

# Rediger, McHugh & Hubbert, LLP

Representing Management in Labor, Employment and Unfair Competition Litigation

## LABOR AND EMPLOYMENT LAW REPORTER

Winter 2003

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### “Avoidable Consequences” – A New Defense To California Sexual Harassment Claims

On November 24, 2003, the California Supreme Court issued its decision in *State Dept. of Health Services v. Superior Court (McGinnis)*, dealing with the issue of whether California employers have a defense to claims of sexual harassment by supervisors. Under California’s Fair Employment and Housing Act (“FEHA”), employers are liable for sexual harassment by a *non-supervisory* employee only if the employer (a) knew or should have known of the harassing conduct, and (b) failed to take immediate and appropriate corrective action.

Because the FEHA imposes this negligence (See “Avoidable Consequences” Defense on page 7)

### PAID FAMILY LEAVE BEGINS

Commencing on January 1, 2004, employers will be required to withhold and forward to Employment Development Department (EDD) additional funds from employees who are covered by state disability insurance. These funds, of course, are collected for the purpose of paying out payments to employees on Paid Family Leave under the California plan which was first adopted by the Legislature last year.

While the payroll deductions begin on January 1, 2004, benefits will not be paid to any employee until July 1, 2004. Employees will draw from the fund created through their contributions as much as six weeks leave of absence in which to care for a parent, spouse, child, domestic partner or child of a domestic partner or to bond with a child. It is expected that the benefits will be approximately 55% of the wages lost by the employee.

It should be noted that employers may require employees to use up to two weeks of their accrued but unused vacation prior to commencing to collect from the fund which is administered by EDD. Employers may not require that sick leave be taken but apparently may coordinate sick leave benefits with the paid family leave payments.

Employers should be aware that while this new law does not provide for any new requirements for granting leave of absences, all employers have some obligations in this regard under either the Family Medical Leave Act, the California Family Rights Act or the Fair Employment and Housing Act and any other laws which mandate a leave of absence be granted.

Employers will be required to notify employees of their rights under this new law by providing a pamphlet describing the benefits and making workplace postings similar to those that are already required by other laws.

# Discipline And Discharge (Part 3): Post-Discharge Pitfalls

By: Robert L. Rediger

*Following is the third and final installment of a three part series of articles on the infamous topic of discipline and discharge. All articles 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 3, entitled “Post-Discharge Pitfalls,” focuses on the safeguards an employer should take after it has implemented its decision to discharge an employee.*

It's never easy to fire an employee. Even when a sophisticated employer has followed its well-drafted policies and procedures, and has communicated its discharge decision to an employee, the managers who convey the bad news often experience feelings of anxiousness, as if waiting in anticipation for “the other shoe to drop.” Any feelings of relief an employer may experience following the implementation of its discharge decision may be short-lived when the former employee refuses to “move on.”

After a discharged employee has vacated the premises, an employer should consider taking the following safeguards immediately:

## 1. Notification to customers

To safeguard against losing customers or clients that the discharged employee had serviced (due to the employer's inattention or the discharged employee's solicitations), the employer should contact its customers immediately. The employer should telephone its customers who were serviced by the discharged employee to provide assurances of continuity of business relations.

## 2. Notification to co-employees

While the employer should be truthful with its employees, it must avoid “black balling” or “defaming” the discharged employee. Although an employer enjoys a “qualified privileged” when discussing matters of common interest with other individuals, a discharged employee may assert that representatives of the employer made false and malicious statements that damaged his or her reputation. An employer should inform its employees that the employment relationship with the discharged

employee has been severed and that company policy prohibits management from discussing the details of the severance. Managers and supervisors should discourage “gossiping” about the discharged employee, especially via the employer's email system.

## 3. Ensuring a safe workplace

An employer has a legal obligation to provide all of its employees with a safe work environment. Changing locks and computer passwords, and possibly even hiring a private security guard, should be considered if concerns for personal safety are raised. An employer may seek a temporary restraining order and/or injunction on behalf its employees who are subjected to acts of violence or credible threats of violence.

