

## The California Family Rights Act Requires Careful Consideration of Leave Requests on a Case-By-Case Basis

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The California Family Rights Act (CFRA) provides full time employees with leave to address family needs such as the birth or adoption of a child, serious illness of a family member, or the employee's own "serious health condition" that makes the employee "unable to perform the functions of the position of that employee." The recent California Supreme Court decision in *Lonicki v. Sutter Health Central* addresses two important questions under CFRA: whether the employer must seek a neutral opinion regarding the employee's medical condition in order to challenge that the employee had a "serious health condition," and whether the employee's performance of the same job for a different employer conclusively establishes that the employee is able to perform the functions of the job. The Court's decision highlights the need for employers to make CFRA leave decisions on a case-by-case basis, and to carefully evaluate how to proceed when entitlement to leave is disputed.

CFRA is the California equivalent of the Family Medical Leave Act (FMLA) adopted by Congress, and applies to companies with 50 or more employees. It allows an employee to take up to 12 weeks of unpaid "family care and medical leave" if the employee has worked for the company for more than a year, and has at least 1,250 hours of service with the employer during the previous 12 months. Upon granting the leave request, the employer is required to guarantee that the employee will be given the same or comparable position upon the termination of the leave.

When the purpose of the leave is to address the employee's own "serious health condition," the employer may require that the request for leave be supported by the employee's health care provider's certification that the employee has a "serious health condition," is unable to perform the functions of the job, and thereby qualifies for leave. If the employer doubts the validity of the certification, it may require the employee to be examined for a second opinion by its own provider. In the event there is a disagreement between the two opinions over whether the employee has a "serious health condition," the employer may require that the employee obtain a third opinion from a neutral provider, approved by the employer and employee. This neutral third opinion is "binding on the employer and the employee" on the question of whether a "serious health condition" exists.

In *Lonicki*, the plaintiff was employed as a technician in the hospital's sterile processing department. The hospital became a level II trauma center, leading to an increase in her workload and stress. At the same time, *Lonicki* was employed at and performed the same duties at another hospital. When her shift scheduled was set to change and a request for vacation was denied, *Lonicki* went home in tears. *Lonicki* obtained a note from a nurse practitioner supporting a one-month leave of absence for "medical reasons" and completed a form requesting a one-month leave of absence.

Her employer directed *Lonicki* to see its occupational health physician who concluded that she was able to return to work without restrictions. Thereafter, *Lonicki's* employer directed her to return to work or face dismissal. The employer did not obtain a third opinion from a neutral health care provider. After discussions with *Lonicki's* union representative, her employer approved paid time off—but not medical leave—and directed her to return to work upon the expiration of the paid time off or face dismissal. Thereafter *Lonicki* did not return to work, and saw a psychologist to support a claim for additional leave. Ultimately she failed to return to work as directed and was discharged.

*Lonicki* filed suit claiming the hospital violated CFRA for failing to provide leave due to her serious health condition

which “makes the employee unable to perform the functions of the position. Her employer sought, and was granted, summary judgment on the ground that because she was performing the same functions at another hospital, she did not have a “serious health condition” that made her “unable to perform the functions” of her job, and did not qualify for medical leave under CFRA. The Court of Appeal upheld this decision, and Lonicki sought review by the California Supreme Court.

The California Supreme Court reversed, and addressed two important questions under CFRA. First, the Court concluded that the employer’s decision to not seek a neutral third opinion regarding whether Lonicki had a “serious medical condition” did not preclude it from challenging in court her claim that her condition made her unable to do her job. Instead, CFRA gives the employer the option of obtaining a binding decision from a third health care provider.

The decision of whether to obtain a third opinion must not be taken lightly. An employer electing to forego a binding third opinion risks a lawsuit by the employee and the potential for a finding that the employer’s refusal to provide leave violated CFRA. But, in the absence of that third opinion, the employer is not barred from challenging whether the employee met the requirements for CFRA leave.

Second, the Court considered whether Lonicki’s performance of similar duties, on a part-time basis elsewhere, conclusively

demonstrated that she was able to perform her duties. The Court concluded that the question of whether she was “unable to perform the functions” of the specific job assigned to the employee, not whether she could perform the functions “generally.” Thus, when an employee’s health condition prevents him or her from performing a job in one environment, it does not necessarily mean that the employee cannot do a similar job elsewhere. Differing levels of stress, part time versus full time employment, and other distinctions in the workplace environment may mean that an employee may not be able to perform a job for a specific employer, but can perform those same or similar job functions elsewhere. Thus, when considering a request for CFRA leave, employers must focus their inquiry on whether the employee’s medical condition prevents him or her from performing their job in that specific environment. The employee’s ability to perform

those functions elsewhere is a relevant consideration, but does not automatically mean that leave may be denied.

Questions regarding entitlement to CFRA leave may overlap with questions under the FMLA, and each must be analyzed separately. Action

upon each request for leave requires careful consideration of the specific facts related to the request, and documentation by the employer of its analysis and the evidence which supports its conclusion. While obtaining a third opinion is not required, and an employer may act in good faith, an incorrect decision may be costly. An individualized response to each request for leave, and obtaining a third opinion where appropriate, may help to minimize potential disputes. ❖

