Filed 12/12/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

AVERY RICHEY, Plaintiff and Appellant, v. AUTONATION, INC. et al., Defendants and Respondents.	B234711 (Los Angeles County Super. Ct. No. BC408319) ORDER MODIFYING OPINION AND DENYING REHEARING (NO CHANGE IN JUDGMENT)

THE COURT:

It is ordered that the opinion filed herein on November 13, 2012 be modified as follows:

1. The second sentence in the first paragraph of the opinion, which now reads,

> Richey sued Power Toyota's parent companies, AutoNation, Inc., Webb Automotive Group, Inc., Mr. Wheels, Inc., and his direct supervisor, Rudy Sandoval (collectively AutoNation), alleging . . . .

is modified to read,

> Richey sued Power Toyota's parent companies, AutoNation, Inc., and Webb Automotive Group, Inc., Mr. Wheels, Inc., and his direct supervisor, Rudy Sandoval (collectively AutoNation), alleging . . . .

2. The current text of footnote 22 on page 24 is deleted and replaced with the following language,

> In arguing the arbitrator's legal error in applying the honest belief defense is not subject to judicial review, AutoNation asserts the Supreme Court in *Pearson Dental* "refused to adopt the rule that 'all legal errors are reviewable in this context.'" AutoNation has clearly misread the Court's reservation of that question for another day.

There is no change in the judgment.

Respondents' petition for rehearing is denied.

PERLUSS, P. J. JACKSON, J. SEGAL, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Filed 11/13/12 (unmodified version)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

AVERY RICHEY, Plaintiff and Appellant, v. AUTONATION, INC. et al., Defendants and Respondents.	B234711 (Los Angeles County Super. Ct. No. BC408319)

Appeal from a judgment of the Superior Court of Los Angeles County, Malcolm H. Mackey, Judge. Reversed.

Scott O. Cummings for Plaintiff and Appellant Avery Richey.

Snell & Wilmer, Richard A. Derevan and Christopher B. Pinzon, for Defendants and Respondents AutoNation, Inc., Webb Automotive Group, Inc., Rudy Sandoval and Mr. Wheels, Inc.

Avery Richey, a sales manager at Power Toyota of Cerritos, was terminated from his job four weeks before the expiration of his approved medical leave under the Moore-Brown-Roberti Family Rights Act (CFRA) (Gov. Code, §§ 12945.1, 12945.2)[1] because his employer believed Richey was misusing his leave by working part time in a restaurant he owned. Richey sued Power Toyota's parent companies, AutoNation, Inc., Webb Automotive Group, Inc., Mr. Wheels, Inc., and his direct supervisor, Rudy Sandoval (collectively AutoNation), alleging his rights under CFRA had been violated.[2] Richey's claims were submitted to arbitration under the terms of a mandatory employment arbitration agreement that provided, in part, "[r]esolution of the dispute shall be based solely upon the law governing the claims and defenses set forth in the pleadings."

The arbitrator denied Richey's CFRA claim based on the so-called honest belief or honest suspicion defense. The trial court denied Richey's motion to vacate the arbitrator's decision and granted AutoNation's petition to confirm the award.

The honest belief defense accepted by the arbitrator is incompatible with California statutes, regulations and case law and deprived Richey of his unwaivable statutory right to reinstatement under section 12945.2, subdivision (a). This clear legal error abridged Richey's statutory rights under CFRA—rights based on, and intended to further, an important public policy. Accordingly, under the principles set forth in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*) and *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665 (*Pearson Dental*), the award must be vacated.

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1 Statutory references are to the Government Code unless otherwise indicated.

2 Richey also alleged claims of racial (he is African American) and disability discrimination under other provisions of the Fair Employment and Housing Act (FEHA) (§ 12940 et seq.). Those claims are not at issue in this appeal.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Richey's Employment at Power Toyota*

Richey was hired by Power Toyota in 2004 to sell cars. At the time he was hired, he signed, as a condition of his employment, an arbitration agreement covering claims against Power Toyota, its parent companies, employees and agents. He performed well and was promoted to a position of assistant sales manager approximately six months after he began working for Power Toyota.[3]

In October 2007, while still working full time for Power Toyota, Richey took steps to start a family seafood restaurant. The restaurant opened in February 2008. Although many employees engaged in business ventures or had part-time jobs outside their employment with Power Toyota, Richey's supervisors, concerned the restaurant was distracting him from his job, met with him to discuss "performance" and "attendance" issues. In response Richey filed a complaint alleging his supervisors were asking inappropriate and personal questions.

