Rediger, McHugh & Hubbert, LLP

Representing Management in Labor, Employment and Unfair Competition Litigation

LABOR AND EMPLOYMENT LAW REPORTER

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Firm Wins Complete Victory For Employer Client

E.A. Hubbert, Jr. was successful in obtaining the dismissal of a lawsuit in Placer County Superior Court on the date it was set to go to jury trial. Five plaintiffs had filed different claims including breach of contract, claims for overtime, violation of good faith and fair dealing, fraud, false advertising, unfair business practices and intentional infliction of emotional distress. The judge granted motions made by Mr. Hubbert on the first day of trial and determined that most of the claims were barred because the plaintiffs had previously filed claims with the Labor Commissioner's office with mixed results. He also dismissed the claim for intentional infliction of emotional distress on a motion for judgment on the pleadings. The combined rulings resulted in all claims as to all plaintiffs being dismissed and a trial was not necessary, a great victory for the employer.

E.A. Hubbert, Jr.

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Case Against Employer Gutted On Summary Judgment Motion

On June 16, 2006, Sacramento County Superior Court Law & Motion Judge Shelleyanne Chang signed an order granting an employer's motion for summary adjudication in favor of the employer on five of six causes of action brought against it by a former employee. The court's ruling was a big victory for the employer, since it effectively gutted the employee's case set to go to trial later this summer.

Attorney Laura C. McHugh filed the motion, which involves asking the court to dismiss some or all of a plaintiff's claims before trial, on the grounds that the claims have no merit or that the defendant can establish a complete defense to such as a matter of law. When a court considers such a motion, it cannot make credibility determinations; it merely looks at all of the evidence in favor of the non-moving party (here, the former employee) and determines whether the claims are worthy of trial.

In this case, the court found that the plaintiff could not establish her age *(Continued on page 5)*

Investigating A Complaint Of Unlawful Harassment

By Robert L. Rediger

When an employer knows or should know of conduct involving its employees that may amount to impermissible conduct, it must conduct a proper investigation that satisfies its legal obligation to ensure a workplace free of unlawful discrimination, harassment and retaliation. An employer must conduct an prompt, objective and thorough investigation that satisfies its legal obligations to the alleged victim, while at the same time, affording due consideration to the rights of the accused harasser.

An employer should consider including the following into its procedure for investigating conduct that may amount to unlawful discrimination, harassment and/or retaliation:

1) A personable, unbiased and impartial individual who is knowledgeable regarding the federal and state equal employment opportunity laws should be designated as the investigator.

2) As soon as possible after an employer knows or should know of conduct involving its employees that may amount to impermissible conduct, or a verbal or written complaint is made, the investigator should interview the alleged victim in private and secure a comprehensive, signed and dated statement that details each occurrence of inappropriate conduct, providing dates, locations, and the names of witnesses, if possible. The alleged victim should be informed that the employer is committed to ensuring a workplace free of harassment, the employee will not be retaliated against for cooperating in the investigation, the investigation will be kept confidential as required by law, and the employer will take forceful and corrective steps to correct and eliminate unlawful conduct from the workplace.

3) Employers have an affirmative duty to take immediate, corrective and forceful actions to stop unlawful harassment from occurring and to eliminate the possibility of it reoccurring. If the circumstances warrant, the employer may have to arrange for the separation of one or more employees even before he or she has completed the first interview. Pending the conclusion of the investigation, the alleged harasser may have to be transferred to a different shift or department, or placed on a short administrative leave. Both the accuser and the alleged harasser should be directed not to communicate with each other until the investigator informs them otherwise.

4) The investigator should next secure a comprehensive, signed and dated statement from the alleged harasser that responds to each allegation of inappropriate conduct. To facilitate the questioning and ensure a thorough investigation, the investigator should present the alleged harasser with a list of objectively-worded, fact-based questions culled from the alleged victim's statement. The list of questions should be prefaced with instructions to answer each "Yes" or "No" and if desired, to write an explanation on the space provided after each question. The investigator should also obtain the names of all witnesses the alleged harasser believes will support what he or she has said.

SUMMER FELLOW ISAURO VILLARREAL

Isauro Villarreal has been placed as a summer fellow at the law firm through the Sacramento County Bar Association's Diversity Fellowship Program. He is currently a student at McGeorge School of Law and will begin his second year after the summer. Mr. Villarreal graduated from Harvard University in 2002 with a degree in American History. Before law school, he was a substitute teacher and coached amateur boxing for at-risk youth. Mr. Villarreal is an avid baseball and boxing fan and is looking forward to the firm's summer picnic at Raley Field where he will root for the River Cats.

