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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

ANTONINA LONICKI, Plaintiff and Appellant, v. SUTTER HEALTH CENTRAL, Defendant and Respondent.	C039617 (Super. Ct. No. 00AS02199)

APPEAL from a judgment of the Superior Court of Sacramento County, Joe S. Gray, Judge. Affirmed.

Martin F. Jennings, Jr. for Plaintiff and Appellant.

Riegels Campos & Kenyon and Charity Kenyon for Defendant and Respondent.

Plaintiff Antonina Lonicki claims that defendant Sutter Health Central (Sutter) violated the Moore-Brown-Roberti Family Rights Act (CalFRA) by denying her request for medical leave. CalFRA entitles an employee to a leave of absence when, "except for leave taken for disability on account of pregnancy, childbirth, or related medical

conditions," the employee's "own serious health condition . . . makes the employee unable to perform the functions of the position of that employee . . . ." (Gov. Code, § 12945.2, subd. (c)(3)(C); further section references are to the Government Code unless otherwise specified.)

Sutter moved for summary judgment on the ground, among others, that plaintiff was not eligible for CalFRA leave because "she was not suffering from a 'serious health condition' which would entitle her to a statutory 'medical leave.'" In support of its motion, Sutter presented undisputed evidence that throughout the relevant time period, plaintiff was successfully performing the functions of an identical job for "Kaiser" hospital in the same geographic area. Indeed, plaintiff acknowledged that the duties of her job at Kaiser were "[a]bout [the] same" as the duties of her job at Sutter's hospital and that she was capable of performing her duties at Sutter if she were assigned to a "less stressful shift."

The superior court concluded that plaintiff was not entitled to CalFRA medical leave because the undisputed evidence established that, at the same time she demanded leave from Sutter, she was performing the same functions for Kaiser. Accordingly, the court entered summary judgment in Sutter's favor.

On appeal, plaintiff contends that as defined by CalFRA, the test whether an employee's health condition "makes the employee unable to perform the functions of the position of that employee" (Gov. Code, § 12945.2, subd. (c)(3)(C)) is employer-specific; thus, she was entitled to a medical leave of absence from Sutter despite

the fact that she was performing the same job functions for Kaiser. We disagree.

As we will explain, the purpose of CalFRA is to balance the demands of the workplace with the needs of employees to take leave for eligible medical conditions and compelling family reasons. CalFRA is neither written nor intended to permit an employee to demand medical leave from one employer, simply because the employee feels that the working environment there is too stressful, when the employee is performing the same essential functions of the job for another employer. Many jobs are stressful, and personality conflicts among coworkers and supervisors can occur. If an employee who is capable of performing the functions of the job is entitled to medical leave simply because the shift creates stress, then "supervisors would no longer be able to manage effectively, without fear of constant demands for transfer by their increasingly hypersensitive employees." (*Dewitt v. Carsten* (N.D. Ga. 1996) 941 F.Supp. 1232, 1236, aff'd. (1997) 122 F.3d 1079.) Accordingly, the statutory definition of a serious health condition that makes an employee "unable to perform the functions of the position of that employee" must be construed to mean an inability to perform the essential job functions generally, rather than for a specific employer. Any other interpretation is inconsistent with the purposes of CalFRA and common sense.

BACKGROUND

Plaintiff began her employment with Sutter in 1989. After working in the housekeeping department, she took a course and became a certified technician of sterile processing. In 1993,

she became a technician in the hospital's sterile processing department, responsible for picking up equipment and processing instruments utilized in patient care. At the time this dispute arose, it appears that plaintiff was working 32 hours per week.

In 1997, Sutter added a trauma center, which caused the hospital to become extremely busy. According to plaintiff, the workload increased and became hectic and stressful; employees began to quit because of the pressure; and, although help was requested, Sutter did not hire additional personnel. Plaintiff claims that the department employees no longer could process all of the work and, as a result, in most cases the work was not done correctly. She says the situation became worse in late 1998, when Sutter announced that some employees in each department would be laid off due to budget constraints.

