CLIENT ALERT

California Family Leave – Employer's Honest Belief That Employee Took Leave For Improper Reason Not Enough to Justify Discharge

Nov.29.2012

In general, California's Moore-Brown-Roberti Family Rights Act, also known as the California Family Rights Act ("CFRA"), like the federal Family Medical Leave Act ("FMLA"), requires employers to reinstate employees to their job positions or to a comparable job position upon return from family leaves of absence. Cal. Govt. Code § 12945.2(a). What happens, though, when the employer develops an honest belief during the leave that the employee is not, in fact, qualified to take family leave? Is that honest belief sufficient to allow the employer to discharge the employee? Earlier this month, California's Second Appellate District in *Richey v. AutoNation, Inc.*, B234711 (November 13, 2012), determined that the employer's honest belief does not control -- the employee is entitled to reinstatement, unless the employer establishes that the employee would not otherwise be employed at the time reinstatement is requested.

Avery Richey was a sales manager at Power Toyota of Cerritos. He also owned a family seafood restaurant. In 2008, Mr. Richey suffered a back injury at home, and when his physician certified that he was unable to perform his job duties at Power Toyota, the dealership granted his request for CFRA leave.

Power Toyota had a policy that precluded employees from engaging in other employment while on leave, and it reminded Mr. Richey of this policy during his leave. (Although Power Toyota informed Mr. Richey that this policy also precluded "self-employment," the company's employee handbook did not support this interpretation – the policy provided, "You are not allowed to accept employment with another company while you are on approved [CFRA] leave.") During his leave, Mr. Richey was observed at his restaurant sweeping, taking orders, acting as cashier, bending over, and using a hammer to hang a sign. He acknowledged engaging in some of these activities, but claimed that (a) he did not believe they violated the company's policy, and (b) his doctor had authorized him to perform only these limited, light-duty tasks. Power Toyota discharged Mr. Richey for violating its policy prohibiting outside employment while on leave of absence. The termination occurred four weeks before Mr. Richey was scheduled to return to work from his CFRA leave.

Mr. Richey filed a lawsuit alleging that his discharge violated the CFRA, among other claims. Power Toyota successfully moved to compel arbitration, based on an arbitration agreement between the parties. After a hearing that spanned eleven days, the arbitrator concluded that Power Toyota was entitled to terminate Mr. Richey either because it had an "honest belief" that he had abused his medical leave or because he had not told the company the truth about his outside employment.

Mr. Richey returned to court and filed a petition to vacate the arbitration award. The lower court denied the petition and confirmed the arbitration award, agreeing with the arbitrator that Power Toyota was entitled to rely on its "good faith honest belief." However, the Court of Appeal agreed with Mr. Richey and vacated the arbitration award.

In its decision, the Court of Appeal rejected the honest belief standard. It focused on the fact that under the CFRA, employees returning from leave are guaranteed reinstatement, with only two exceptions, as described in the CFRA regulations: (1) if the employer proves that the "employee would not otherwise have been employed at the time reinstatement is requested,"

inasmuch as employees have "no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the CFRA leave period;" and (2) under certain circumstances applicable to key employees. *Id.* at 12, citing 2 Cal. Code Regs., §§ 7297.2(c)(1), (2). Applying consistent state authorities, as well as federal authorities decided under the FMLA, the Court of Appeal in *Richey* held that employers may not "simply rely on an imprecisely worded and inconsistently applied company policy to terminate an employee on CFRA leave without adequately investigating and developing sufficient facts to establish the employee had actually engaged in misconduct warranting dismissal." *Id.* at 23. The Court of Appeal also recognized that the mere fact that an employee is able to perform a different job does not necessarily mean he or she is able to perform the essential duties of the current job. *Id.* at 22. The court concluded:

> Whether the arbitrator's ruling resulted from his improper acceptance of the honest belief defense or the employer's reliance on a policy that violated Richey's substantive right to reinstatement, neither comports with the substantive requirements of CFRA.

Id. at 23-24 (footnote omitted).

The Court of Appeal also held that it had the authority to vacate the arbitrator's award, notwithstanding limitations on judicial review of arbitration decisions. The court relied on public policy exceptions to the general rule limiting judicial review. It observed further that the arbitration agreement between the parties expressly authorized the arbitrator to resolve claims "solely upon the law" -- as a consequence of this provision, the Court of Appeal ruled, "the arbitrator's failure to address all of Richey's statutory CFRA claims and his reliance on a legally unfounded equitable defense to vitiate those claims warrant closer scrutiny of the award than might otherwise be appropriate." *Id.* at 26 (footnote omitted).

Notwithstanding the decision in *Richey*, employers are not powerless when they learn that employees abuse their FMLA or CFRA leave. As the Court of Appeal in *Richey* recognized, "[a]n employer who 'has reason to doubt the validity of' the employee's health certification 'may require, at the employer's expense, that the employee obtain the opinion of a second health care provider, designated or approved by the employer, concerning any information certified….'" *Id.* at 11, quoting Cal. Govt. Code § 12945.2(k)(3)(A). And if the second opinion differs from the opinion of the employee's health care provider, "the employer may require, at the employer's expense, that the employee obtain the opinion of a third health care provider, designated or approved jointly by the employer and the employee," whose opinion is binding on the parties. *Id.,* quoting Cal. Govt. Code §§ 12945.2(k)(3)(C), (D). Thus, when presented with information suggesting that an employee may not suffer from the serious health condition he or she asserted to obtain family leave, an employer should seek a second medical opinion and potentially a third opinion, as authorized by the CFRA. Employers are well-advised not to discharge an employee who they may honestly believe abused his or her right to take family leave, unless they are able to prove by a preponderance of evidence that the employee would not otherwise have been employed at the time reinstatement is requested, whether because of a violation of company policy or for some other reason that warrants discharge.

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