

Rediger, McHugh & Hubbert, LLP

Representing Management in Labor, Employment and Unfair Competition Litigation

LABOR AND EMPLOYMENT LAW REPORTER

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FIRM CELEBRATES MAJOR VICTORY

On December 22, 2004, Honorable Loren E. McMaster of the Sacramento County Superior Court granted the Defendants' motions for summary judgment in a lawsuit alleging sexual harassment, racial harassment, and retaliation against the California Department of Education ("CDE") and three individual supervisors.



Attorneys Laura C. McHugh and Allan H. Keown.

The Plaintiff, an employee of the CDE, alleged that her supervisor racially and sexually harassed her by hugging her three times over a nine-month period, lifting her skirt once to see an injury on her leg, whispering to her in a provocative manner, showing her a purported "love letter" written in

Spanish to an employee, commenting that, "she is our Muslim girl" in reference to another employee, and kissing yet another employee in front of her.

The Plaintiff did not report the alleged harassment for nine months, and once she did, the CDE immediately investigated and took corrective action. She also alleged that she was retaliated against after she

complained, because her job duties were restricted. She sought compensatory and punitive damages.

In granting the motions, Judge McMaster agreed with the Defendants, finding that there was not enough admissible evidence, as a matter of law, for the case to be heard before a jury. Trial had been scheduled to begin on January 3, 2005.

"It's a great victory for the CDE and the individuals," commented Attorney Laura C. McHugh, who, along with Allan H. Keown, Deputy General Counsel for the CDE, led the case to victory. "This was a frivolous, opportunistic lawsuit. Justice was served."

IN THIS ISSUE

Firm Celebrates Major Victory	1
New Employment Laws For 2005	2
Answers To Your Questions	4
Announcements.....	4
Sexual Harassment Training	5
Recent Developments	5
Upcoming Events.....	6

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New Employment Laws For 2005

By Robert L. Rediger

On Friday, January 7, 2005, Rediger, McHugh & Hubbert, LLP presented a half-day seminar at the Sutter Club to explain the full impact of the new federal and state laws passed in 2004 and new court decisions to assist employers in complying with the new laws.

Following is an alphabetized list by subject that provides a brief summary of the new laws:

“Bounty Hunter” Law

SB1809 amends and repeals various provisions of the Private Attorneys General Act of 2004. The new law provides for the recovery of lesser penalties by an aggrieved employee and only after complying with procedural and administrative requirements.

Consolidated Omnibus Budget Reconciliation Act

The US DOL has issued final rules that set minimum standards for the timing and content of the notices required under the continuation coverage provisions of COBRA, establish standards for administering the notice process, and provide model notices for employees.

Discrimination, Harassment and Retaliation in Employment

AB 1706 prohibits an employer from using an assignment order to deny a promotion to an employee or to take any other adverse action in regard to an employee’s terms and conditions of employment.

AB 1825 requires employers with 50 or more employees to provide at least two hours of sexual harassment training and education to all supervisory employees within one year of January 1, 2005, unless the employer has provided such after January 1, 2003, and once every two years after January 1, 2006.

AB 2870 authorizes the FEHC to conduct mediations in an attempt to settle complaints of discrimination filed with the DFEH.

AB 2900 amends various provisions of several codes to prohibit discrimination on the same basis as set forth in the Fair Employment and Housing Act, including race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, and sexual orientation.

Domestic Partner Rights

AB 2208 requires a health care service plan and a health insurer to provide coverage to the registered domestic partner of an employee, subscriber, insured, or policyholder that is equal to the coverage it provides to the spouse of those persons.

AB 205 (the California Domestic Partner Rights and Responsibilities Act of 2003) extends the rights and duties of marriage to persons registered as domestic partners, effective January 1, 2005.

Family and Medical Care Leave

Employees in California may be eligible to receive Paid Family Leave benefits effective July 1, 2004 as a result of SB 1661 that was passed in September, 2002.

Healthcare

A majority of “NO” votes were cast for Proposition 72, a referendum on the Health Insurance Act of 2003. Accordingly, SB 2, that would have required certain employers to provide health care coverage to their employees, will not go into effect.