On March 10, 2008 Richey suffered a back injury while moving furniture at home. His physician certified he was unable to perform the duties of his job at Power Toyota, and Richey filed a claim for leave under CFRA. The leave was granted and extended on several occasions. Richey's physician set a date of May 28, 2008 for his return to work.

On April 11, 2008 one of Richey's supervisors sent a letter advising him of the company's policy barring other employment, including self-employment, while on a leave of absence. Richey did not respond to the letter because he believed the policy as stated in the employee handbook—"You are not allowed to accept employment with

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[3] Before Richey's promotion, he accused a coworker of using a racial epithet. The coworker was initially given a one-day suspension. In response to Richey's complaint the discipline was inadequate, the suspension was increased to one week without pay. The company's response to this episode, together with Richey's failure to complain about further incidents of racial epithets, were relied upon by the arbitrator to deny Richey's claims of racial discrimination.

another company while you are on approved [CFRA] leave"— did not apply to him because he was simply the owner of a restaurant. On April 18, 2008, responding to information Richey was working at his restaurant while on leave, Richey's supervisor directed another employee to drive by the restaurant. The employee parked near the restaurant for a few minutes and observed Richey sweeping, bending over and using a hammer to hang a sign. Another of Richey's supervisors visited the restaurant for about 20 minutes on a different occasion and believed he saw Richey working there at the time. Several other coworkers observed Richey taking orders and acting as a cashier at the restaurant. Testifying at the arbitration hearing, Richey acknowledged he had taken orders, handled payment and answered the telephone while at the restaurant but claimed he had only engaged in limited, light-duty tasks authorized by his doctor.

On May 1, 2008 Power Toyota terminated Richey for engaging in outside employment while on a leave of absence.

2. *The Lawsuit and Resulting Arbitration Award*

After receiving a right-to-sue letter from the Department of Fair Employment and Housing (DFEH), Richey filed this lawsuit, alleging multiple claims under FEHA, including CFRA. AutoNation moved to compel arbitration under the agreement signed by Richey at the commencement of his employment with Power Toyota, which provided: "Resolution of the dispute shall be based solely upon the law governing the claims and defenses set forth in the pleadings and the arbitrator may not invoke any basis (including, but not limited to notions of 'just cause') other than such controlling law."[4]

The arbitration hearing was conducted over the course of 11 days. In a written order the arbitrator denied Richey's claims of racial discrimination and harassment, finding the conditions of Richey's employment did not constitute a hostile work environment.[5] With regard to Richey's claims under CFRA and its federal corollary, the

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4 The parties agree California law governs Richey's CFRA claim.

5 In denying Richey's claims of racial discrimination, the arbitrator stated, "The arbitrator readily acknowledges the reality of car dealerships. . . . If one mixes people

Family and Medical Leave Act of 1993 (29 U.S.C. §§ 2601-2654 (FMLA)), the arbitrator identified the issue under both statutes as "whether the law provides a protective shell over Mr. Richey that bars his termination until he is cleared to return to work by his physician, or does the law allow an employer to let an employee go, while on approved leave, for other *non-discriminatory reasons*?" Despite the many factual disputes, the arbitrator decided Richey's CFRA claim could be decided based on a single issue of law and fact: Relying on federal court decisions applying FMLA and one California decision affirming the discharge of an employee who played golf and worked on his lawn during the week he was supposedly caring for his injured father (see *McDaneld v. Eastern Municipal Water Dist.* (2003) 109 Cal.App.4th 702 (*McDaneld*)), the arbitrator concluded, "[a]n employer who honestly believes that it is discharging an employee for misusing FMLA [leave] is not liable even if the employer is mistaken."[6]

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who come from different cultures, educational backgrounds and life experiences into a work pool . . . human nature takes over and no one should be surprised that bawdy and off color conversations are going to occur. [¶] No sensible person is going to believe that raspy jokes were not told, the 'n' word was never used and everyone used proper table conversation in their daily contact with each other. Summarizing the witnesses, it is clear that questionable African, Hispanic and Asian comments were being exchanged at the dealership."