## 4. Maintaining integrity of personnel files

Personnel files maintained by an employer should always be kept secure. Much information contained in employees' personnel files is sensitive or confidential, and may be protected from disclosure by various statutes and/or the right of privacy contained in the California Constitution. A discharged employee, or his or her “representative,” should never have unfettered access to his or her own or another employee's personnel file. Generally, a current or former employee's request to inspect his or her own personnel file must be honored within a reasonable period of time at the employer's premises, but such should occur in the presence of a representative of the employer. If an employee requests a copy of his or her personnel file, a private employer must supply only copies of those documents the employee signed.

*(Continued on page 3)*

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## **Discipline** (continued from page 2)

5. All inquiries regarding the discharged employee should be directed to one person

All inquiries regarding the discharged employee should be directed to a designated individual, preferably someone associated with the employer's human resources department. Inquiries may come in various forms, including a request for a letter of reference or a telephone call seeking employment verification. An employer should provide a "neutral" reference regarding the employee, but it may be required by law to provide specific responsive information to law enforcement agencies that are considering employing the discharged employee.

6. Extreme caution must be exercised when participating in administrative or other proceedings regarding the discharged employee.

A discharged employee may file a claim and/or complaint with one or more federal or state administrative agencies. For example, a former employee may file a claim for unemployment or worker's compensation benefits, a complaint for wages or a complaint alleging harassment or discrimination. The employee may seek to invoke an employer's internal dispute resolution procedure or demand to address a high level representative of the employer or members of its board of directors. If represented by a union, the employee may file a grievance under a collective bargaining agreement. An incomplete or erroneous response pertaining to the discharged employee may prove disastrous to the employer if it exploited in a yet-to-be-filed lawsuit alleging various employment-related torts.

## **Negative Reference Based On Incorrect Information Did Not Create Liability For Former Employer**

In an encouraging decision from the California Court of Appeals Fourth Appellate District, the Court has held that pursuant to California Civil Code section 47 subdivision c, an employer who mistakenly and without malice gives false information to another employer concerning a former employee will not be liable for defamation.

In this case, the Defendant employer had mistakenly advised the subsequent employer that the employee in question had been terminated because of "loss prevention issues." It turned out that this information was incorrect and in fact the employee had no "loss prevention issues."

The Court in this case determined that although false and inaccurate information about the employee was communicated, the communication was done without malice which is required to defeat the qualified privilege the employer had under the code section referred to above. The Court further stated that simple negligence did not give rise to a finding of malice on behalf of the defendant and that inadvertence or forgetfulness or carelessness is not evidence of malice.

While this case does afford employers some possibility of a defense to a defamation action where incorrect information is communicated, all employers are reminded that the best practice is to respond to inquiries regarding former employees by only giving the dates of employment and the position held. Any information beyond that has the potential to expose an employer to liability.

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# STATE LAW REQUIREMENTS REGARDING PAYMENT FOR TRAVEL TIME

By: Jessavel Y. Wong

When employees are required to travel, whether to report to a distant jobsite or from jobsite to jobsite during the workday, California wage and hour laws may require the employer to compensate the employee for some or all time spent traveling. Generally, employers must compensate employees for travel time when such time constitutes “hours worked.” “Hours worked” is defined as time during which an employee is subject to the control employer and includes all of the time the employee is “suffered or permitted to work.”

The federal Fair Labor Standards Act also regulates the payment of travel time. Where federal and California laws conflict, the employer must follow the law that provides greater protection for the employee. With respect to travel time, California law generally provides more protection for the employee. Below is a summary of California laws regarding travel time pay.

**Ordinary Commute:** An employer need not compensate its employees for ordinary commute from home to work at the beginning of the workday or from work to home at the end of the workday.

**Compulsory Travel:** If an employee is required to report to a designated location and use the employer’s vehicle to travel to a jobsite, the employer must compensate the employee for all of the time from the moment the employee reports to the pick up location until the time the employee is released to return home. In *Morillion v. Royal Packing Co.* (2000) 22 Cal.4<sup>th</sup> 575, the California Supreme Court held that farm workers who were required to meet at designated departure points to ride to the location of the day’s work in the employer’s buses were entitled to be compensated for the time spent traveling on company buses, even though they were free to nap, read or engage in other personal pursuits while on the bus. The Court differentiated between “compulsory travel time,” which is compensable and “an ordinary commute,” which is not compensable.