Leaves of Absence

On September 20, 2004, the US DOL has issued regulations interpreting the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

Privacy Rights of Employees

SB 1618 requires employers to provide employees with
(Continued on page 3)

Rediger, McHugh & Hubbert, LLP
Extends Congratulations And Accolades To
Donna Dell, Senior Vice President of Human Resources and
Chief Employment Counsel of ABM Industries, Inc.,
on her appointment to State Labor Commissioner.

an identification number that shows no more than the last four digits of an employee's social security number by January 1, 2008 and provides that violation of the law is a misdemeanor.

Public Works

AB 2690 exempts any work that is performed by a volunteer, a volunteer coordinator, or by members of the California Conservation Corps or of certified Community Conservation Corps, from the definition of "public works."

Unfair Business Practices

A majority of "YES" votes were cast for Proposition 64 that limits the types of lawsuits that may be brought under Business and Professions Code section 17200. Except for the Attorney General and local public prosecutors, no person may bring a lawsuit for unfair competition unless he or she has suffered injury and lost money or property, and a person pursuing such claims on behalf of others will have to meet the requirements of a class action lawsuit.

Unemployment Insurance

AB 2412 provides that if the Director of the EDD finds that any employer, or any employee, officer, or agent of any employer, willfully makes a false statement or fails to report a material fact in submitting a written statement concerning the reasonable assurance of a claimant's reemployment, he or she shall assess a penalty in an amount not less than two nor more than 10 times the weekly benefit amount of that claimant against the employer.

Wage and Hour

US DOL regulations, the "White-Collar" exemptions of the FLSA, became effective August 23, 2004.

Worker Adjustment Retraining Notification Act

AB 2028 provides that payments received by an employee from an employer because it failed to provide at least 60 days advance notice as required by the federal or state WARN Acts may not be construed as wages or compensation for purposes of determining eligibility for unemployment compensation benefits.

Whistle-Blowing Protection

AB 1127 requires employers to display a list of employees' rights and responsibilities under the whistleblower laws in lettering larger than size 14-point type, including the telephone number of the whistleblower hotline.

Workers' Compensation

SB 889 made numerous reforms to the workers' compensation system.

Employee Handbook Review
With the new year upon us, it's time to review
your employee handbook to ensure that it is
up to date with the new laws.
Call us for information and special offers
regarding handbook reviews.

Answers To Your Employment-Related Questions

Question: Should an employer have a policy that addresses an employee's request to inspect or copy documents contained in his or her personnel file?

Answer: It is not necessary for an employer to have a written policy regarding an employee's request to inspect or copy documents contained in his or her personnel file. It is more important that an employer understand the nature of the employee's request and that it complies with the California laws regarding such. An employee is entitled to *copies* of those documents relating to the obtaining or holding of employment that he or she signed. (Cal. Labor Code section 432). An employee is entitled to *inspect* the personnel records that the employer maintains relating to the employee's performance or to any grievance concerning the employee. (Cal. Labor Code section 1198.5). Within 21 calendar days of making a request, an employee is entitled to inspect and/or obtain copies at a reasonable cost of certain financial-related information related to the employee's wages and the computation thereof for the last three years. (Cal. Labor Code section 226).

Any policy contained in an employee handbook that addresses an employee's ability to inspect documents in his or her personnel file should track the requirements of California Labor Code section 1198.5. An employer must make the employee's personnel records available at reasonable intervals, at reasonable times, at the place where the employee reports to work, and within a reasonable period of time following the employee's request. An employer does NOT have to permit the employee to inspect records relating to the investigation of a possible criminal offense, letters of reference, ratings, reports, or records that were: (A) obtained prior to the employee's employment, (B) prepared by identifiable examination committee members, or (C) obtained in connection with a promotional examination. An employer should also make sure that it does NOT copy or permit the inspection of any communications between it and its attorneys regarding the employee, such as letters from counsel or notes made while speaking with counsel regarding the employee, because such may be protected from disclosure by the attorney-client communication privilege and /or the work-product privilege.

Announcements

E.A. Hubbert, Jr. recently prevailed in a *trial de novo* in Superior Court, representing an employer restaurant that had received an adverse decision from the Labor Commissioner resulting in an imposition of several thousand dollars in wages and penalties against the employer.

The claimant was a friend of a cook in the restaurant who spent time visiting the restaurant and, on occasion, helped carry out trash and performed other functions in exchange for receiving food from the cook. Following the trial of the matter, the Superior Court judge determined the claimant was not an employee and thus not entitled to wages, and reversed the Labor Commissioner's decision, awarding the claimant nothing.