6 See, e.g., *Medley v. Polk* (10th Cir. 2001) 260 F.3d 1202, 1207 ("[t]he law, from a number of authorities at both the federal appellate and district court levels, is, . . . that an employer who discharges an employee honestly believing that the employee has abandoned her job and is otherwise not using FMLA leave for its here 'intended purpose,' to care for a parent, would not be in violation of FMLA, even if its conclusion is mistaken, since this would not be a discriminatory firing," fn. omitted]; *Kariotis v. Navistar Internat. Trans. Corp.* (7th Cir. 1997) 131 F.3d 672, 680-681 ["Discrimination statutes allow employers to discharge employees for almost any reason whatsoever (even a mistaken but honest belief) as long as the reason is not illegal discrimination. Thus

Applying this rule of law to Power Toyota's decision to terminate Richey, the arbitrator "readily concede[d]" that the company's policy barring "employment with another company" was poorly written and accepted Richey's testimony he did not believe he was violating company policy by managing his own restaurant. Further, several Power Toyota supervisors agreed exceptions to the rule had been made in the past depending on the nature of the outside activity. The arbitrator also acknowledged "[r]easonable minds" could differ as to whether Richey's duties at the restaurant were so "minimally physical" they conformed with the doctor's certification of Richey's bad back.[7] Nonetheless, the arbitrator reasoned, the issue centered on "what was in [Richey's supervisor's] mind when he decided to let Mr. Richey go," and Power Toyota was allowed to terminate Richey if it had an "honest belief" that he was abusing his medical leave or was not telling the company the truth about his outside employment. Although the arbitrator acknowledged the investigation conducted by Power Toyota could be considered "superficial," he concluded the supervisor who fired Richey did so for a legally permissible, non-discriminatory reason.

3. *The Trial Court's Denial of Richey's Motion To Vacate and Award of Costs*

Richey promptly moved to vacate the arbitrator's final award, arguing the arbitrator had made an egregious error of law by improperly allowing a good faith

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when an employee is discharged because of an employer's honest mistake, federal anti-discrimination laws offer no protection. . . . [¶] . . . The problem for Kariotis [the employee] is that Navistar [the employer] has demonstrated that it honestly believed she was not on a legitimate FMLA leave . . . [or] was not using her leave for its 'intended purpose' of recovering from knee surgery.").

[7] Richey's physician, Stuart Finkelstein, testified Richey had suffered a subluxation of the spine that was evident in X-rays of his coccyx. He approved Richey for medical leave through May 28, 2008 based on this injury. When Richey asked him if he could continue to manage his restaurant, Dr. Finkelstein told Richey he could go to his restaurant to oversee it as long as he did not do anything to put stress on his back.

defense adopted by a minority of federal circuits but rejected by the Ninth Circuit and other more recent decisions, wrongly applying the *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668] burden-shifting analysis for discrimination claims to his CFRA claim, and failing to follow the California Supreme Court's decision in *Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201 (*Lonicki*), in which the Court held a part-time job does not conclusively establish an employee is ineligible for CFRA leave. As Richey emphasized, the arbitration agreement required the arbitrator to decide the claims "solely upon the law governing the claims and defenses set forth in the pleadings" and barred the arbitrator from "invok[ing] any basis (including, but not limited to notions of 'just cause') other than such controlling law." Pointing to the Supreme Court's instruction in *Armendariz, supra,* 24 Cal.4th at page 101 that "an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA," Richey argued the arbitrator's failure to make the necessary factual findings and his misapplication of the law required the court to vacate the award.

The trial court rejected Richey's interpretation of *Lonicki*, found AutoNation was entitled to rely on its "good faith honest belief" defense and denied the motion. According to the court, "[t]he critical issue is whether the employer maintained a good-faith, reasonable belief that the discharged employee had abused his CFRA/FMLA leave and the employer's suspicion of fraud, *even if wrong*, [was] enough to justify the employee's discharge." (Italics added.) In other words, Richey was terminated for violating company policy by operating his restaurant and working there while on a leave of absence for medical leave:[8] "Richey was operating his own fish market business at the time he claimed he was disabled. There is no showing that he was unable to do his job as sales manager if he could work at a fish market and there was no showing that he was

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8 The trial court also noted Richey had "fraudulently represent[ed]" he was not working at the restaurant when he was. This factual inference, however, is not supported by the arbitrator's decision.

severely disabled. It appears that he just had a back sprain from lifting furniture and was being treated by a chiropractor."