In January 1999, plaintiff began working in the sterile processing department at Kaiser hospital. Her position at Kaiser was for weekend work, 16 hours per week. Sometimes, however, she worked additional hours on weekdays. Plaintiff conceded that she occasionally took vacation days from Sutter in order to work at Kaiser. Later in the year, her Kaiser position was expanded to 20 hours per week. By the time of her deposition, she was working full time there.

Plaintiff performed the same duties at Kaiser that she performed for Sutter. She maintained her employment at Kaiser throughout the events that gave rise to this litigation.

Effective July 26, 1999, Sutter changed plaintiff's shift. She previously had worked from 8:00 a.m. to 4:30 p.m., but her

schedule was changed to 12:00 noon to 8:30 p.m. Although the new schedule was posted, plaintiff was not personally informed of the change and did not look at the schedule. She went to the hospital at her usual time and her supervisor, Pat Curtis, pointed out the shift change. Plaintiff complained to the director, Steve Jatala, who apologized for the inconvenience but said Sutter needed someone to overlap on the afternoon shift.

Plaintiff complained to her union representative, Mike Egan. He told her that Sutter could not change shifts without complying with contract rules. Plaintiff then called Curtis, her supervisor at Sutter, and said she was too emotionally upset to work. Later that day, Curtis left a message on plaintiff's answering machine stating that Jatala wanted her to obtain a doctor's excuse for her absence.

Because her primary doctor was on vacation, plaintiff was seen by Joe Labaccaro, a family nurse practitioner. Labaccaro gave her a note that said, in its entirety: "Plan return to work 8/27/99. Medical reasons." Plaintiff submitted the note and an application for a medical leave of absence.

Director Jatala called plaintiff and asked her to see Dr. Cohen. Plaintiff asserted, without evidentiary support, that Cohen worked for Sutter; but Cohen submitted a declaration stating that he does not work for Sutter and never has done so.

Dr. Cohen reported to Jatala that plaintiff was fit to go back to work at Sutter with no restrictions. Jatala called plaintiff and told her to return to work on August 9, 1999. He advised her that she could be terminated if she did not return to work.

Mike Egan, the union representative, negotiated with Jatala. As a result, Jatala agreed to approve plaintiff's absence until August 21, 1999. He approved the absence as paid time off, rather than as medical leave, because (1) he had been unable to obtain information from plaintiff's doctor, (2) he was aware that she was continuing to work for Kaiser, and (3) Dr. Cohen concluded that she was capable of returning to work at Sutter. Jatala then told plaintiff to return to work on August 23. Plaintiff previously had informed Jatala that she would not return until August 27, and she asserts that she did not give Egan authority to agree otherwise.

Plaintiff did not return to the hospital until August 27, when she went in to extend her absence for another month. Upon arriving, she was told that she had been fired as a result of her failure to return to work on August 23.

Plaintiff filed a civil complaint asserting violation of CalFRA. In appropriate circumstances, CalFRA requires an employer to grant a medical leave of absence if an employee's serious health condition "makes the employee unable to perform the functions of the position of that employee . . . ." (§ 12945.2, subd. (c)(3)(C).)

On motion for summary judgment, the trial court found that plaintiff was not entitled to CalFRA medical leave because the undisputed evidence demonstrated that, at the same time she was demanding a medical leave from Sutter, she was performing the same functions of her position for Kaiser. Accordingly, summary judgment was entered in Sutter's favor.

DISCUSSION

I

The relevant provisions of CalFRA are contained in section 12945.2. Subdivision (a) provides that it shall be an unlawful employment practice for an employer to refuse to grant the request of a qualified employee to take up to a total of 12 workweeks in any 12-month period for "family care and medical leave." For purposes of summary judgment, there is no dispute that Sutter was an employer for purposes of CalFRA and that plaintiff was a qualified employee.[1]

The pivotal statutory provision is subdivision (c)(3)(C) of section 12945.2, which defines "family care and medical leave" to include "[l]eave because of an employee's own serious health condition that makes the employee unable to perform the functions of the position of that employee, except for leave taken for disability on account of pregnancy, childbirth, or related medical conditions."