Isauro Villarreal

5) If the alleged harasser does not admit to engaging in the alleged inappropriate conduct, the investigator must continue the investigation by interviewing and obtaining written statements from all other witnesses who may support or undermine the alleged improper conduct.

6) After beginning with the same statements referenced in number 2) above, the investigator should secure comprehensive, written, signed and dated statements from each witness that details occurrences of inappropriate conduct, providing dates, locations and the names of witnesses. If the witness asserts that he or she has no knowledge regarding a specific incident, a statement of lack of knowledge regarding such should be set forth in the written statement. (The investigation could "mushroom" as the investigator interviews other employees who may relate their own complaints or observations of impermissible conduct on the part of the alleged harasser or others).

7) After securing written statements and other evidence from relevant sources, the investigator should prepare a report detailing his or her findings and explaining the basis of any necessary credibility determinations. The report will conclude that inappropriate conduct occurred, inappropriate conduct did not occur, or that based upon the available evidence, a determination of whether inappropriate conduct occurred was not possible.

8) If it is determined that unlawful conduct occurred, prompt remedial action must be taken by the employer to correct the situation and ensure that it does not reoccur. The severity of the discipline to be imposed is a decision for the employer, but the victim should be consulted as to the proposed discipline and other contemplated remedial action and his or her suggestions considered by the employer.

9) Even if unlawful conduct is deemed not to have occurred, or a determination of whether inappropriate conduct occurred was not possible, prompt remedial action must still be taken by the employer to ensure a hostile free work environment. The employer should consider employee training, the dissemination of various equal employment opportunity brochures, etc.

California Supreme Court Rejects "Friends" Lawsuit

By Laura C. McHugh

On April 20, 2006, the California Supreme Court issued its decision in the *Friends* sexual harassment case, *Amaani Lyle v. Warner Brothers Television Productions, et al*., discussed in the Winter edition of the *Labor and Employment Law Reporter*. In the *Friends* case, a former writer's assistant, Amaani Lyle, claimed that she was improperly subjected to vulgar and coarse language by the comedy show's writing staff. In a 7-0 decision, the Court ruled in favor of Warner Brothers, finding that the bawdy talk was a necessary component of a "creative workplace" that developed scripts for the "adult-oriented" NBC program. Thus, the Court held that Lyle could not maintain her hostile work environment sexual harassment case under California's Fair Employment and Housing Act (FEHA), which she brought after being terminated for poor performance.

In reaching its decision, the Court found it significant that the alleged raunchy comments and simulated lewd acts were not specifically directed at Lyle, but were instead just part of the atmosphere of the show's writer's room, where both men and women were present. As such, the Court required that she establish facts from which a reasonable trier of fact could find that the conduct permeated her work environment and was pervasive and destructive. Lyle could not meet this high standard, since her only evidence of conduct directed at her was that one of the writers "looked straight at her" when he told a joke; beyond that, she had heard a few isolated comments about specific actresses on the set that involved speculation about one actress' fertility and one writer's belief that he missed an opportunity to have sex with one of the actresses.

As the Court explained, the use of sexual speech is not prohibited by state and federal employment law. What's off limits is speech and conduct directed at an employee or group of employees *because of*

their gender. Citing with approval the United States Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, the Court concluded that the FEHA is not a "civility code" for the workplace, nor was it intended to outlaw all forms of sexual comments or vulgar language. "It is the disparate treatment of an employee on the basis of sex—not the mere discussion of sex or use of vulgar language—that is the essence of a sexual harassment claim." The Court also clarified that a "commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment" when a plaintiff cannot point to a loss of tangible job benefits.

Although the Court's ruling is favorable to employers, the Court cautioned that the use of sexually explicit and vulgar language in the workplace can constitute unlawful harassment when the *totality of the circumstances* demonstrate that the conduct is aimed at a particular person or group of people, and that such language could be used as proof of discrimination in the workplace.

In reality, the "creative necessity" defense will have narrow application. Employers should remain vigilant in applying their anti-harassment and anti-discrimination policies.

Recent Developments

EEOC Issues Guidance Regarding Race And Color Discrimination
On April 19, 2006, the U.S. Equal Employment Opportunity Commission issued a new Compliance Manual section related to evaluating allegations of discrimination, providing equal access to jobs through the recruitment, hiring and promotion processes, and addressing harassment and retaliation under the Civil Rights Act of 1991.