Having denied Richey's motion to vacate the arbitration award, the court granted AutoNation's petition to confirm the award and awarded costs in the amount of $1,400 as requested by AutoNation in its proposed order.

DISCUSSION

1. *Grounds for Vacating an Arbitration Award and Standard of Review*

When parties agree to private arbitration, the scope of judicial review is strictly limited to give effect to the parties' intent "to bypass the judicial system and thus avoid potential delays at the trial and appellate levels . . . ." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 10 (*Moncharsh*).) Generally, a court may not review the merits of the controversy between the parties, the validity of the arbitrator's reasoning or the sufficiency of the evidence supporting the arbitration award. (*Ibid.*) "'[I]t is within the power of the arbitrator to make a mistake either legally or factually. When parties opt for the forum of arbitration they agree to be bound by the decision of that forum knowing that arbitrators, like judges, are fallible.'" (*Id.* at p. 12; accord, *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1340 (*Cable Connection*) ["the California Legislature 'adopt[ed] the position taken in case law . . . that is, "that in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the statute"'"].)

Judicial review of an arbitration award is limited to "circumstances involving serious problems with the award itself, or with the fairness of the arbitration process." (*Moncharsh*, *supra*, 3 Cal.4th at p. 12.) The only grounds on which a court may vacate an award are enumerated in Code of Civil Procedure section 1286.2.[9] "[C]ourts are

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[9] "[T]he court shall vacate the award if the court determines any of the following: [¶] (1) The award was procured by corruption, fraud or other undue means. [¶] (2) There was corruption in any of the arbitrators. [¶] (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator. [¶] (4) The arbitrators

authorized to vacate an award if it was (1) procured by corruption, fraud, or undue means; (2) issued by corrupt arbitrators; (3) affected by prejudicial misconduct on the part of the arbitrators; or (4) in excess of the arbitrators' powers." (*Cable Connection, supra*, 44 Cal.4th at p. 1344.) "There is a presumption favoring the validity of the award, and [the party challenging the award] bears the burden of establishing [a] claim of invalidity." (*Betz v. Pankow* (1993) 16 Cal.App.4th 919, 923.)

Although a court generally may not review an arbitrator's decision for errors of fact or law, an arbitrator exceeds his or her power within the meaning of Code of Civil Procedure section 1286.2 and the award is properly vacated when it violates an explicit legislative expression of public policy (see *Moncharsh, supra*, 3 Cal.4th at p. 32; *Cotchett, Pitre & McCarthy v. Universal Paragon Corp.* (2010) 187 Cal.App.4th 1405, 1416-1417), or when granting finality to the arbitration would be inconsistent with a party's unwaivable statutory rights. (*Pearson Dental, supra*, 48 Cal.4th at p. 679; see *Armendariz, supra*, 24 Cal.4th at p. 106; *Moncharsh*, at p. 32.) Specifically addressing the issue in the context of "a mandatory employment arbitration agreement, i.e., an

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exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted. [¶] (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title. [¶] (6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. However, this subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives." (Code Civ. Proc., § 1286.2, subd. (a).)

adhesive arbitration agreement that an employer imposes on the employee as a condition of employment," the Supreme Court has recognized "'that an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA' [citation], because the enforcement of such rights was for the public benefit and was not waivable." (*Pearson Dental,* at p. 677; see also *Board of Education v. Round Valley Teachers* (1996) 13 Cal.4th 269, 272-277 [judicial review and vacatur of arbitration award is proper when upholding arbitrator's decision would be inconsistent with the protection of a party's clear statutory rights].) To ensure full vindication of an employee's statutory rights in an arbitral forum, there must be both a written decision and judicial review "'sufficient to ensure the arbitrators comply with the requirements of the statute.'" (*Pearson Dental,* at p. 677 [discussing *Armendariz,* at pp. 103-113]; accord, *Cable Connection, supra,* 44 Cal.4th at p. 1353, fn. 14; *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1076.)