Sutter argues, and the trial court agreed, that plaintiff was not unable to perform the functions of her position because she successfully performed the very same functions for another employer during the time she claimed a right to medical leave. Plaintiff, on the other hand, asserts that the legal standard must be employer-specific, and that the fact she was performing

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[1] An "employer" is any person who employs 50 or more persons to perform services for a wage or salary. (§ 12945.2, subd. (c)(2).) A qualified employee is a person who has more than 12 months of service with the employer and who has at least 1,250 hours of service with the employer during the previous period of 12 months. (§ 12945.2, subd. (a).)

the functions of her job for Kaiser does not preclude her from being entitled to a medical leave of absence from Sutter.

II

There are two decisional authorities that would appear to support plaintiff's view of the matter.

The first is *Stekloff v. St. John's Mercy Health Systems* (8th Cir. 2000) 218 F.3d 858 (hereafter *Stekloff*). The employee in that case, Debbie Stekloff, was a psychiatric nurse. Following an argument with her supervisor about personal calls Stekloff made during work hours, she said she was too upset to work and left. She then obtained a doctor's note recommending that she not return to work for about two weeks, and put the note in her supervisor's mailbox. Stekloff was fired eight days later for job abandonment. (*Id.* at p. 859.) She filed a lawsuit alleging, among other things, that the employer violated her rights under the federal Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. § 2601-2654). (*Ibid.*) Similar to CalFRA, the FMLA provides that an eligible employee may take medical leave for "a serious health condition that makes the employee unable to perform the functions of the position of such employee." (29 U.S.C. § 2612(a)(1)(D).) On motion for summary judgment, it was shown that, shortly before these events, Stekloff had obtained a second, part-time nursing job with another employer and that, during the relevant times, she was attending orientation for that employer. (*Stekloff, supra,* 218 F.3d at pp. 859, 860.) Holding "the inquiry into whether an employee is able to perform the essential functions of her job should focus on her ability to perform those functions in her current environment," the Court of

Appeals concluded Stekloff presented sufficient evidence that her request for medical leave was protected by the FMLA "even if she was continuously able to work as a psychiatric nurse for some other employer." (*Id.* at p. 862.)

CalFRA closely parallels the FMLA. Hence, regulatory and decisional interpretations of the FMLA, while not controlling, may be persuasive in interpreting CalFRA. (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 994-995; *Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 261).

But the decision in *Stekloff* is not persuasive. The essential problem in applying its reasoning to CalFRA is that the decision provided no reasoning. In discussing the requirement of a "serious health condition," the Court of Appeals thought that the term was meant to be broad and that the FMLA "should be interpreted to effect its remedial purpose." (*Stekloff, supra,* 218 F.3d at p. 862.) In proceeding to the question of whether an employee was unable to perform the functions of her position, the court indicated a belief that, "[f]or the same reasons," the inquiry should focus on the employee's current job with her current employer. (*Ibid.*) The court then opined that whether the employee could perform the functions of her job for another employer was not material to her FMLA eligibility. (*Ibid.*) In short, the decision simply represented the court's opinion of what the law should be. It provides no reasoning, persuasive or otherwise, that is applicable to CalFRA. In the absence of persuasive reasoning, we cannot defer to that opinion in interpreting and applying CalFRA. (*Pang v. Beverly Hospital, Inc., supra*, 79 Cal.App.4th at pp. 994-995.)

The second authority that lends support to the plaintiff in this case is a decision of the Oregon Court of Appeals applying the Oregon Family Leave Act. (*Centennial School District No. 28J v. Oregon Bureau of Labor and Industries* (2000) 169 Or.App. 489 [10 P.3d 945] (hereafter *Centennial*).) In that decision, the court reviewed an award imposed administratively by the Commissioner of the Bureau of Labor and Industries (BOLI).

