ASAP™ A Littler Mendelson **Time Sensitive** Newsletter

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A California employer may still argue that an employee is unqualified for CFRA leave, even if it does not seek a tie-breaking third medical opinion. Nevertheless, employers are advised to make informed decisions about whether employees are entitled to CFRA medical leave.

California Edition

A Littler Mendelson California-specific Newsletter

The California Supreme Court's First CFRA Opinion Underscores The Need To Make Informed Decisions About Eligibility For CFRA Leave

By Rod M. Fliegel and Christopher Daley

In *Lonicki v. Sutter Health Central*, the California Supreme Court issued its first opinion concerning the state's version of the Family and Medical Leave Act (FMLA), the Moore-Brown-Roberti Family Rights Act (CFRA). Like the FMLA, the CFRA permits an employer to condition CFRA leave on a timely certification from the employee's health care provider that the employee has a "serious health condition" and thereby qualifies for CFRA leave. If the employee's health care provider provides such a certification, the employer may seek a second opinion from its own doctor. In the event of a disagreement, the employer may seek a tie-breaking third opinion from a neutral health care provider. In *Lonicki*, the Supreme Court rejected the plaintiff-employee's argument that an employer *must* seek a tie-breaking third opinion or forever give up its right to argue that the employee was unqualified for CFRA leave in the first place. In so holding, the Court preserved this argument for employers who forego a third opinion and wind up litigating whether the employee was entitled to CFRA leave.

In remanding the case to the court of appeal for a further decision, the Court by no means ruled for Lonicki. The lower courts had both held that Lonicki could not prove she was qualified for CFRA leave based on evidence that Lonicki was working in a similar job at precisely the same time that her psychiatrist was keeping her off from work at Sutter. In reversing, the Supreme Court only held that the jury had to decide whether to credit Lonicki's testimony about alleged differences between the two jobs.

Factual Setting For The Case

Lonicki was employed by Sutter at its hospital in Roseville as a technician in the hospital's sterile processing department and was responsible for picking up equipment and processing instruments utilized in patient care. In June 1997, the hospital became a level II trauma center. According to Lonicki, this led to a major increase in her workload and job-related stress.

In January 1999, Lonicki also started working for Kaiser in its sterile processing department. On July 26, 1999, Lonicki arrived for work at Sutter at her normal starting time, 8:00 a.m., and was told by her supervisor that she had a new shift that would start at noon and run to 8:30 p.m. She went home in tears. Lonicki subsequently filled out a form requesting a one-month leave of absence. The request was supported by a note from a nurse practitioner.

Lonicki was directed to see a doctor selected by the Company. He concluded that Lonicki was able to return to work without any restrictions. Lonicki was then instructed to come back to work or she would be fired.

After discussions with Lonicki's union representative, the Company agreed to allow Lonicki to use her paid time off, but not to grant her medical leave. She was told to return to work no later than

August 23. Lonicki had stated that she was unable to return to work until August 27.

On August 26, Lonicki consulted a psychiatrist. He diagnosed Lonicki with "major depression," opined that her symptoms were work-related, and advised her to remain off from work for another month. The next day, Lonicki brought the psychiatrist's note to work. Lonicki was told that she had been discharged for her failure to appear for work on August 23 and August 24. Lonicki asked for and received a "right to sue" letter from the state agency with oversight of the CFRA, the Department of Fair Employment & Housing (DFEH). Lonicki then filed suit in Sacramento Superior Court.

The Lower Court Decisions

Sutter moved for summary judgment in the trial court, arguing that Lonicki was not qualified for medical leave under the CFRA because, at the time of her request, Lonicki was maintaining part-time employment in a substantially similar position at another medical facility. Lonicki countered that her testimony about differences between the two jobs raised fact issues for trial. Lonicki also argued that the Company was precluded from disputing whether she was qualified for leave in light of the Company's decision not to see an opinion from a third health care provider. The trial court ruled in favor of the Company and dismissed Lonicki's lawsuit.