**Travel During the Workday or In Addition to Regular Work Hours:** An employer must compensate its employees for any travel required by the employer during the workday or in addition to regular working hours. For example, if an employee is required to work at two different jobsites in one day, the time she spends traveling from the first to the second jobsite is compensable.

**Traveling A “Substantial” or More Than A “Reasonable” Distance:** The California Department of Labor Standards Enforcement (“DLSE”), the State agency that enforces California wage and hour laws, has taken the position that travel involving a “substantial distance” from the assigned workplace to a distant work site to report to work on a short-term basis is compensable travel time. The travel time is measured by the difference between the time it normally takes the employee to travel from her home to the assigned workplace and the time it takes the employee to travel from home to the distant work site.

The DLSE has not provided a bright-line rule as to what constitutes “substantial” or “reasonable distances.” However, the DLSE has stated, “[a]lthough we have held that 30 and 45 miles are excessive, distance and cost to and from work must be considered in light of the commuting pattern of any given community, including the feasibility of public transportation.” In particular, the DLSE has opined that a construction employer that requires an employee to travel to a distant work site must compensate its employee for travel time to the work site. Thus, even in those instances where there is a reasonable expectation that the occupation would require some travel, unreasonably extended travel could be compensable depending on the surrounding circumstances.

**Pay Rate for Travel Time:** In the absence of a collective bargaining or other employment agreement, the employer may establish a different  
(Continued on page 7)

## Answers To Your Employment Related Questions

*We are sometimes asked the same labor and employment law question by several people. With the inquiring person's permission, we will reprint such questions in this column for the benefit of all of our readers.*

**Question:** My Company is considering laying off some employees. What issues should I consider?

**Answer:** When considering a reduction-in-force (RIF), a Human Resource professional should first ascertain whether the employer has already addressed the subject. If an employer is unionized, provisions concerning layoff and recall may be in the collective bargaining agreement (CBA) it has with a labor organization. If the affected employees are non-union, you should check your company's policy manual and/or employee handbook to see if the subject of RIF is addressed and how such is to be effectuated. If no policies or procedures exist, you should consider what criteria the company intends on using to select employees for layoff. For example, will the layoff be based on the employee's date of hire, score on last written evaluation, whether the employee is cross-trained, etc? The criteria used in selecting employees for layoff should be "objective," relate to legitimate, business reasons, and be applied uniformly. Once the employer has a preliminary idea of the employees who will be laid off or retained, labor counsel should review the criteria used, how it was applied, and whether such will have a "disparate impact" on a protected class of employees. Employers should also consider alternatives to the layoff, COBRA notices, potential recall rights, the cash out of accrued compensation, the effect on employees who are on a leave of absence allowed by law, exit interviews, security issues, written notices to the affected employees informing them of their status, and the 60 day notice requirements if the layoff invokes the protections of the Worker Adjustment and Retraining Notification Act (WARN).

## Announcements

**Robert L. Rediger** negotiated a five-year master collective bargaining agreement (CBA) with the Teamsters Union on behalf of six major providers of parking services in San Francisco. The CBA contains many clauses favorable to the employers, including a wage freeze in the first year of the contract, an expansion of the job duties covered employees will perform, and a significant increase in the number of hours an employee must work each month to be eligible for medical insurance coverage. The CBA is also the *first* master collective bargaining agreement in the Bay Area that provides that covered employees *waive* their rights to sue any of the six employers *in court* for employment-related statutory claims (such as unlawful discrimination, harassment, retaliation, wage and hour, leaves of absence, etc.), and that they *may only* bring such claims before a labor arbitrator pursuant to the Grievance and Arbitration provisions of the CBA.

**Laura C. McHugh** successfully represented an employer in a labor arbitration involving an employee's claim that she was discharged without just cause. The arbitrator found that the employer had just cause under its collective bargaining agreement with the union, since it was able to demonstrate that the employee was insubordinate when she used a company bus to go to her personal hair appointment.