The complainant in *Centennial* was a school custodian assigned to work four hours per day at one school and four hours per day at another. He liked the personnel and environment at the first facility but did not like the personnel and workload at the second school. Citing stress and depression, he was granted medical leave from his duties at the second school while he continued to work at the first school four hours per day. After 12 weeks, the district advised him that he would be reinstated full time if he obtained a release to return to work and that, if he did not obtain a release, he would become a permanent four-hour-per-day employee assigned to the second school. After he did not obtain a release and did not report for work at the second school, he was fired. (*Centennial, supra,* 169 Or.App. at pp. 491-495 [10 P.3d at pp. 946-948].) BOLI awarded him damages, concluding that, because he had been taking only four hours per day of medical leave, the district erred in terminating his leave on the ground that his 12-week entitlement was spent. (*Id.* at pp. 495-497 [10 P.3d at pp. 948-949].)

On review, the school district argued, among other things, that the complainant had not shown an inability to perform the essential functions of his position as a custodian. (*Centennial,*

supra, 169 Or.App. at p. 503 [10 P.3d at p. 952].) The district relied upon federal decisions involving claims under the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.), which hold a right of action under the ADA cannot be established by a claim of selective disability based upon stress and anxiety resulting from personality conflicts and the like. (*Palmer v. Circuit Court of Cook County, Ill.* (7th Cir. 1997) 117 F.3d 351, 352; *Weiler v. Household Finance Corp.* (7th Cir. 1996) 101 F.3d 519, 524; *Dewitt v. Carsten, supra,* 941 F.Supp. at p. 1236.) The Oregon court found those decisions were inapposite because they addressed whether the person was disabled rather than whether he was able to perform the essential functions of a job. (*Centennial, supra*, 169 Or.App. at pp. 504-505 [10 P.3d at p. 953].)

According to the Oregon court, to the extent the issue had been considered under the ADA, federal courts have determined that the ability to work at a specific job site is an essential job function. (*Centennial, supra*, 169 Or.App. at pp. 505-506 [10 P.3d at pp. 953-954].) But the three cases cited by the Oregon court are inapposite since they did not involve a claim that an employee was unable to perform a particular job during a time in which the employee was successfully performing an identical job for a different employer. Two of the cases, *Nowak v. St. Rita High School* (7th Cir. 1998) 142 F.3d 999 and *Tyndall v. National Educ. Centers* (4th Cir. 1994) 31 F.3d 209, involved teachers who could not, or would not, go to school to instruct and meet with students. (*Nowak v. St. Rita High School, supra,* 142 F.3d at p. 1004; *Tyndall v. National Educ. Centers,*

supra, 31 F.3d at pp. 211-212.) The decisions simply concluded that a failure or refusal to go to work and perform the job precluded recovery under the ADA. (*Nowak v. St. Rita High School, supra*, 142 F.3d at pp. 1003-1004; *Tyndall v. National Educ. Centers, supra*, 31 F.3d at p. 213.) In the third case cited by the Oregon court, *Waggoner v. Olin Corp*. (7th Cir. 1999) 169 F.3d 481, the employee had a sporadic attendance record and ultimately was fired for excessive absences. (*Id*. at p. 482.) With respect to the ADA claim, the court noted that the employee "simply wanted to miss work whenever she felt she needed to and apparently for so long as she felt she needed to." (*Id*. at p. 485.) In other words, the employee thought the ADA required an employer to give her a job but did not allow the employer to require her to regularly perform it. (*Id*. at p. 484.) The court rejected the claim, observing that there "are limits to how far an employer must go in granting medical leave" (*id*. at p. 483) and concluding that an employer need not "put up with employees who do not come to work" (*id*. at p. 484).