Decisions of the Labor Commissioner are subject to an appeal to Superior Court, where the appeal is heard in a new trial ("*trial de novo*"). Employers appealing an adverse decision as such, must post a bond with the reviewing court, in the amount of the Labor Commissioner's award. The employer is entitled to a refund of the bond, if it prevails in the *trial de novo*.

SEXUAL HARASSMENT TRAINING FOR SUPERVISORS

On September 29, 2004, Governor Schwarzenegger signed Assembly Bill 1825 into law. The new law **requires** employers with 50 or more employees to provide at least two hours of sexual harassment training to all of its supervisory employees. The anti-harassment laws in California apply to **all** employers and impose **individual liability** on all employees. Providing training to supervisors is one of the most effective ways to reduce the likelihood that an employee will bring a lawsuit alleging harassment by his or her supervisors, co-employees and/or others.

The management labor lawyers of Rediger, McHugh & Hubbert, LLP have presented many seminars and have litigated numerous cases regarding harassment over the years. The attorneys have put together a two-hour program to put your company in compliance with the new law. The program will be led by an attorney and include lectures, questions and answers, brochures, excerpts from decisions, notices, policies and legal strategies for providing a harassment-free workplace.

The "Sexual Harassment Training For Supervisors" program will be presented at your facility or at our law firm, depending on your preference, for a total cost of \$600.00. For more information or to schedule a training session, call Sara at (916) 442-0033 or send an email to info@rmlaw.net.

Recent Developments

Religious Accommodation. On September 29, 2004, the Second District Court of Appeal in *FEHC v. Gemini Aluminum Corp.* enforced a decision of the California Fair Employment and Housing Commission that had found employment discrimination where an employer had denied an employee's request to take time off to attend a convention of Jehovah's Witnesses. When the employee missed work to attend the convention, he was suspended. When he complained about the suspension, he was fired. The FEHC held that the employer's failure to make a reasonable effort to accommodate sincerely held religious beliefs of an employee established a prima facie case of employment discrimination.

Age Discrimination. On October 4, 2004, the Fourth District California Court of Appeal in *Carter v. CB Richard Ellis, Inc.* held that an employer's reorganization that resulted in the demotion of many employees who were over the age of 40 did not amount to unlawful age discrimination. The plaintiff had argued that her employer's facially neutral policy resulted in unlawful discrimination because it had a "disparate impact" on older workers. The *Carter* Court held that the trial judge had erred by not setting aside the jury verdict because the plaintiff had failed to provide statistical data showing that the employer's practice was due to the plaintiff's membership in a protected class.

Wage and Hour. On October 19, 2004, the Second Appellate District Court of Appeals in *Smith v. Superior Court* affirmed the dismissal of a class action lawsuit. The lead plaintiff was a model who claimed that she had been discharged after one day of work and had not been paid until two months later. The Plaintiff sought waiting time penalties on behalf of herself and all similarly rated models arguing that an employer is required to pay any and all monies "immediately upon discharge." Relying primarily on out-of-state cases, the *Smith* Court held that because the plaintiff was hired to work at a one day hair show for \$500.00, the completion of her work did not constitute a "discharge" within the meaning of the California Labor Code and she was not entitled to waiting time penalties.

Upcoming Events

January 7, 2005 - Employment Law "Essentials" For 2005. Rediger, McHugh & Hubbert, LLP will present its annual half-day seminar at the Sutter Club 1220 9th Street, Sacramento, from 8:30 am - 12:00 noon. New laws and court decisions, model policies, HR forms, posters, etc. \$125.00 for first attendee/\$100.00 for others from same employer includes seminar, breakfast, materials and parking. Reduced rate for clients. Go to sacramentolaborlaw.com or call (916) 442-0033 for more information.

January 14, 2005 - Robert L. Rediger will answer questions and provide an overview of the new employment laws that will become effective in 2005 for Executive Directors and Human Resource Managers who are members of the Nonprofit Resource Center or its affiliated Affinity Group. The meeting will take place from 11:30am - 1:00pm at a Downtown Sacramento location. Contact Chris Howland of the Nonprofit Resource Center at (916) 264-2788 for more information.

New Law - Mandatory Sexual Harassment Training for Supervisors. See page 5.

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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Best Wishes For A Great New Year!