As in *Armendariz,* the Court in *Pearson Dental* declined to opine broadly as to the appropriate level of judicial review required in every case involving an employee's unwaivable statutory rights. However, the Court emphasized the arbitrator's written decision should not be viewed as "an idle act, but rather as a precondition to adequate judicial review of the award so as to enable employees subject to mandatory arbitration agreements to vindicate their rights under FEHA." (*Pearson Dental, supra,* 48 Cal.4th at p. 679.) Crafting only a rule sufficient to resolve the case before it, the Court concluded the arbitrator's "clear legal error" in finding the employee's FEHA claim to be time-barred, thus precluding any hearing on the merits of the claim, and the corresponding failure to provide a written decision revealing "'the essential findings and conclusions on which the award [was] based,'" required the award's vacatur. (*Ibid.*)

Absent conflicting extrinsic evidence, the validity and enforceability of an arbitration clause is a question of law subject to de novo review. (*Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1468; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174.) Similarly, whether the arbitrator exceeded his or her powers in granting relief, and thus whether the award should have been vacated on that basis, is

reviewed on appeal de novo. (*Reed v. Mutual Service Corp.* (2003) 106 Cal.App.4th 1359, 1365 ["whether the award was made in excess of the arbitrators' contractual powers" is a question of law]; *Kahn v. Chetcuti* (2002) 101 Cal.App.4th 61, 65.)

2. *The Arbitrator Committed Clear Legal Error in Basing His Decision Solely on Power Toyota's Honest Belief Richey Had Abused His Leave*

a. *Both CFRA and FMLA guarantee reinstatement following leave; the burden of proof is on the employer to justify any refusal to reinstate the employee*

CFRA, which was enacted in 1991as a state counterpart to FMLA, "is intended to give employees an opportunity to take leave from work for certain personal or family medical reasons without jeopardizing job security." (*Nelson v. United Technologies* (1999) 74 Cal.App.4th 597, 606; accord, *Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 878 (*Faust*).) CFRA makes it an unlawful employment practice for an employer of 50 or more persons to refuse to grant a request by an employee to take up to 12 weeks in any 12-month period for family care or medical leave. (§ 12945.2, subds. (a), (c)(2)(A); see *Faust,* at p. 878.) Grounds for the leave are family needs such as the birth or adoption of a child, serious illness of a family member, or when "an employee's own *serious health condition . . . makes the employee unable to perform the functions of the position of that employee . . . .*" (§ 12945.2, subd. (c)(3)(C), italics added.) The CFRA defines a "[s]erious health condition" as "an illness, injury, impairment, or physical or mental condition that involves either of the following: [¶] (A) Inpatient care in a hospital, hospice, or residential health care facility. [¶] (B) Continuing treatment or continuing supervision by a health care provider." (§ 12945.2, subd. (c)(8).)

To establish an employee's entitlement to medical leave under CFRA, the employer may require the employee to submit a certification by the employee's health care provider, which "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." (§ 12945.2, subd. (k)(1).) An employer who "has reason to doubt the validity of" the employee's

health certification "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 . . . ." (§ 12945.2, subd. (k)(3)(A).) If there is *a difference of opinion between the two*, "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 . . . ." (§ 12945.2, subd. (k)(3)(C), italics added.) The opinion of the third provider is "binding on the employer and the employee." (§ 12945.2, subd. (k)(3)(D); see generally *Lonicki*, *supra*, 43 Cal.4th at p. 208.)[10]

Leave under CFRA "shall not be deemed to have been granted unless the employer provides the employee . . . , a guarantee of employment in the same or a comparable position upon the termination of the leave." (§ 12945.2, subd. (a).) Regulations adopted by the DFEH further define this guarantee of reinstatement: "Upon granting the CFRA leave, the employer shall guarantee to reinstate the employee to the same or a comparable position, subject to the defenses permitted by section 7297.2, subdivisions (c)(1) and (c)(2), and shall provide the guarantee in writing upon request of the employee. It is an unlawful employment practice for an employer, after granting a requested CFRA leave, to refuse to honor its guarantee of reinstatement to the same or a comparable position at the end of the leave, unless the refusal is justified by the defenses stated in section 7297.2, subdivisions (c)(1) and (c)(2)." (Cal. Code Regs., tit. 2, § 7297.2, subd. (a).) Although an employer is permitted to terminate an employee and deny reinstatement when the employee's employment otherwise would have ceased, it bears the burden of establishing