Thus, none of the cases cited by the Oregon court stand for the proposition that a person can be considered unable to perform the functions of a job for one employer while at the same time successfully performing the functions of an identical job for a different employer. Nevertheless, the Oregon court agreed with the reasoning of the administrative decision by BOLI, which was, essentially, that since the employer expected the employee to go to work to do his job, doing work at the specific job site became an essential function of the position. (*Centennial, supra*,

169 Or.App. at p. 506 [10 P.3d at p. 954].) The argument is sophistical and wholly unpersuasive in interpreting CalFRA.

III

In light of the language and purpose of CalFRA, we agree with the trial court that plaintiff's employment in the sterile processing department at Kaiser's hospital establishes she was able to perform the essential functions of the same job at Sutter's hospital and, therefore, she was not entitled to CalFRA leave.

To qualify for medical leave under CalFRA, an employee must suffer from a "serious health condition that makes the employee unable to perform the functions of the position of that employee, except for leave taken for disability on account of pregnancy, childbirth, or related medical conditions." (§ 12945.2, subd. (c)(3)(C).) By regulation, the Department of Fair Employment and Housing (DFEH) has provided that this means the employee is either "unable to work at all or unable to perform any one or more of the essential functions of the position of that employee." (Cal. Code Regs., tit. 2, § 7297.0, subd. (k).) The regulation specifies it uses the term "essential functions" as that term is defined in section 12926, subdivision (f) of the California Fair Employment and Housing Act, which states: "'Essential functions' means the fundamental job duties of the employment position the individual with a disability holds or desires. 'Essential functions' does not include the marginal functions of the position."[2]

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[2] Section 12926, subdivision (f), goes on to provide: "(1) A job function may be considered essential for any of several

The "essential functions" formulation in subdivision (f) of section 12926 was adopted in the statutory scheme that prohibits employment discrimination against persons with disabilities. (§ 12940, subd. (a).) An employer does not unlawfully discriminate by refusing to hire, or by discharging, a person with a disability if that person "is unable to perform his or her essential duties" even with reasonable accommodations. (§ 12940, subd. (a)(1) & (2).) This is essentially identical to the federal standard under the ADA. (42 U.S.C., §§ 12111(8); 12112.)

The obvious purpose of the "essential functions" formulation is to prevent an employer from discriminating by adopting an expansive definition of the duties of a job. (See *Deane v. Pocono Medical Center* (3d Cir. 1998) 142 F.3d 138, 147; *Simon v. St. Louis County, Mo.* (8th Cir. 1984) 735 F.2d 1082, 1084.) The focus must be upon the "necessary and legitimate"--i.e., essential--functions of the

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reasons, including, but not limited to, any one or more of the following: [¶] (A) The function may be essential because the reason the position exists is to perform that function. [¶] (B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed. [¶] (C) The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function. [¶] (2) Evidence of whether a particular function is essential includes, but is not limited to, the following: [¶] (A) The employer's judgment as to which functions are essential. [¶] (B) Written job descriptions prepared before advertising or interviewing applicants for the job. [¶] (C) The amount of time spent on the job performing the function. [¶] (D) The consequences of not requiring the incumbent to perform the function. [¶] (E) The terms of a collective bargaining agreement. [¶] (F) The work experiences of past incumbents in the job. [¶] (G) The current work experience of incumbents in similar jobs."

job that an employer may demand the employee be able to perform. (*Simon v. St. Louis County, Mo., supra,* 735 F.2d at p. 1084.)

With respect to the right to medical leave, the regulations implementing CalFRA, like the FMLA, adopt the "essential functions" formulation applicable to discrimination cases. As in cases of discrimination, the standard is somewhat narrow rather than broad and amorphous. The words "unable to perform the functions of the position of that employee" (§ 12945.2, subd. (c)(3)(C)) are words of restriction, not expansion. The standard requires that an employee be unable to perform, rather than merely limited or inhibited; and it requires that the inability relate to the essential functions of the job. (Cal. Code Regs., tit. 2, § 7297.0, subd. (k).)