No Pay For Travel Time Required For Employee of Disneyland
On February 1, 2006, a California Court of Appeal in *Overton v. Walt Disney Company* rejected a security guard's claim for compensation for the time he spent after parking his car and taking the employer operated shuttle to his worksite. The *Overton* Court affirmed the trial judge's grant for summary judgment to the employer finding that Disney did not require its employees to drive to work and take its shuttle, but rather encourage its employees to use alternative forms of transportation. Accordingly, the ruling of the California Supreme Court in *Morillion v. Royal Packing Company*, that when an employer requires its employees to meet at a designated place to take its bus to work "controls" the employee and is therefore required to compensate for such "hours worked," was not applicable.

Announcements

Laura C. McHugh successfully represented an employer in a hearing before the Unemployment Insurance Appeals Board, defeating an employee's appeal of the initial denial of unemployment benefits. The administrative law judge found the employee's actions in contacting a co-worker during working time to constitute misconduct connected with work, disqualifying him from benefits. The co-worker had alleged that the employee harassed her and the employee had been warned several times not to have any contact with her during working time.

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Jennifer L. Lippi Presents

ANTI-HARASSMENT TRAINING

Employers that regularly employ 50 or more employees have a continuing legal responsibility to provide two hours of anti-harassment training to their supervisors and managers. California 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." The employment law attorneys of Rediger, McHugh & Hubbert, LLP are offering two options to put our clients in compliance with AB 1825:

OPTION A - We are offering anti-harassment training at our law firm on Wednesday, August 16th from 9:00 to 11:00 am at a total cost (including parking and materials) of $100.00 per attendee.

OPTION B - If your company has more than a few supervisors or managers who have not received the anti-harassment training required by law, or who cannot attend the training offered as Option A, we will present the two hour training at your facility or at our law firm, for a total cost of $600.00.

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

Firm Celebrates Recent Victories for Clients

Pictured left to right: E.A. Hubbert, Jr., Robert L. Rediger, Laura C. McHugh, Lori M. Sandoval, Lorraine L. Renfroe, Jennifer L. Lippi and Sara B. Mauzac.

(Continued from page 1) discrimination, retaliation, breach of contract, promissory estoppel, or unpaid overtime claims as a matter of law. The plaintiff, a former human resources manager who was in her late forties and had worked for the employer for 10 months, claimed that her discharge constituted age discrimination because employees made some age-based comments to her, including that she looked young for being a grandma. She also claimed that her discharge was retaliatory since she had informed the employer in her role as a human resources manager about workplace comments that could be construed as discriminatory or in violation of the law. In addition, she claimed that the employer breached an oral contract with her when it told her to dock her pay for taking excessive time-off, that she had relied to her detriment on alleged oral promises regarding her taking time off, and that the employer violated wage and hour laws by docking her pay and thus converting her status to that of a non-exempt employee without paying her overtime.

Significantly, the court's ruling eliminated the plaintiff's claims for attorney's fees, which she was entitled to related to her claims brought under the California Fair Employment and Housing Act ("FEHA") (age discrimination and retaliation). Now, the plaintiff only has one claim remaining for trial: her claim for wrongful termination in violation of public policy, and the value of her case has been diminished significantly.

Laura C. McHugh

Upcoming Events

August 25, 2006 – National Business Institute will present a seminar entitled "Human Resource Policies That Prevent Lawsuits" from 9:00 a.m. to 4:30 p.m. in Sacramento. Four employment law attorneys will speak at the seminar. Robert L. Rediger will present the morning session of the conference and address legal aspects of the hiring process and creating comprehensive employee handbooks. Clients of Rediger, McHugh & Hubbert, LLP are eligible for a $50.00 discount off the registration fee by identifying themselves as a client of the Firm. For more information, please contact Debbie Steves at NBI at (800) 777-8707.

September 20, 2006 – Lorman Educational Services will present a seminar entitled "Advanced Topics in The Family Medical Leave Act, The California Family Rights Act, The California Pregnancy-Related Disability Act, And Other Leaves of Absence in California" from 9:00 a.m. to 4:30 p.m. in Sacramento. Four employment law attorneys will speak at the seminar. Robert L. Rediger will provide attendees with a comprehensive checklist of all reasons an employee may be excused from work under federal and California law, and provide strategies and practical information for handling leave of absence requests. For more information, please contact Mary Lane at Lorman at (630) 540-1368.

September 28, 2006 – Robert L. Rediger will present a seminar for the Nonprofit Resource Center on the Essentials of Employee Handbooks from 9:00 a.m. to 12:00 p.m. in Sacramento. Mr. Rediger will address policies and procedures that should be included and avoided in employee handbooks and address the "minefields" associated with requests for leaves of absence. For more information, please contact Susan L. Roberts at the Nonprofit Resource Center at (916) 264-2772.

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