before the California Labor Commissioner. A disgruntled former commission sales employee had made a claim for several thousand dollars in unpaid commissions, alleging that he was owed commissions on orders taken prior to his termination from employment. The Hearing Officer issued an Award finding that because taking an order was only the first step in a lengthy procedure, and because the employer's commission plan provided that commissions only become due at the time of delivery and payment, there was no obligation for the employer to pay commissions on the transactions in question. The employee received nothing.

**Robert L. Rediger** negotiated a four-year master collective bargaining agreement with the SEIU, Local 24/7 on behalf of six major providers of security services in San Francisco. The CBA contains many innovative clauses favorable to the employers, including a broad management rights clause, provisions permitting the employers to file grievances, and the employers' right to more favorable terms the Union grants to any other employer in San Francisco, Alameda or Contra Costa Counties.

**Lori M. Sandoval** is a summer fellow with the firm through the Sacramento Minority Bar Fellowship Program. She currently attends the University of the Pacific McGeorge School of Law and will begin her second year of law school in August. Prior to attending McGeorge, Ms. Sandoval worked full-time at the San Joaquin District Attorney's office - Family Support Division while attending evening classes full time at CSU Stanislaus where she obtained her degree in Psychology. When she is not working or in school, Ms. Sandoval enjoys reading, cooking, and her cat Suki.

(**Discipline** continued from page 3) The notice of suspension should inform the employee that he or she a) may not visit the employer's premises or contact any employees during their work time, b) must comply with all of the employer's directives and c) that such represents the employee's "last chance" to continue the employment relationship.

4. Termination- The most severe form of penalty an employer could impose on an employee is termination of employment, sometimes referred to as "industrial capital punishment." The discharge of an employee for misconduct is often necessary

if the employee engages in significant misconduct or fails to improve after being warned. Even if an employer has established a valid at-will employment relationship, it should have one or more business-related reasons for terminating an employee's employment. The existence of a "legitimate business reason" for an employer's decision to discharge an employee is essential in the context of lawsuits and administrative proceedings when the employee alleges unlawful discrimination on the basis of his or her protected status.

(Picketing continued from page 4)

In *Catalano*, union representatives entered a jobsite to perform a safety inspection and prepare a steward's report. The owner effectuated a citizen's arrest that led to the union representatives' criminal prosecution. The Court held that the union representatives may not be prosecuted for trespass under the penal code because they were conducting "lawful union activity;" the union's collective bargaining agreement expressly authorized the inspections and reports. In determining whether the union representatives' conduct was "lawful," the court looked at the "customary and accepted practices of the construction industry" and balanced the interests of the union and the property owner. The Court found that the union representatives' inspections and reports were consistent with the union's past practice and the landowner knew of prior entries by union representatives.

Acts or threats of violence or physical intimidation, false statement and blocking the ingress and egress to a business do not constitute "lawful union activity." *2M Restaurants, Inc. v. San Francisco Local Joint Exec. Bd. Of Culinary Workers, Local No. 9*, 124 Cal.App.3d 666 (1981). Strikes and other activity that violate the NLRA are do not constitute "lawful union activity."

### **Free Speech Right**

The California Constitution gives every person an affirmative right to free speech. Article I, section 2, subdivision (a) provides, "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

In *Golden Gateway Center v. Golden Gateway Tenants Assoc.*, 26 Cal.App.4th 1013 (2001), the California Supreme Court held that the right to free speech exists only when the property where the speech occurs is freely and openly accessible to the public. Since a privately-owned medical center and its parking lot are not freely open to the public and are not functionally equivalent to a traditional public forum, the public

does not have a right to engage in free speech on such property. An individual homeowner is also exempt from the purview of the free speech clause because, presumably, individual homes are not freely and openly accessible to the public. In contrast, a sidewalk in a business district and a shopping mall to which the public has unrestricted access are public fora where the public may engage in free speech.

Courts have upheld the right to peacefully picket at privately owned shopping centers and private sidewalks and parking lots abutting large supermarkets, finding such areas to be public in nature. *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899 (1979). In contrast, the United States Supreme Court in *Labor Board v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) upheld an employer's right to prohibit picketing in a company parking lot where the parking lot was not generally open to the public.

