

# Employment Matters



VOL. I, SPRING 2015

## IN THIS ISSUE

You Can't Fire Me... I'm on FMLA . . . . . page 1

The Rise in Pregnancy-Related Employment Discrimination Claims . . . . . page 1

Addressing Emotions That Drive Disparate Views of Fairness . . . . . page 4

Unpaid Interns Gain More Protection . . . . . page 5



## You Can't Fire Me... I'm on FMLA

By Hon. Luis Cardenas (Ret.)

Is this true? The answer is a familiar one to lawyers who practice employment law: maybe.

In January 2015, the Supreme Court of California, in *Richey v. AutoNation*, provided some guidance regarding this unsettled area of the law but declined to address some of the major concerns facing employers with workers on FMLA/CFRA leave in California.

The matter started with an arbitration, where an award was rendered in favor of AutoNation against a salesman, Mr. Richey.

He brought a suit claiming his employment was impermissibly terminated while he was on approved medical absence.

**In the award, the arbitrator based his decision on two primary factors:**

1. The company held an "honest belief" the employee was working at another job while on sick leave from AutoNation.
2. The employer had a written policy forbidding outside employment while on FMLA. (*This policy was in the employee handbook, and Mr. Richey acknowledged reading it.*)

[\(Continued on page 2\)](#)

## The Rise in Pregnancy-Related Employment Discrimination Claims

By Maria C. Walsh, Esq.

Laws prohibiting discrimination in employment against women, coupled with economic and cultural imperatives, result in more women entering more diverse occupations than ever before. Approximately 75 percent of women entering the workforce will be pregnant during their employment, and 75 percent of those new mothers will choose to breastfeed. No wonder pregnancy-related employment issues are increasing.

The Pregnancy Discrimination Act of 1978 amended Title VII by banning employment discrimination on the basis of pregnancy,

childbirth or related medical conditions. Thirty-six years and several laws later, we're still grappling with how to apply the law in today's workplace. As more women juggle pregnancy and childbirth-related issues with the demands of their work, employers must navigate some highly personal personnel issues.

The Equal Employment Opportunity Commission (EEOC) defines pregnancy discrimination as "treating a woman unfavorably because of pregnancy, childbirth or a medical condition related to pregnancy or childbirth." Refusing to hire,

[\(Continued on page 3\)](#)



Mr. Richey challenged the award in the Superior Court, but the judge declined to vacate the arbitrator's decision. The dispute went to the Court of Appeal, 210 Cal. App. 4th 1516, where the justices, ruling in 2012, reversed the Superior Court and the arbitrator's award.

The Court of Appeal found Mr. Richey had an "unwaivable statutory right" under California law, because approved medical leave under FMLA/CFRA includes a guarantee of reinstatement upon return to work.

The justices stated the arbitrator committed "clear legal error" in relying on federal case law, and one California decision, which allowed an employer to rely on the "honest belief" doctrine. These decisions hold that a company may investigate and conclude its employee is abusing his/her medical leave, and terminate the worker. Even if the employer's determination is mistaken, the honest belief provides a defense.

The court relied heavily on its review of federal case law and came to the conclusion that the "honest belief" doctrine was a minority view. It also faulted the arbitrator for shifting the burden of proof to Mr. Richey and found it was up to AutoNation to prove by a preponderance that its employee had violated company policy. In other words, the gist of the opinion is that AutoNation could not rely on suspicion or honest belief, but rather had to articulate specific facts supporting its decision to let Mr. Richey go.

This is where it gets tricky for employers. Relying on *Lonicki v. Sutter Health* (2008), the court said, in essence, if an employee performs a second job while on medical leave from his/her primary job, it is not always a defense when a company is sued for wrongful termination.

The issue is whether the worker is

unable to do his/her current job. A person may be incapacitated from performing his/her duties at the primary place of employment but is able to do the work at another company. Having a second job may or may not override an employee's FMLA/CFRA guarantees. This is where the employer is required to carry the burden and prove the leave protections are not in place.