This standard can only have been adopted to prevent employees from abusing the right to medical leave by asserting some broad, amorphous, and perhaps subjective need or desire for leave. (See *Fisher v. State Farm Mut. Auto. Ins. Co.* (E.D.Tex. 1998) 999 F.Supp. 866, 870, aff'd. (1999) 176 F.3d 479 [rejecting the claim that an employee's "'necessary presence at a place other than work'" is sufficient to meet the statutory standard under the FMLA].)

Had the Legislature intended to confer an expansive right to medical leave, it could have used language far more conducive to such a goal. While CalFRA must be construed liberally to effectuate its purpose, we may not construe it in a manner beyond the limits of its language and discernable legislative intent. (*Pang v. Beverly Hospital, Inc., supra*, 79 Cal.App.4th at p. 998.)

CalFRA, like the FMLA, is concerned with promoting "'stable workplace relationships.'" (See *Stekloff, supra*, 218 F.3d at

p. 861.) Its purpose is like that of the FMLA, "to balance the demands of the workplace with the needs of employees to take leave for eligible medical conditions and compelling family reasons." (*Hukill v. Auto Care, Inc.* (4th Cir. 1999) 192 F.3d 437, 441; see also *Rhoads v. F.D.I.C.* (4th Cir. 2001) 257 F.3d 373, 381.)

A stable workplace relationship is a two-way street, and balance requires consideration of the needs of each party. As the court noted in *Dewitt v. Carsten, supra*, 941 F.Supp. 1232, an ADA case, everyone would like to hold a job as stress free as possible. (*Id.* at p. 1235.) But stress inheres in most jobs, and personality conflicts with coworkers, particularly supervisors, can arise. If an employee is entitled to make legal demands on an employer merely because his or her boss creates stress, then at times entire offices might go unstaffed. (*Id.* at p. 1236.) And "supervisors would no longer be able to manage effectively, without fear of constant demands for transfer by their increasingly hypersensitive employees." (*Ibid.*)

CalFRA and the FMLA were not intended to tilt the balance so far. They provide for temporary leave as a legal right when, as the result of a serious medical condition, an employee cannot perform the essential functions of the job. They do not permit an employee to miss work for any reason and then claim entitlement to leave. (See *Fisher v. State Farm Mut. Auto. Ins. Co., supra,* 999 F.Supp. at p. 870, aff'd. 176 F.3d 479.) Such a broad extension of the right would thwart, rather than further, the purposes of the law and would be inconsistent with the language of the statute. (*Ibid.*) Accordingly, when an employee is capable

of performing the essential functions of the job, an employer has the right to expect and demand that the employee come to work and do so. (*Waggoner v. Olin Corp., supra*, 169 F.3d at p. 484.)

Federal courts considering the FMLA have held that, when an employee in fact performs the essential functions of his or her job, the employee cannot establish a right to medical leave. (*Price v. Marathon Cheese Corp.* (5th Cir. 1997) 119 F.3d 330, 334-335; *Peterson v. Exide Corp.* (D. Kan. 2000) 123 F.Supp.2d 1265, 1270; *Carter v. Rental Uniform Service of Culpeper, Inc.* (W.D.Va. 1997) 977 F.Supp. 753, 760-761.) In those cases, employees who were terminated for excessive absence or for leaving work without permission filed lawsuits claiming entitlement to medical leave under the FMLA. In each case it was shown that the employee had in fact gone to work and successfully performed the functions of the job during the alleged period of incapacity. In each case the courts held that, despite proffered medical opinions, the employee could not establish entitlement to medical leave.

Those decisions are not squarely on point because, in each case, the employee performed the essential functions of the job for the defendant employer rather than for a different employer. They do, however, serve to illustrate a point: "The proof of the pudding is in the eating." (Miguel de Cervantes, from *Don Quixote de la Mancha*.) An employee who in fact successfully performs the essential functions of a job cannot thereafter establish that he or she was incapable of doing so.

There is an obvious 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. (*Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292, 1296.) 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. (See *Dewitt v. Carsten, supra*, 941 F.Supp. at p. 1236.) The employee will claim an inability to work under a particular supervisor, with particular coworkers, or for a particular employer.

