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LABOR & EMPLOYMENT ALERT

JUNE 2008

CALIFORNIA SUPREME COURT'S "SERIOUS HEALTH CONDITION" DECISION: A SERIOUS HEADACHE FOR EMPLOYERS

by Julianne M. Scott

The California Family Rights Act ("CFRA"), like the federal Family and Medical Leave Act ("FMLA"), allows an employee to take a medical leave of absence when, due to a "serious health condition," the employee is "***unable to perform the functions of the position of that employee.***" Thus, based on the plain language of the statute, most employers would probably assume that an employee seeking a medical leave from one employer, while at the same time continuing to ***perform the same job for another employer***, would not be entitled to leave. In *Lonicki v. Sutter Health Central* 43 Cal. 4th 201 (2008), however, the California Supreme Court ruled that a "serious health condition" may make an employee unable to work for one employer, but not another.

Background

In *Lonicki* the claimant worked approximately 32 hours per week for Sutter Health as a technician in its sterile processing department. During the course of Lonicki's employment, Sutter added a trauma center, which Lonicki claimed caused her employment to become increasingly stressful. At the same time, Lonicki also worked part-time as a technician in the sterile processing department for Kaiser. The duties Lonicki performed at each hospital were substantially the same.

Lonicki requested a medical leave of absence from Sutter due to stress associated with her job. She provided a note from a family nurse practitioner stating that she required a one-month leave of absence for "medical reasons." Sutter required a second opinion from a health care provider selected by the company. This physician concluded that Lonicki did not have a serious health condition and was able to return to work without restrictions. Based on this second opinion, Sutter instructed Lonicki to return to work. Lonicki did not return and, instead, delivered another doctor's note further extending her request for leave. Sutter terminated Lonicki's employment and Lonicki sued.

The trial court dismissed the lawsuit, concluding that Lonicki's continued employment in the part-time job at Kaiser showed that Lonicki did not have a "serious health condition" rendering her unable to perform the functions of the position. This dismissal was affirmed by an appellate court.

The Supreme Court's Decision

On appeal, the Supreme Court reversed the lower courts and held that, while Lonicki's continued employment at Kaiser provided *evidence* that she may not have suffered from a serious health condition, that evidence was not *conclusive*. The Court reasoned that, while a serious health condition may prevent an employee from doing the tasks of an assigned position in one environment, this would not necessarily indicate that the employee is incapable of doing

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SEXUAL HARASSMENT PREVENTION TRAINING

IN ORDER TO ASSIST OUR CLIENTS AND FRIENDS IN COMPLYING WITH THE TRAINING REQUIREMENTS OF CALIFORNIA LAW, MS&K IS PLEASED TO OFFER SEXUAL HARASSMENT PREVENTION TRAINING FOR SUPERVISORS.

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WHERE: MS&K
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COST: $50 PER ATTENDEE

RSVP: MARY MARSHALL,
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Q: UNDER WHAT CIRCUMSTANCES MAY AN EMPLOYER SEEK A SECOND MEDICAL OPINION UNDER THE CFRA?

A: AS IS THE CASE UNDER THE FMLA, AN EMPLOYER THAT "HAS REASON TO DOUBT THE VALIDITY OF THE EMPLOYEE'S HEALTH CERTIFICATION" MAY REQUIRE, AT THE EMPLOYER'S EXPENSE, THAT THE EMPLOYEE OBTAIN THE

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substantially the same job in another employment environment. Thus the case was sent back to the Superior Court for trial.

Also at issue before the Supreme Court was whether Sutter was obligated legally to seek a third medical opinion when its doctor and Lonicki's disagreed as to whether she suffered from a serious health condition. Pursuant to CFRA (and FMLA) regulations, in such a circumstance, an employer may seek a third opinion from another health care provider and that person's opinion is binding. On a positive note, the Supreme Court held that, while seeking a binding third opinion is an option available to the employer, it is not mandatory. However, as was the case in *Lonicki*, the failure to seek a binding third opinion may lead to litigation if the employer accepts its medical provider's opinion over that of the employee's.

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OPINION OF A SECOND HEALTH CARE PROVIDER DESIGNATED BY THE EMPLOYER.

Q: IF THE SECOND MEDICAL OPINION COINCIDES WITH THE FIRST, MAY THE EMPLOYER STILL SEEK A THIRD MEDICAL OPINION?

A: NO. IF THE SECOND MEDICAL OPINION IS CONSISTENT WITH THE INITIAL MEDICAL CERTIFICATION, THE EMPLOYER MUST ACCEPT THAT DETERMINATION.

Q: IS AN EMPLOYEE OBLIGATED TO DISCLOSE THE NATURE OF THE "SERIOUS HEALTH CONDITION" IN ORDER TO BE ELIGIBLE FOR CFRA LEAVE?

A: NO. UNLIKE THE FMLA, UNDER THE CFRA, AN EMPLOYER MAY NOT REQUIRE AN EMPLOYEE (OR HEALTH CARE PROVIDER) TO DISCLOSE THE EMPLOYEE'S DIAGNOSIS. THUS, EMPLOYERS MUST ENSURE THAT WHATEVER CERTIFICATION FORM THEY USE MAKES CLEAR THAT DISCLOSURE OF THE DIAGNOSIS IS OPTIONAL.