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[10] Reviewing these provisions in *Lonicki, supra,* 43 Cal.4th 201, the Supreme Court concluded section 12945.2, subdivision (k)(3)'s use of the permissive "may"—rather than the mandatory "shall"—means an employer does not forfeit its right to contest the legitimacy of an employee's asserted serious health condition when it fails to invoke the prescribed statutory procedure. (*Lonicki*, at pp. 210-212.)

the employee would not otherwise have been employed at the time of reinstatement.[11] (*Id.*, § 7297.2, subd. (c)(1) ["An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the CFRA leave period. An employer has the burden of proving, by a preponderance of the evidence, that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny reinstatement."].)

FMLA was enacted in 1993 as "the culmination of several years of negotiations in Congress to achieve a balance that reflected the needs of both employees and their employers." (*Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1119.) To that end, "[t]he FMLA creates two interrelated, substantive employee rights: first, the employee has a right to use a certain amount of leave for protected reasons, and second, the employee has a right to return to his or her job or an equivalent job after using protected leave." (*Id.* at p. 1122, citing 29 U.S.C. §§ 2612(a), 2614(a); accord, *Sanders v. City of Newport* (9th Cir. 2011) 657 F.3d 772, 777 (*Sanders*).)

Under title 29 United States Code section 2612(a)(1)(D), "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." If the employer doubts the validity of the certification of a serious health condition, "the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any [such] information." (29 U.S.C. § 2613(c)(1).) Like CFRA, FMLA provides the opinion of a third health care provider "shall be considered to be final." (29 U.S.C. § 2613(d)(2).) "[A]ny eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave . . . to be restored . . . to the position . . .

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11 The regulation's only other enumerated defense to mandatory reinstatement of an employee granted CFRA leave relates to key employees and is not implicated in this case. (See Cal. Code Regs., tit. 2, § 7297.2, subd. (c)(2).)

held by the employee when leave commenced . . . ." (29 U.S.C. § 2614(a)(1)(A).) "It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise" the substantive rights guaranteed by FMLA. (29 U.S.C. § 2615(a)(1).) A companion provision of FMLA makes it "unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter." (29 U.S.C. § 2615(a)(2).)

Also like CFRA, the right to reinstatement is not unlimited: "Nothing in this section shall be construed to entitle any restored employee to . . . any right, benefit, or position of employment other than . . . which the employee would have been entitled had the employee not taken the leave." (29 U.S.C. § 2614(a)(3)(B).) Regulations promulgated by the Department of Labor (DOL) under FMLA confirm the burden falls on the employer to demonstrate facts sufficient to deny reinstatement: "An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An *employer must be able to show* that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment." (29 C.F.R. § 825.216(a), italics added; see also *id.*, § 825.312(d) ["[a]n employer must be able to show, when an employee requests restoration, that the employee would not otherwise have been employed if leave had not been taken in order to deny restoration to employment"].)[12]

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12 "The [Fair Employment and Housing] Commission has incorporated by reference the federal regulations interpreting the FMLA to the extent they are not inconsistent with [CFRA] or other state laws. (Cal. Code Regs., tit. 2, § 7297.10.)" (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 993.)

b. *The honest belief defense applied by the arbitrator has been rejected by most federal jurisdictions; under federal decisional law the employer bears the burden of proving the employee was not eligible for reinstatement*

Notwithstanding the clarity of the CFRA/FMLA statutory scheme, the arbitrator in this case made a single factual finding it concluded was determinative of Richey's CFRA claim as a matter of law—that is, Richey's supervisor, after a "superficial investigation," held an "honest belief" Richey had violated company policy barring outside employment during his CFRA leave. In doing so, the arbitrator improperly imposed the burden of proof on Richey rather than his employer.