When the Supreme Court of California published its opinion, it reversed the Court of Appeal and affirmed the arbitrator's award.

However, the opinion is an important read for all lawyers practicing employment law. The court, unfortunately, never addresses the concept of "honest belief," and the application of that defense remains, as the court stated, "an unsettled question of law."

The Supreme Court specifically reversed the Court of Appeal because AutoNation had a policy against "outside work while on approved CFRA medical leave." The company reminded Mr. Richey that the handbook specifically prohibited self-employment. (Richey had opened a restaurant.) The court went on to emphasize the evidence "overwhelming[ly]" supported the arbitrator's findings that the policy existed, plaintiff was warned about the restrictions while on leave and Mr. Richey declined AutoNation's offer to discuss the matter. ■



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## The lessons to be learned are as follows:

1. Advising your client to apply the "honest belief" doctrine to a determination whether to fire an employee on medical leave who is perceived to be abusing the time off may not, depending on future court decisions, provide a defense.
2. An employee handbook or other source of company policy must have clear and specific language defining prohibitions against other employment while on medical leave. Written proof of service of the employer's policy on the employee is essential.
3. A second job may or may not be an abuse of FMLA/CFRA. As in many legal matters, it depends on the particular facts of a specific individual. No rule applies to all.
4. If an employer arrives at the conclusion it has the legal right to discharge an employee for violating a company policy, the court emphasized the fact that AutoNation reached out to the plaintiff to discuss the matter. Whether this would have altered the nature of the opinion is open to debate, but the court is dropping a strong hint to employers to engage the employee in a conversation.
5. Judicial review of arbitration awards remains a steep climb for those challenging an arbitrator's decision. A mistake in law is unlikely to trigger a reversal if other grounds are present to support the award.
6. It is important to remember, as the court reminds us, an employee has "no greater right to reinstatement or to other benefits and conditions of employment than if [he/she] had been continuously employed" during the FMLA/CFRA leave.

train, promote or provide equal pay, insurance or other benefits because of an employee's pregnancy violates the law.

The Americans with Disabilities Act, as amended in 2008, prohibits discrimination due to temporary impairments of "major life activities." Although pregnancy is not a disability, temporary medical complications resulting from pregnancy, such as severe nausea, gestational diabetes, sciatica, post-partum depression, etc., may constitute disabilities within the meaning of the ADA. If a woman's temporary medical condition related to pregnancy or childbirth temporarily prevents her performance of work responsibilities, the EEOC requires her employer to treat her the same way it treats other temporarily disabled employees. Light duty, alternative assignments or other accommodations offered to other temporarily disabled employees also must be offered to employees temporarily disabled by pregnancy. The Supreme Court has yet to consider this aspect of the ADA. In a decision interpreting Title VII, as amended by the PDA, the Court concluded that employers need not grant pregnant employees "most favored nation" status by providing every accommodation afforded all other employees. *Young v. United Parcel Service, Inc.*, March 25, 2015. (In a Title VII disparate treatment claim, the Court should weigh the persuasiveness of the employer's reasons for accommodating other employees against the burden imposed on pregnant workers by non-accommodation to determine whether intentional discrimination could be inferred from the failure to accommodate).

Seemingly neutral policies can adversely impact pregnant workers. An employee who lost sales commissions because her accounts were reassigned temporarily during her pregnancy leave, or who was disciplined for tardiness due to pregnancy-related nausea, may suspect discrimination. Employers who invite and address employee complaints when they arise can promote productivity and avoid litigation.

After pregnancy-related discrimination charges increased nearly 50 percent, the EEOC urged employers to do more to explore pregnancy-related accommodations. The federal agency favors employer initiation of an "interactive process" to explore possible "reasonable accommodations" for employees temporarily disabled by pregnancy-related medical complications. Temporary reasonable accommodations such as rescheduling early-morning meetings (for an employee suffering from morning sickness) or substituting videoconferencing for long-distance travel (for a breastfeeding new mother) can allow employees to continue to work while pregnant or breastfeeding. Employers need not adopt accommodations that impose undue hardships on the employer.