**Laura C. McHugh** successfully represented an employer in a labor arbitration involving a bus driver's refusal to pick-up an additional passenger on her regularly scheduled route. The employee claimed that she did not receive the assignment, which was communicated to her from dispatch over a mobile data computer in her bus. The arbitrator refused to accept her version of events and found that she ignored the directive to pick-up the additional passenger, and thus was terminated for just cause under the operative collective bargaining agreement.

## State Law (continued from page 5)

pay scale for travel time as opposed to the regular work time rate, so long as the travel time rate is not less than minimum wage and the employee is informed of the different pay rate for travel before the travel begins.

**Travel Time as Overtime:** If the total compensable travel time exceeds 8 hours in a workday, the employee must be paid one and a half times her regular hourly wage rate for travel in excess of 8 hours, less meal periods and the equivalent time that would normally be spent traveling from the employee's home to her regular place of work. For purposes of determining the regular rate of pay for overtime work where a different rate is applied to travel time, California has adopted a "weighted average" method. Under this method, the employer must pay overtime at a rate that is obtained by adding all hours worked in the workweek and dividing that number into the total compensation for the week.

## "Avoidable Consequences" Defense (Continued from page 1)

standard only for harassment "by an employee other than an agent or supervisor," by implication, the FEHA makes the employer *strictly liable* for harassment by a supervisor.

In 1998, the United States Supreme Court issued its decisions in, *Burlington Industries v. Ellerth* ("Ellerth") and *Faragher v. City of Boca Raton* ("Faragher"), holding that an employer could raise the following defense in cases involving sexual harassment by a supervisor that resulted in no tangible employment action (such as a demotion or termination), if the employer could show: (1) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

In *McGinnis*, the California Supreme Court addressed the issue of whether the federal *Ellerth-Faragher* defense applies to sexual harassment claims brought under the California FEHA. The *McGinnis*

held that California employers are strictly liable under FEHA for *all* acts of sexual harassment by supervisors, and that the *Ellerth-Faragher* defense does *not* apply to such cases.

However, in so holding, the *McGinnis* court ruled that, in a FEHA action against an employer for hostile work environment sexual harassment by a supervisor, an employer may plead and prove a defense based on the "avoidable consequences" doctrine. In this particular context, the defense has three elements: (1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered.

The *McGinnis* defense is limited. As the Court stated, "this defense will allow the employer to escape liability for those damages, and only those damages, that the employee more likely than not could have prevented with reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment." The defense affects only damages, not liability. Thus, California employers remain strictly liable for *all* acts of sexual harassment committed by supervisors, but may be able to limit damages in such actions where it has in place appropriate policies and procedures for preventing and correcting workplace harassment, and where it takes swift corrective action.



**Santa's sexual harassment trial takes a dramatic change for the worse**

## Upcoming Events

**January 9, 2004** - Rediger, McHugh & Hubbert, LLP will host a half-day seminar from 8:30 am to 12:00 noon entitled "Employment Law Essentials for 2004" at the Sutter Club in Sacramento. The cost for our clients is \$100.00 for the first person and \$75.00 for each additional person from your organization and includes the half-day seminar, continental breakfast, parking at the Sutter Club, and a binder containing the written materials.

**January 9, 2004** - Robert L. Rediger will address the California Family Rights Act and answer questions on medical leaves of absence and the Family Medical Leave Act for members of the Personnel Affinity Group. The Brown Bag luncheon will be held from 12:30 to 2:00 pm at the Sacramento Commercial Bank in downtown Sacramento.

**March 1 and 2, 2004** - The Council on Education in Management will host a two-day seminar entitled Public Sector Employment Law Update for 2004 in Sacramento. Robert L. Rediger will address "Sovereign Immunity For Public Sector Employers" and "Update On Unionization In The Public Sector." Call CEM at (704) 561-0215 to register.

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)

## Labor And Employment Law Reporter

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**Best Wishes  
For A Great New Year!**