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COPY

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Mr. Ronald T. Weakley
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Dear Ron:

You have requested our opinion on three questions regarding employee free speech and related matters. I have divided this letter in three separate sections to discuss each of your questions.

1. Employee Free Speech Off the Job.

The first question you ask is: "What are the limits as to free speech and activity off the job of a member (employee), which could affect his employer?" In view of the memo you attach to your letter, I assume your question relates to the right of an employee to participate in political and community activities and discussions which criticize, assess, or in some manner express a point of view concerning political or public actions of the employee's employer. For example, you want to know whether a P.G.& E. employee can participate in a hearing or other discussion before a board or commission of local government, or in a community or political group, concerning P.G.& E. actions or proposed plans which raise issues of air and/or water pollution, radiation hazards, or other conservation questions.

To begin with, an employee's political activities in general are protected against employer interference by Section 1101 and 1102 of the California Labor Code. Section 1101 states that "no employer shall make, adopt, or enforce any rule, regulation, or policy (a) forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office; or (b) controlling or directing, or tending to control or direct the political activities or affiliations of employees." Section 1102 states that "no employer shall coerce or influence, or attempt to coerce or influence his employees through or by means of threat or discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."

The terms "political action" and "political activity" are not defined in the statute, but the California Supreme Court has referred with approval, in this context, to the dictionary definition of "political" as including "the exercise of the rights and privileges or the influence by which the individuals of a state seek to determine or control its public policy." Lockheed Aircraft Corp. v. Superior Court, 28 Cal. 2d 481 (1946). Thus, any employee's participation in hearings before public boards or commissions, or in political or community groups, would appear to be within the protection.

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While there have been no reported decisions involving the application of Sections 1101 and 1102 to political activities which affect the employer directly, it seems likely that a court would interpret those sections as protecting an employee's good faith political activity even if it affects the employer adversely. Relevant by analogy is a decision of the Court of Appeals holding that a labor union could not lawfully discipline members who openly campaigned for a right-to-work law in contravention of the expressed official policy of the union. Mitchell v. International Association of Machinists, 196 Cal. App. 2d 796(1961).

Off-the-job speech or activity which does not come within the protection of Sections 1101 and 1102 of the Labor Code would be dependent upon the rulings of an arbitrator under the provisions of the collective bargaining agreement. In that connection, it is an accepted principle, and one that has been applied to the P.G.& E. agreement by arbitrators, that an employee may not be disciplined for off-duty activity unless it "involves or affects the employer/employee relationship. Such involvement or effect on the employer/employee relationship by off-duty conduct is usually measured by three considerations: First, has the company been harmed; second, has the employee been rendered unable to perform his job; and third, have other employees refused to work with the subject employee". Menzie Dairy Co., 45 LA 283. Applying that general principle, arbitrators have sustained disciplinary action in the following types of cases:

(i) Where the employee publicly criticizes the employer's product or services not in good faith for the public interest but maliciously, or as a device for coercing the employer on a matter which is subject to contractual grievance procedure discipline has been upheld. For example, in General Electric Co., 40 LA 1126, discharge of an employee for publishing an article in a union paper stating that the employer was "insisting on bad parts" on production of military orders was upheld, on the basis of findings by the arbitrator that the article was malicious and without substance. Similarly, in Sinclair Oil and Gas Co., 39 LA 508, discharge was upheld where an employee threatened to boycott the employer's product in order to redress certain grievances concerning job classification and other working conditions.

(ii) Disclosure of trade secrets or confidential information, unless pursuant to legal process, may also be grounds for disciplinary action.

(iii) The employee's right to off-the-job free speech is apparently also limited by his responsibility not to slander company officials personally. In Four Wheel Drive Auto Co., 20 LA 823, the arbitrator sustained a dismissal of an employee who spread disparaging rumors concerning a company official and his wife. This case does not directly involve off-duty political discussion or activities, but it suggests that the employee who wishes to participate in such discussion and activities should avoid personal comments about company officials.

(iv) It has also been held that an employee may be discharged for lodging formal protest with public officials concerning the conduct of a customer of the employer, where the employee makes that protest in "unrestrained and discourteous" language. That was the holding in Air Reduction Co., 30 LA 486, in which the arbitrator upheld the discharge of an employee who lodged a formal complaint with the State Public Health Department concerning a restaurant operated on the premises of one of the employer's customers. In lodging the protest the employee stated that the restaurant was "the most unsanitary in the state". The arbitrator held that although the employee had the right to lodge the complaint, his characterization of the

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restaurant as "the most unsanitary in the state" was unrestrained and discourteous criticism of the employer's customer, and as such constituted grounds for dismissal.

A number of cases on the other hand make clear that an employee may use, or suggest the use of, formal legal redress against wrong done by the employer or by a customer of the employer. For example, in Dow Chemical Co., 32 LA 71, it was held improper for an employer to dismiss an employee who sued the employer for slander in connection with an on-the-job theft incident. The arbitrator held that the employee had a legal right to attempt to redress the alleged slander, and that the filing of the suit was in good faith and was not an attempt to harass the employer. Similarly, in Bethlehem Steel Co., 32 LA 749, it was held improper to dismiss employees who instituted a personal injury claim against a customer of the employer. The arbitrator was particularly impressed by the fact that (1) the pleadings filed by the employees were restrained and factual, (2) the employees had not made any disparaging or damaging remarks about the customer involved, and (3) the publicity that did result was not encouraged or solicited by the employees. In still a third case, Hagan's Chevrolet Co., 12 LA 635, it was held improper to dismiss an employee who advised a friend, in the presence of co-employees, to retain an attorney and sue the employer regarding a two-year delay in delivery of an automobile. The arbitrator was impressed by the fact that the employee was in good faith in offering such advice and was not attempting to harass the employer. A result contrary to the three decisions just referred to was reached in New York Central Railroad, 44 LA 552, in which the arbitrator held that the company could dismiss a part-time employee who acted as attorney for parties bringing a law suit against the company.