Human resource professionals or mediators can help managers and employees explore reasonable accommodations through interactive discussions before problems develop. Supervisors trained to conduct effective interactive discussions and to identify appropriate accommodations can help temporarily disabled employees remain productive and avoid pregnancy-related discrimination complaints.

Even healthy employees may have pregnancy-related conditions that affect their work. Often juggling work requirements like heavy lifting, exposure to noxious fumes, travel demands, etc., with concerns for the health of their child and themselves, healthy employees may not qualify for legally mandated accommodation. Instead, they may request leave to avoid working conditions they fear may threaten their pregnancy.

Pregnant employees who qualify for leave under the Family Medical Leave Act are entitled to 12 weeks of unpaid leave because pregnancy is a "serious health condition." Advocates for further accommodation in the workplace argue that the option of taking leave is neither as productive for the employer nor as useful to the employee as reasonable workplace accommodations. If an

employer can accommodate weight-lifting restrictions temporarily to permit a healthy pregnant employee to work longer during her pregnancy, both the employer and employee may benefit.

Some state laws require employers to accommodate non-disabled pregnant employees. The 2010 Affordable Care Act also promotes accommodation by requiring employers to provide both private space (other than a bathroom) and unpaid break time for one year after birth for expressing breast milk at work. Employers of fewer than 50 employees may be exempted if compliance imposes an undue hardship. The Act does not preempt states laws that mandate greater accommodation.

**"Refusing to hire, train, promote or provide equal pay, insurance or other benefits because of an employee's pregnancy violates the law."**

Disputes about whether otherwise-neutral employment policies discriminate against pregnant workers or whether a particular accommodation is required continue to spawn litigation across the country. Early intervention and resolution can improve productivity and job satisfaction, while avoiding costly claims of discrimination and retaliation. ■



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# Addressing Emotions That Drive Disparate Views of Fairness

By Hon. Jamie Jacobs-May (Ret.)

Almost 20,000 employment cases were filed with the Department of Fair Employment and Housing in 2013, with more than 15 types of charges, including retaliation, harassment and discrimination based on race, gender, age, physical and mental disability. Employment cases can sound in contract or tort, and they can involve an entry-level clerk or a former CEO, a large global company or a mom-and-pop shop.

Despite this range, employment cases often have commonalities. For many employees, the conflict transcends a workplace dispute and goes to core issues of self-esteem and identity. Employees who are terminated or otherwise suffer adverse employment action are often devastated, not only because of the loss of a livelihood, but also because of feelings of betrayal, humiliation and embarrassment. The employee is hurt and angry, seeks justice and wants to right the wrong.

The employer, too, feels outraged. The claims are viewed as untrue, and the employee is viewed as greedy. The employer is concerned about reputation and a cascade of claims from other disgruntled employees. The laws are perceived as one-sided and unfair, requiring employers to pay their own attorney's fees, while the employee gets a "free ride" through a contingent fee agreement. If this weren't bad enough, the employer is then saddled with paying the employee's attorney's fees if the case is lost, though the reverse is almost never the case.

Addressing these powerful emotions during the course of negotiating the resolution of an employment case is a challenge. Each side seeks "fairness,"

and the inherent subjectivity of distributive fairness perceptions is amplified by the depth of emotion felt by both sides.

However, there is another important variable that can have a profound effect on parties' conclusions that the substantive outcome is fair, or at least acceptable. That variable is procedural fairness.

Procedural fairness focuses on the process used to arrive at an outcome. As the California courts learned through the 2005 landmark public trust and confidence assessment, *Trust and Confidence in the California Courts*, perceptions of procedural fairness are the strongest predictor of whether members of the public approve of or have confidence in California's courts.

