

Rediger, McHugh & Hubbert, LLP

Representing Management in Labor, Employment and Unfair Competition Litigation

LABOR AND EMPLOYMENT LAW REPORTER

Summer 2005

Firm Wins A Rare Award Of Attorney's Fees Against Employee Who Brought A Frivolous Lawsuit

In the Winter 2004 edition of the Labor and Employment Law Reporter, we reported that Attorney Laura C. McHugh had been successful in a Motion for Summary Judgment, that resulted in the dismissal of a lawsuit alleging sex and racial harassment and retaliation against the California Department of Education and three individually named supervisors. On June 8, 2005, in response to a



Laura C. McHugh

motion brought by Attorney McHugh, Sacramento Superior Court Judge Loren E. McMaster awarded the Defendants their attorney's fees, finding that the Plaintiff's lawsuit was "frivolous" and that her attorney bore the responsibility of telling her such after her deposition. Defendants rarely are awarded attorney's fees in employment lawsuits. Hopefully this award deters frivolous lawsuits in the future.

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Unions Form "Change To Win Coalition" To Organize Employees

By Robert L. Rediger

On June 15, 2005, five labor organizations announced the formation of a new alliance with the goal of organizing large numbers of workers. Leaders of the Service Employees International Union, Teamsters, Laborers, Hotel and Food and Commercial unions have been critical of the lack of organizing efforts undertaken by the AFL-CIO. The five unions represent approximately one third of the 13 million members of the AFL-CIO.

In a Statement by leaders of the five unions, the spokespersons for the new "Change To Win Coalition" stated that their purpose was "to marshal the collective strength of our unions to develop and implement strategies to organize the tens of millions of workers in the private sector who are desperate for a voice on the job and in their community."

SUMMER FELLOW ANA P. PEREZ

Ana P. Perez has become a summer fellow with *Rediger, McHugh & Hubbert* through the Sacramento County Bar Association's Minority Fellowship Program. The firm has been participating in the Program for a number of years and welcomes the opportunity to provide qualified law students with the opportunity to learn legal skills during the summer. Ms. Perez is a current student at the University of California at Davis School of Law and will begin her second year in August. She graduated from Stanford University with a B.A. in International Relations. She enjoys taking trips to Napa and Lake Tahoe.



Rescission of Conditional Job Offers To HIV-Positive Job Applicants May Be Unlawful

By Jennifer L. Lippi

In *Leonel v. American Airlines, Inc.*, (9th Cir. 2005) 400 F.3d 702, Walber Leonel and two other individuals applied for flight attendant positions with American Airlines. They were given conditional offers of employment, contingent upon passing both background checks and medical examinations. Rather than waiting for the background checks, American immediately sent the applicants to its on-site medical department for medical examinations, where they were required to fill out medical history questionnaires and give blood. None of the appellants disclosed their HIV-positive status or related medications. Thereafter, American discovered their HIV-positive status and rescinded their job offers, citing their failure to disclose information during their medical examinations.

Although the district court granted American's motion for summary judgment of plaintiffs' claims for violations of the Americans with Disabilities Act ("ADA"), California's Fair Employment and Housing Act ("FEHA") and the California Constitution's right to privacy, the Ninth Circuit reversed. The appellate court held that both the ADA and FEHA prohibit medical examinations until after the employer has made a "real" job offer to an applicant. The court further held that to issue a "real" offer under the ADA and FEHA, an employer must have either completed

all non-medical components of its application process or be able to demonstrate that it could not reasonably have done so before issuing the offer. The appellate court concluded that the offers were not "real" because they were subject to both medical and non-medical conditions when they were made and the appellants were required to undergo immediate medical examinations. Thus, the court reasoned that the medical examination process was premature and American could not penalize the appellants for failing to disclose their HIV-positive status.

Lesson to be learned: All non-medical components of an employer's application process should be completed prior to issuing a job offer and employers should steer clear of "conditional" job offers.

Check Your Posters: Sacramento Requires Language Prohibiting Sexual Orientation Discrimination

The Sacramento City Code (Chapter 9.20 et seq.) requires all employers with 15 or more employees, and all employment agencies, to post in every place upon its premises where notices to employees and applicants are posted, a notice that discrimination on the basis of sexual orientation is prohibited by law. You can comply with this requirement by posting and keeping posted Chapter 9.20 of the Sacramento City Code, or "by adding the words 'sexual orientation' to all notices required by federal or state law, and indicating on the notice that discrimination on the basis of sexual orientation is prohibited by Chapter 9.20 of the Sacramento City Code."

