CLIENT NEWS BRIEF

California Supreme Court Confirms that Employees May Be Terminated While on Leave, But Questions Remain Unanswered

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An employer may dismiss an employee who is on medical leave if the employee violates company policy during the leave. In *Richey v. Autonation, Inc.* (2015) 60 Cal. 4th 909, a case that applies both to school and municipal employers, the California Supreme Court reversed the court of appeal and upheld an arbitrator's award in favor of an employer that terminated the employee while he was on an approved medical leave because he violated the company policy that prohibited working during a leave.

Avery Richey began working at Power Toyota in Cerritos in 2004. He was aware that outside employment while on California Family Rights Act (CFRA) leave was not allowed. Employees that violated this policy in the past had been fired. In October 2007, Mr. Richey decided to open a restaurant while he was still working at Power Toyota. In March 2008, Mr. Richey injured his back at home and he was unable to work as a result of his injury. Mr. Richey filed for leave under the CFRA and the federal Family Medical Leave Act (FMLA) and Power Toyota granted the leave.

While Mr. Richey was on leave, Power Toyota sent him a letter stating that employees were not allowed to engage in outside employment while on leave and he could contact them if he had questions. Mr. Richey failed to respond to the letter. After receiving information that Mr. Richey was working while on leave, Power Toyota conducted an investigation and determined that Mr. Richey was working at his restaurant. Just prior to the conclusion of Mr. Richey's leave Power Toyota terminated him. Mr. Richey began legal action against Power Toyota. An arbitrator granted an award in favor of Power Toyota and Mr. Richey sought to vacate the award in court.

The CFRA (Gov. Code § 12945.2) and the FMLA (29 U.S.C. 2601, *et. seq.*) allow employees to take up to 12 weeks of leave in a 12 month period to care for an employee's family member or for the employee's own medical condition. An employee is entitled to reinstatement in the same, or a comparable position, at the end of their leave. Defenses to reinstatement exist under both the CFRA and the FMLA. One such defense provides that "(a)n employee has no greater right to reinstatement or to other benefits . . . of employment than if the employee had been continuously employed during the CFRA leave period." An employer has the burden of proving that an employee would not have been employed at the time of reinstatement even if they had not taken leave. (Cal.Code Regs., tit. 2, § 11089, subd. (c)(1); *see also* 29 C.F.R. § 825.216(a).)

The California Supreme Court found that the evidence overwhelmingly supported the arbitrator's factual findings that Mr. Richey was fired because he pursued outside employment while on CFRA leave, not because he decided to take CFRA leave for his injury. The California Supreme Court was persuaded by evidence such as Power Toyota's notice to Mr. Richey of company policy that prohibited outside employment, including self-employment, while on leave and Mr. Richey's failure to respond to his employer's concerns. The court acknowledged that even if the arbitrator was correct in finding that Power Toyota's employee handbook was "poorly written," Mr. Richey was clearly informed that he was not supposed to pursue outside employment while he


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was on CFRA leave. The court stated that to decide otherwise would undermine the defense included in the CFRA that an employee does not have "greater right to reinstatement" because they have taken leave.

This case demonstrates that employee protections under the CFRA are not absolute, when ample evidence exists that they have violated a clear, known policy of their employer. When there is suspicion that an employee is abusing leave, the employer should conduct a thorough investigation with supporting documentation. Here the court found it significant that the employee was fully aware of the policy prohibiting outside employment while on leave and he was reminded of the same but disregarded it.

The California Supreme Court did not decide whether policies prohibiting outside employment while on leave are generally legal because Mr. Richey did not raise this argument until the appeal. How California courts will address the legality of these policies remains to be seen. An important lesson from this decision is that school districts and other public entities should have clear policies with unambiguous language, ensure that employees are notified of the policy, and ensure that policies are consistently enforced before considering whether to discipline or terminate an employee under the policy.

If you have any questions regarding the *Richey* decision and how it may impact your existing leave policies, or if you have questions regarding employee leave rights in general, please contact one of our nine offices located statewide. You can also visit our website, follow us on Facebook or Twitter, or download our Client News Brief App.