Research also demonstrates that when people believe that a decision-making process is fair, they are more likely to believe that the outcome produced by that process is fair, even if it is not the party's desired outcome. Of course, negotiation and mediation are not decision-making processes. Still, if the four components of procedural fairness are met (discussed below), there is evidence to suggest that there is a greater likelihood that the mediation will end with a successful resolution. (See Nancy A. Welch, *Perceptions of Fairness In Negotiation*, 87 Marquette Law Review 753, 764 (2004).)

The first component of procedural fairness is voice, a meaningful opportunity for parties to tell their story. This also means that the mediator sincerely works to "get" that party's point of view, whether it concerns facts or feelings, and the party ultimately feels heard and understood.

Second, the mediator must be neutral. This does not mean that the mediator cannot express views or give evaluations if that is the mediator's style. Rather, it means that if evaluations are given, they must be based on objective criteria, and explanations grounded in that objective criteria must be given.

Third, the neutral must be trustworthy. Trust and credibility come from being honest, prepared and knowledgeable; asking meaningful questions; and being able to integrate the facts, law and unique features that the case presents.

Finally, procedural fairness requires that all participants be treated with dignity and respect.

As significant as it is for the mediator to provide procedural fairness, it is also very powerful when the dynamics between the participants and opposing counsel are laced with the four components of procedural fairness. (*Id.* at 764.) Certainly, procedural fairness is not a panacea that guarantees a case will settle. However, it can have a profound effect on the participants, allowing them to find that overlapping zone of agreement. ■



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# Unpaid Interns Gain More Protection

By Joel M. Grossman, Esq.

The number of lawsuits brought by unpaid interns, either individually or as class actions, keeps growing. Employers who choose to engage unpaid interns must remember that if they are doing work that could be done by regular employees, and if their work is more of a benefit to the employer than to the intern, the employer may well be violating minimum wage laws. For many years, there was an unspoken bargain: The intern would work without pay but gain experience and a good reference for his or her resume, while the employer would have someone work for free. But a recent spate of lawsuits has thrown this bargain out the window. Interns who worked without pay in various capacities have been exercising their rights to get paid, including minimum wage, overtime and penalties for denial of meal and rest breaks.

In California, employers have a new concern. AB 1443, signed into law by Governor Jerry Brown last year, took effect in January 2015. This law added unpaid interns to the list of persons covered by California's antidiscrimination laws, codified at Government Code section 12940. For the first time, unpaid interns in California have the same rights as regular employees to be free of discrimination on the basis of their race, gender, age and other factors. In other words, a person who applies for an unpaid internship and is rejected has the legal right to claim that he or she was not selected due to his or her gender, race, sexual orientation, age or other protected status. So too, an unpaid intern who is terminated, or who is denied a certain position within the company, may assert that he or she was fired or not placed in his or her requested position due to discrimination.

This new law, combined with the prior law regarding when someone is a true intern and not an employee, will likely result in many employers doing away with unpaid internships

altogether. First, as has always been the case, an employer who engages an unpaid intern faces the risk that the intern will later sue, claiming that the internship was a sham and he or she was actually a true employee who is now owed at least minimum wage. As noted above, such claims were once rare, but the publicity regarding lawsuits, such as the one brought against the producers of the movie *The Black Swan*, have encouraged unpaid interns to bring their own lawsuits.

The risk for employers in California has now been expanded exponentially. First, the employer must be sure to comply with all of the rules and be sure the intern cannot later be deemed an employee. Now the employer now must also worry that an applicant for an unpaid internship who is not granted the internship can sue the employer, based on the claim that he or she was denied the internship based on unlawful discrimination. So too, the employer must now worry that unpaid interns can sue for sexual harassment, discriminatory termination or a variety of other claims. And when these new risks are combined with the requirement that an internship be a training opportunity and more for the intern's benefit than for the employer's, the question must be asked: Why bother having interns in the first place? Employers have enough to worry about when it comes to potential harassment or discrimination claims from their actual employees; do they need a new set of claims from their unpaid interns? ■



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