ASSOCIATE ATTORNEY VANESSA R. INMAN

Rediger, McHugh & Hubbert is pleased to announce the addition of Vanessa R. Inman as an associate attorney with the firm. Ms. Inman 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. Inman was an associate in the litigation department of *Downey Brand LLP* in Sacramento. She is a graduate of the University of Oregon School of Law, where she was a Law Review editor, participated in moot court and civil clinics, and earned a Business Law Certificate. She also served as a judicial extern to Justice Thomas A. Balmer of the Oregon Supreme Court. Prior to law school, she worked as a litigation consultant and as a federal investigator at the U.S. Equal Employment Opportunity Commission investigating charges of employment discrimination under federal civil rights statutes. She graduated with a B.A. in Political Science from the University of California, Berkeley.



Announcements

Laura C. McHugh achieved the dismissal of a wage claim before the Labor Commissioner without a formal hearing on the merits. The employee claimed that the employer failed to pay him his final wages and vacation upon termination. He sought damages and waiting time penalties in excess of \$14,000. The Deputy Labor Commissioner holding the Conference agreed that the employer met its burden of showing the employee had been paid properly, especially when taking into consideration overpayments of previous wages to the employee.

Laura C. McHugh successfully represented an employer in a hearing before the Unemployment Insurance Appeals Board. The employee claimed that she was entitled to unemployment benefits since she was terminated for excessive tardies, not “misconduct.” The judge sided with the employer, finding that the employee’s conduct amounted to insubordination, since she had been warned about her tardies prior to her termination and had failed to follow company procedure on the day she was terminated. Ironically, the employee arrived late at the hearing on her unemployment benefits claim, which did not sit well with the judge.

Jennifer L. Lippi convinced the Department of Fair Employment and Housing (“DFEH”) that it lacked jurisdiction over a Complaint of Discrimination filed by an employee who had signed a Release in exchange for a severance payment. The Release purported to release the employer from any and all claims, although it did not mention discrimination claims specifically. The DFEH may initiate an investigation after the filing of a Complaint, but in this case, the Release was worded broadly enough to prohibit the employee from filing a Complaint in the first instance, resulting in the issuance of notice of “Case Closure” by the DFEH.

Robert L. Rediger defeated an attempt by the Road Sprinklers Fitters Union Local No. 669 to unionize the employees of an employer in Sacramento. Local 669 had filed a Petition seeking an election with the National Labor Relations Board (NLRB), but then resorted to filing unfair labor practice (ULP) charges against the employer when it began running a counter-campaign to the Union’s organizing efforts. The Regional Director for Region 20 of the NLRB dismissed Local 669’s ULP charges. The Union had alleged that the employer had unlawfully discharged several employees who had supported the Union, and had sought a bargaining order that would have made the employer a “union employer” without an NLRB election being held.

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. 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 swood@rmlaw.net.

November 1, 2005 - Lorman Education Services has secured five employment law attorneys to present a one-day seminar entitled "Employment Law From A to Z in California" from 8:30 a.m. to 4:30 p.m. in Sacramento. Robert L. Rediger will give presentations on "How to Discipline and Discharge" and "Leaves of Absence In California." Jennifer Lippi will give a presentation on "How to Deal With the Chronically Absent Employee." Call Mary Lane at (630) 540-1368 at Lorman to register.

Alerts

DHS Issues Revised I-9 Form Effective May 31, 2005 - The U.S. Citizenship and Immigration Service ("USCIS") (formerly the Immigration and Naturalization Service ("INS")) and the U.S. Immigration Customs and Enforcement ("ICE") have updated the Employment Verification Eligibility Form (Form I-9) effective May 31, 2005. The revisions are minor, focused mainly on changing the name of the agency from INS to "DHS" ("Department of Homeland Security") and a new form name. Additional substantive changes to the new Form I-9 may be made in the future. Employers may continue using the old Form I-9 until the end of this year. The new Form I-9 can be downloaded from the USCIS website at <http://uscis.gov/graphics/formsfee/forms/i-9.htm>.

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