EMPLOYMENT LAW360

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Calif. Justices, Eyeing Leave Act, Lean Toward Boss

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Friday, Jan 11, 2008 --- An employee's argument that she should be able to take medical leave from one employer while continuing to work part-time for another company has been greeted with skepticism by the California Supreme Court.

The state's High Court heard oral arguments Tuesday in a hospital technician's California Family Rights Act case against Sutter Health Central for refusing her request for stress leave, and has 90 days to rule on the matter.

Justice Ming Chin was concerned about fairness to both the employer and employee, and asked why an employer should be obligated to pay leave to an employee who continues to perform similar duties for a competitor, according to a news report by The Recorder.

Baldwin J. Lee, an employment lawyer closely following the case, said the comments of Justice Chin seem to provide support for affirming the appeal court's decision granting summary judgment to Sutter.

"It's hard to say whether the California Supreme Court will issue a definitive ruling or send the case back to the trial court to have more issues of fact resolved," said Lee, who heads up Allen Matkins Leck Gamble Mallory & Natsis LLP's employment and labor group in San Francisco.

At issue in particular is whether plaintiff Antonina Lonicki had a serious medical condition as required under CalFRA to be eligible for leave.

"The question in this case is whether the law is going to be interpreted from the perspective of whether the employee is entitled to leave of absence if the employee complains of a health condition that prevents one from working for a specific employer, but not for a different employer. Or whether the health condition is a health condition that applies in all circumstances," said Margaret Rosenthal, a partner at Baker Hostetler LLP's Los Angeles office.

Lonicki, a full-time technician of sterile processing at Roseville, Calif.-based Sutter, had obtained a doctor's certification for medical leave after she complained of depression and stress from working too much and from an unwanted change to her schedule requiring her to work an afternoon shift.

But when she asked Sutter for medical leave in 1999, Sutter denied her request on grounds that one of Sutter's doctors did not see a reason for the

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leave and that Lonicki, who worked 32 hours at Sutter, planned to continue working a 16-hour weekend job at Kaiser Permanente.

Lonicki sued under CalFRA, which lets employees take up to 12 weeks for family care or unpaid medical leave annually. Under the state law, employers must continue to provide employees on leave with health benefits, and upon one's return, an employee must be reinstated to the same or similar position.

In a rare victory for employers in California, the Third District Court of Appeal affirmed a superior court's decision granting summary judgment in favor of Sutter.

The appeals court noted a distinction between an employee who has become medically unable to perform the essential functions of the job and one who has become unwilling to do so for the employer.

"She was not unable to perform the essential functions of her job; rather, she was unwilling to do so for Sutter. Therefore, her claim of selective disability did not entitle her to leave under CalFRA," the appeals court stated.

Rod M. Fliegel, a partner at Littler Mendelson PC's San Francisco office, said the appeal court's exceptionally pro-employer decision cited concerns that employees would abuse this leave and did not want to facilitate the problem. He suspected that the California Supreme Court took up the case not necessarily to reverse the decision but rather to make the ruling more flexible for employees in other cases.

"The court of appeal's decision says if an employee works somewhere else, he is not entitled to CalFRA, which sounds absolute. I could see how the Supreme Court could reach the same conclusion in this case, but may rule that another case could call for a different conclusion," Fliegel said.

He said in particular that employers that have employees with multiple jobs are going to be keeping an eye on how this case plays out. Employers in the health care, retail and restaurant industries often have hourly employees who have more than one job.

"This case will be the first glimpse into how the California Supreme Court views CalFRA, which is in substance fairly similar to the federal statute. The use of this leave, whether it's continuing or intermittent, is something that is a fairly significant challenge for employers, especially those with employees who have more than one job," Fliegel said.

Rosenthal was rooting for the appeals court's decision to be upheld because she says for an employee to perform the functions of a job for one employer while being unable to do the same functions for another employer due to a shift change puts an unreasonable burden on the employer.

"This changes the purpose of the law from a need situation to a want situation. If an employee is unable to perform certain tasks, the law has

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accommodations for that. If an employee is unable to perform for a specific employer, that doesn't ring true to the purpose of what the statute is," Rosenthal said.

An attorney representing Sutter declined to comment, and an attorney for Lonicki did not return a call seeking comment.

Antonina Lonicki is represented by the deRubertis Law Firm. Sutter Health Central is represented by Kenyon Yeates LLP.

The case is Lonicki v. Sutter Health Central, case number S130839, in the California Supreme Court.

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