Courts generally have been reluctant to validate claims of flexible or selective disability and thus have refused to extend statutory benefit schemes to unwilling employees. (*Schneiker v. Fortis Ins. Co.* (7th Cir. 2000) 200 F.3d 1055, 1062 [the ADA]; *Weiler v. Household Finance Corp., supra*, 101 F.3d at p. 525 ["[i]f [the employee] can do the same job for another supervisor, she can do the job, and does not qualify under the ADA"]; *Dewitt v. Carsten, supra*, 941 F.Supp. at p. 1236 [the ADA]; *Palmer v. Circuit Court of Cook County, Soc. Serv.* (1995) 905 F.Supp. 499, 507-508 [the ADA]; *Fisher v. State Farm Mut. Auto. Ins. Co., supra,* 999 F.Supp. at pp. 870-871 [the FMLA]; *Haywood v. American River Fire Protection Dist., supra*, 67 Cal.App.4th at p. 1296 [disability retirement].)

This reluctance is justified. If an employing entity is to be able to operate, it must have wide latitude in making management decisions. (*Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17

Cal.4th 93, 100; *Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743, 769.) Managers must be free to manage, and supervisors must be free to supervise. Consequently, there must be balance between an employer's interest in efficient operation and an employee's interest in continued employment. (*Cotran v. Rollins Hudig Hall Internat., Inc., supra,* 17 Cal.4th at p. 100; *Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994.)

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. (*Dewitt v. Carsten, supra*, 941 F.Supp. at p. 1236.) 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.

CalFRA, like the FMLA, was intended to balance the demands of the workplace with the needs of employees. (See *Rhoads v. F.D.I.C., supra*, 257 F.3d at p. 381; *Hukill v. Auto Care, Inc., supra,* 192 F.3d at p. 441.) It was not intended to shift the balance of power to a capable but unwilling employee. That is apparent from the incorporation of the "essential functions" standard applicable to discrimination cases. Under this standard, an employee who is able to perform the essential functions of his or her position is not entitled to medical leave regardless of the assertion of a selective disability.

In her deposition, plaintiff testified that she did not have a problem with work and thought she could have returned to work for Sutter if it had changed the working conditions to suit her. It was undisputed that plaintiff in fact performed the essential functions of the same job for Kaiser during the time she was demanding leave from Sutter. In sum, 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.

IV

The primary thrust of plaintiff's contention on appeal is that, regardless of whether she was actually able to perform the functions of her job, Sutter is precluded from contesting the issue. This is so, she argues, because before denying her request for medical leave based upon a family nurse practitioner's note, Sutter did not seek other medical opinions in accordance with the procedures set forth in subdivision (k) of section 12945.2[3]

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[3] Section 12945.2, subdivision (k), states in pertinent part:
"(1) An employer may require that an employee's request for leave because of the employee's own serious health condition be supported by a certification issued by his or her health care provider. That certification shall be sufficient if it includes all of the following:
"(A) The date on which the serious health condition commenced.
"(B) The probable duration of the condition.
"(C) A statement that, due to the serious health condition, the employee is unable to perform the function of his or her position.
"(2) The employer may require that the employee obtain subsequent recertification regarding the employee's serious

(hereafter "the three-opinion procedures"), which are substantially identical to the certification provisions of the FMLA. (29 U.S.C. § 2613.)

In support of her contention, plaintiff relies on the decision of the federal district court in *Sims v. Alameda-Contra Costa Transit Dist*. (N.D.Cal. 1998) 2 F.Supp.2d 1253 (hereafter *Sims*). But that decision does not help her.

Sims concluded that the failure to invoke the three-opinion procedures precludes an employer from contesting the validity of the employee's certification of medical condition, provided that the certification sufficiently establishes the employee has a serious health condition that prevents the employee from doing

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health condition on a reasonable basis, in accordance with the procedure provided in paragraph (1), if additional leave is required.