These cases held that an employee may participate in formal legal proceedings involving his employer, as long as his conduct toward his employer is not characterized by bad faith or maliciousness. It is our opinion that the principle of these cases would be extended to formal proceedings before local governmental boards, commissions, or other bodies though we find no cases in point.

(v) It has been held in one case that where the off-duty political activities of an employee become so controversial as to constitute a clear and present danger of violence on the employer's property, as well as a reasonable probability of a wildcat strike and consumer boycott against the employer in protest of those activities, the employee involved may properly be discharged, even though he did not intend that the danger of violence, or the probability of a strike and a boycott, should occur. This was the holding in Baltimore Transit Co., 47 LA 62, in which the arbitrator upheld a public transit company's dismissal of a bus operator who was acting grand dragon on the state branch of the Ku Klux Klan. In that capacity the employee had made statements which had been extensively publicized by the local news media. The arbitrator found that as a result of that publicity "(1) there existed a clear and present danger that unless the employment of X was promptly terminated, company officials could reasonably anticipate physical violence involving persons and property on buses that X operated or was believed to be operating; (2) a wildcat strike by X's fellow bus operators had significant support (nearly half of the other bus operators were black); (3) there existed a reasonable probability of an economic boycott by patrons of the bus line. (About 50% of the patrons were black)". The arbitrator held that under these conditions the company was not required to wait until an act of violence on the job occurred.

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CONCLUSIONS:

The net effect of the applicable statutory and arbitration decisions can be stated as follows:

In general, an employee has a right to off-duty free speech which will be protected against disciplinary action, even where that speech involves or affects his employer adversely, so long as he acts in good faith and for the public interest, or in pursuance of his civic duties. The protection will be lost, however, if the employee acts maliciously, in order to injure his employer; or if he makes disparaging remarks concerning the employer's product or services to further his personal interests or for the purpose of pressuring the employer on a matter which is subject to negotiations or arbitration. The protection does not extend to personal attacks on company officials with respect to their private lives; nor does it extend to the disclosure of confidential information, except pursuant to legal process. The protection may be lost if the employee's speech is unnecessarily unrestrained or discourteous, or if it creates a clear and present danger of violence or disruption of the employer's business.

2. Employee Free Speech On the Job.

The second question you ask is: "What is the extent of an individual's right to free speech in discussions with other employees while on the job in terms of being critical of the company's operation?" I would like to divide your question into two separate parts, as follows:

(i) Speech involving employer action of a public or political nature. In our opinion, the general principles discussed in part (1) above apply to this type of speech as well. Taken as a totality, the cases and Labor Code sections referred to suggest that in private, personal conversation on the job, an employee has a right to express an opinion concerning the public or political actions of his employer. However, this right of on duty free speech is subject to the same limitations as off-duty free speech.

(ii) Speech involving employee grievances. Somewhat different considerations govern the situation where an employee wishes to engage in on-the-job conversations concerning company activities which constitute violations of his or other employees' rights under the collective bargaining agreement. The cases suggest (see, for example, Arrow Head Products, 49 LA 944) that an employee must of necessity have the right to engage in a reasonable amount of on-the-job fact-finding and opinion-trading with other employees, in order to determine whether the employer has violated the collective agreement. Assuming the agreement has a grievance procedure, the proper implementation of that procedure depends on the right of an employee to engage in such discussion. However, the right to engage in such discussion ends when the employee has had a reasonable opportunity to inform himself concerning the suspected violation. At that point, he must consult an appropriate union official (or, if there is no union, an appropriate company official) to bring the matter to a conclusion. Such a principle is suggested in the Fischer and Sinclair Oil and Gas Co. cases decided above.

3. Discussions of Potential Grievances with Shop Stewards.

Your third question is: "What is the right of an employee to look up a Shop Steward on the job and discuss a grievance with him? Are there limits in terms of

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time, holding up the job, etc.?" As suggested in the Arrow Head Products case cited above, in order to make a contractual grievance procedure (assuming there is one) workable, an employee must have a reasonable opportunity to discuss a potential contract violation with a Shop Steward on the job. An employee must be allowed sufficient time on the job to seek out the Shop Steward, inform him of the facts of the situation involved, and discuss with him the possibility of a contract violation. However, in engaging in such discussions, an employee cannot unduly or unreasonably interfere with or impair the efficient operation of the plant. In short, the rule of reason governs the employees' rights in this type of situation. He has a right to discuss the potential grievance fully, but he cannot unreasonably impair the company's operations.

I am sorry to have taken so long in replying to your letter, but the area is a complicated one, and required considerable research on our part. If you have any further questions, please let me know.

Very truly yours,

/s/ J. R. Grodin

Joseph R. Grodin

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