### **Conclusion**

Where state law prohibits an employer or property owner from excluding union representatives from private property, the employer or property owner commits an unfair labor practice by restricting access to union representatives engaged in Section 7 activities. Under state law, speech on public property is generally constitutionally protected, and an employer or property owners' rights may have to give way to a union representative's right to free speech. Union representatives may thus engage in peaceful picketing or handbilling on private property that constitutes a public forum if they do not engage in otherwise unlawful conduct, such as blocking the entrance or exit to a business. Property owners may, on the other hand, impose reasonable time, place and manner restrictions on expressive activity. Such restrictions must be content-neutral, uniformly enforced, narrowly tailored to protect a significant interest of the property owner, and leave open alternative channels for the communication of information.

# Recent Developments

## California Supreme Court Clarifies Standard For 132a Liability

In *Department of Rehabilitation v. Workers' Compensation Appeals Board (Lauher)*, the California Supreme Court held that for an injured worker to establish discrimination under Labor Code section 132a, he or she must show not only an adverse consequence from the employer's action or inaction, but also that he or she was treated differently from other employees not suffering from an industrial injury. The plaintiff showed that he was subjected to "detrimental consequences" by his employer because of his industrial injury, but he failed to show that any other employee received a salary without being forced to use sick and vacation time when they were unable to work due to obtaining treatment for non-industrial injuries.

## Public Employees May Sue States for FMLA Violations

In *Nevada Department of Human Resources v. Hibbs*, the United States Supreme Court held that Congress intended to override the "sovereign immunity" normally enjoyed by the states from lawsuits brought in federal court when it enacted the Family Medical Leave Act (FMLA). In *Hibbs*, the high court permitted a state worker to maintain his action against Nevada alleging that it had violated the FMLA by refusing to reinstate him following his leave of absence for a serious medical condition.

## Corporate Officers Are Not Personally Liable for Wage and Hour Violations

In *Reynolds v. Bement*, the Second District Court of Appeal held that individual directors, officers, and agents of an employer are not "employers" within the meaning of the state wage and hour laws and therefore may not be sued in their personal capacities. (NOTE: The Division of Labor Standards Enforcement (DSLE) is attempting to obtain a contrary conclusion in the Fourth District Court of Appeal by arguing that the reasoning used by the *Reynolds* court is "flawed and its conclusions are erroneous.")

## Employer May Discharge Employee Based on Reasonable Belief That He is Misusing Family Leave

In *McDaneld v. Eastern Municipal Water District Board*, the Fourth District Court of Appeal held that an employer could lawfully fire an employee because it had an honest suspicion that the employee has misused his Family Medical Leave provided by California and/or federal law. The *McDaneld* Court accepted the Employer's findings that the employee had played golf, performed yard work, and did not take care of his father or wife, whose illnesses the employer regarded as feigned, and that the employee was untruthful during the employer's subsequent investigation into the matter.

## Employees May Use California's "Unfair Competition" Law When Suing for Discrimination

In *Herr v. Nestle USA, Inc.*, the Second District Court of Appeal affirmed a lower court's granting of an injunction under California's Unfair Competition Law (UCL) as an appropriate remedy against an employer that engaged in age discrimination against its older employees in violation of the Fair Employment and Housing Act (FEHA). Following the entry of judgment on a jury's verdict in excess of five million dollars against the employer for engaging in unlawful age discrimination against the plaintiff, the trial judge entered an order enjoining Nestle from discriminating against *any employees* on the basis of their age. The *Herr* Court noted that the remedies and penalties provided in the UCL are "cumulative" and that the plaintiff was not limited to remedies provided in the FEHA. The *Nestle* Court noted that the employer's practice of age discrimination gave it "an unfair competitive advantage" over those employers that did not violate the law.

## Upcoming Events

**July 24, 2003** - Sterling Education Services will present a full-day seminar in Sacramento. Robert L. Rediger will address "The Termination Process" and "Information Disclosure Issues" at this seminar entitled "Hiring And Firing." Clients of Rediger, McHugh & Hubbert, LLP will receive a 25% discount. Call Sterling at (715) 855- 0498.

**August 14, 2003** - Nonprofit Resource Center will present a half-day seminar in Sacramento. Robert L. Rediger will present Part 2 of "Critical Human Resource Issues" that includes lecture, discussion and materials on Hiring Process, How to Discipline, Leaves of Absence, Sexual Harassment and Employment-related lawsuits. Cost to clients of Rediger, McHugh & Hubbert is \$50.00 per person. Call NPRC at (916) 264-2788.

**October 8, 2003** - Sacramento Employers Advisory Council will present a full-day seminar on "Employer Fitness 2003: Are You Legally In Shape" at the Radisson Hotel in Sacramento. Call SEAC Membership Chair Vanessa Haines at (916) 484-4647 for more information.

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

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