"(3)(A) In any case in which the employer has reason to doubt the validity of the certification provided pursuant to this section, the employer may require, at the employer's expense, that the employee obtain the opinion of a second health care provider, designated or approved by the employer, concerning any information certified under paragraph (1).

"(B) The health care provider designated or approved under subparagraph (A) shall not be employed on a regular basis by the employer.

"(C) In any case in which the second opinion described in subparagraph (A) differs from the opinion in the original certification, the employer may require, at the employer's expense, that the employee obtain the opinion of a third health care provider, designated or approved jointly by the employer and the employee, concerning the information certified under paragraph (1).

"(D) The opinion of the third health care provider concerning the information certified under paragraph (1) shall be considered to be final and shall be binding on the employer and the employee."

his or her job. (*Sims, supra,* 2 F.Supp.2d at p. 1263.) In so ruling, the court made clear its view that, if the employee's certification is not sufficient, the employer is not precluded from litigating whether the employee, in fact, had a serious health condition. (*Id.* at pp. 1263-1264.)

When plaintiff requested medical leave, she presented only a note from a family nurse practitioner that said, "Plan return to work 8/27/99. Medical reasons." Because this was manifestly insufficient to establish a qualifying medical condition (§ 12945.2, subd. (k)(1)), the decision in *Sims* would not preclude Sutter from litigating the issue.

DISPOSITION

For all the reasons stated above, the judgment is affirmed.

SCOTLAND, P.J.

I concur:

NICHOLSON, J.

Dissenting Opinion of Morrison, J.

In this case we requested supplemental briefing to allow the parties to brief the effect of certain authorities suggesting a person can be entitled to remedies under family leave acts if he or she is unable to work for a specific employer, although he or she is able to work in a similar job for another employer. Contrary to the majority's position, Sutter's supplemental brief *agrees* that it is legally possible to be disabled from working for a particular employer, but disagrees that the facts allow plaintiff Lonicki to prevail.

I agree with Sutter's legal position. The critical language of the CalFRA refers to an employee's "serious health condition that makes the employee unable to perform the functions of the position of that employee" (Gov. Code, § 12945.2, subd. (c)(3)(C)), and in my view the phrase "position of that employee" means the specific job position, for the specific employer, held by the employee, not the generic job description or type of work he or she performs. I do not believe as the majority opinion states, that this construction violates the purposes of CalFRA or common sense. It is supported by Justice Chin in his employment law treatise, and by foreign authorities construing analogous statutes. (Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2002) Leaves of Absence, ¶ 12:266, p. 12-24; *Stekloff v. St. John's Mercy Health Systems* (8th Cir. 2000) 218 F.3d 858;

Centennial School District No. 28J v. Oregon Bureau of Labor and Industries (2000) 169 Or.App. 489 [10 P.3d 945].)

This case arises on summary judgment and therefore Sutter bore the burden to negate Lonicki's claim, Lonicki had no burden at all unless Sutter met its prima facie burden. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826.) Sutter's briefing does not discuss contrary facts tendered by Lonicki. The trial court found Lonicki raised "triable issues of material fact as to whether defendant had good cause to discharge plaintiff for not reporting to work on the two days she was allegedly scheduled to work, whether defendant complied with the requirements of the [CalFRA], and whether plaintiff is entitled to punitive damages." The majority properly does not conclude the trial court erred on these points. The trial court also found Sutter could not contest the adequacy of the nurse's note since it did not assert it was insufficient when Lonicki presented it.

The *sole reason* the trial court granted summary judgment was the legal ruling that if Lonicki could do a similar job for Kaiser, she was not entitled to CalFRA protections at Sutter. For the reasons stated by Justice Chin in his treatise, by the Eighth Circuit, by the Oregon Court of Appeals, and *not disputed by Sutter in its supplemental brief,* I believe this legal ruling is incorrect and summary judgment should have been denied.

Accordingly, I dissent.

MORRISON, J.