In a strongly worded pro-employer opinion, the court of appeal agreed with the trial court. It reasoned that Lonicki was not unable to work, but rather unwilling to do so. The court of appeal emphasized Lonicki's testimony that she could have returned to work if the Company had changed the working conditions to suit her. On the issue of possible statutory abuse, the court noted: "It is not uncommon for an unwilling employee to seek the benefits of a statutory scheme by claiming stress, anxiety, or depression arising from things such as conflicts with coworkers or supervisors, or from the workplace in general. In such cases, the alleged disability is often of a 'very flexible' or selective sort." The court further explained: "If an employer is required to make concessions to an unwilling employee who makes a claim of selective disability, the employer's ability to effectively manage will be significantly compromised. For example, the employer may find it difficult or impossible to staff an unpopular department or shift. Coworkers who do not themselves become hypersensitive and assert selective disabilities will be imposed upon by being compelled to cover the absentee employee's workload."

The Supreme Court's Holding

The first issue addressed by the Court was Lonicki's argument that the Company had forfeited the right to argue that she was unqualified for CFRA leave by not seeking a tie-breaking decision between Lonicki's psychiatrist, who said she was suffering from major depression, and the Company's doctor, who said she could return to work without any restrictions. The Court rejected Lonicki's argument. Instead, it held that while the tie-breaker is an option for an employer when its health care provider disagrees with the employee's health care provider, its use is not mandatory. According to the Court:

> If an employer doubts the validity of such a claim, nothing in either law precludes the employer from denying the employee's request for medical leave and discharging the employee if the employee does not come to work. Of course, an employer embarking on that course risks a lawsuit by the employee and perhaps a finding by the trier of fact that the employer's conduct violated the employee's rights under either the CFRA or the FMLA, or both, by denying the requested medical leave. To avoid such risks, the employer can resort to the [tie-breaker] dispute-resolution mechanism provided for by both laws.

In reaching its conclusion under California law, the Court rejected a number of prior, contrary decisions from federal courts in California and other jurisdictions that had been issued under the federal FMLA.

Next, the Court considered whether the lower courts had correctly ruled that there was no reason for a jury to hear Lonicki's CFRA claim, because no reasonable jury could find in her favor. Here, the Court disagreed. The Court held that a jury could credit Lonicki's testimony about the differences between her two jobs, including the hours and stress-level, and therefore find that she was qualified for CFRA leave. The Court explained that in evaluating whether an employee is qualified for leave, the focus is not on whether the employee can work in *general*, but instead on whether the employee is unable to perform some or all of the duties of *his or her current position*.

Practical Implications

It is not at all uncommon for employees to work at more than one job in the health care, retail, food service, construction and other industries. The teaching point from Lonicki is not so much a new one, but more of a reminder that employers must *carefully* evaluate whether an employee who requests FMLA/CFRA leave is entitled to take job-protected medical leave, including whether the employee has a "serious health condition" within the meaning of the statutes. (For a further discussion, please see Rod M. Fliegel and Justin Curley, "Evaluating Eligibility for FMLA Leave: Federal Case Law Underscores the Need for Informed Decision Making," *The Labor Lawyer*, Vol. 11, No. 1 (2006).) In California, while a tie-breaker opinion is not required, the price of being wrong can be costly, even if the employer is acting in good faith. Moreover, California CFRA law and federal FMLA law may differ on whether use of a tie-beaker opinion is mandatory. Employers should not assume that federal courts in interpreting the FMLA will follow the California Supreme Court's lead, and employers also covered by the FMLA should seriously consider whether to seek the third opinion rather than hazard the risk of losing the right to contest eligibility under the federal statute.

The Court's opinion also serves as a reminder on two important and corresponding points. First, that the FMLA/

CFRA only permit a limited inquiry into the employee's medical issues, unless the employee consents to broader disclosure. As stated by the Court: "[A]n employer may not require an employee seeking medical leave to provide detailed intimate and private information about a serious psychiatric condition that has made the employee unable to do the work, nor may the employer deny the employee's request for medical leave for failing to provide such information." As a practical matter, this means that prudent employers should gather pertinent information, but should be careful not to *overreach* by intruding into the employee's medical privacy.

Second, that in situations involving an employee's own health problems, and not a family member's, the employer must separately analyze the potential issues under the FMLA/CFRA and the federal Americans With Disabilities Act (ADA) and its California equivalent, the Fair Employment & Housing Act (FEHA). As explained by the Court: "The ADA is a distinct statutory scheme, whose provisions do not resemble those in either the FMLA or its California counterpart, the CFRA." Of course, with work-related injuries, the employer also must assess its further rights and obligations under the California Workers' Compensation Act.

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