The honest belief rule was developed in a series of employment decisions from the Seventh Circuit applying the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green, supra,* 411 U.S. at pages 802 to 803.[13] (*Smith v. Chrysler Corp.* (6th Cir. 1998) 155 F.3d 799, 806, discussing *Kariotis v. Navistar Internat. Transportation Corp.* (7th Cir. 1997) 131 F.3d 672, 676 (*Kariotis*); see also *McCoy v. WGN Continental Broadcasting Co.* (7th Cir.1992) 957 F.2d 368, 373; *Pollard v. Rea Magnet Wire Co.* (7th Cir.1987) 824 F.2d 557, 559-560.) As applied by the Seventh Circuit, the honest belief defense provides that "so long as the employer honestly believed in the proffered reason given for its employment action, the employee cannot establish pretext even if the employer's reason is ultimately found to be mistaken, foolish, trivial, or baseless." (*Smith*, at p. 806.) "The rationale behind the rule is that the focus of a discrimination suit

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13 Under the *McDonnell Douglas* framework, the burden of proof alternates between the parties. First, a plaintiff alleging employment discrimination must establish a *prima facie* case of discrimination. Once the plaintiff does so, the burden shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action at issue. (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253 [101 S.Ct. 1089, 67 L.Ed.2d 207], citing *McDonnell Douglas, supra*, 411 U.S. at p. 802.) If the employer meets this burden, then the burden of production shifts back to the plaintiff to demonstrate that the proffered reason is false. (*Ibid.*)

is on the intent of the employer. If the employer honestly, albeit mistakenly, believes in the non-discriminatory reason it relied upon in making its employment decision, then the employer arguably lacks the necessary discriminatory intent. 'In other words, arguing about the accuracy of the employer's assessment is a distraction because the question is not whether the employer's reasons for a decision are "*right* but whether the employer's description of its reasons is *honest.*"'" (*Smith*, at p. 806, quoting *Kariotis*, at p. 677.) The *Kariotis* rule "apparently does not require an employer to demonstrate that its belief was reasonably grounded on particularized facts that were before it at the time of the employment action . . . [;] for the rule to apply, the employer need only provide an honest reason for firing the employee, even if that reason had no factual support." (*Smith*, at p. 806.)[14]

Kariotis, like *Smith*, was not decided primarily as an FMLA case; and the court assumed, without analysis,[15] that the "now routine" *McDonnell Douglas* burden-shifting framework applied not only to claims brought under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) but also to the claims of the plaintiff under other employment rights statutes, including FMLA.[16] (*Kariotis*, *supra*, 131 F.3d at pp. 676,

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14 The Sixth Circuit ultimately rejected the Seventh Circuit's version of the good faith honest belief and directed that an employer's adverse employment decision be "reasonably based on particularized facts." (*Smith v. Chrysler Corp.*, *supra*, 155 F.3d at p. 807.)

15 "The district court approached this case under the *McDonnell Douglas* framework, and the parties appear to agree that this is the approach we should use." (*Kariotis*, *supra*, 131 F.3d at p. 676.)

16 The other statutes included the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.) and the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001 et seq.).

680-681.) Nonetheless, the facts in *Kariotis* are strikingly similar to those in the instant case: Kariotis, the employee, was discharged when the employer concluded she had abused her medical leave for knee replacement surgery. Based on a limited private investigation that "left something to be desired" (*Kariotis, supra,* 131 F.3d at p. 675), Kariotis's employer discharged her based on a videotape that showed her shopping, walking and bending; the employer failed to speak with Kariotis's physician or obtain a second opinion by having its own doctor examine her. (*Ibid.*) Although "no other evidence [came] close to *proving* Kariotis to be a fraud" (*id.* at p. 680), the court concluded the employer's right to fire her while on the job if she had been suspected of fraud also permitted it to fire her for a suspicion of fraudulent conduct while she was on leave (*id.* at p. 681). As the court reasoned, "If Navistar had to prove more than an honest suspicion simply because Kariotis was on leave, she would be better off (and enjoy 'greater rights') than similarly situated employees (suspected of fraud) who are not on leave." (*Ibid.*)

Although *Kariotis* is still followed in the Seventh Circuit (see, e.g., *Scruggs v. Carrier Corp.* (7th Cir. 2012) 688 F.3d 821, 825-826), it has little persuasive value in view of the many subsequent decisions that have refused to adopt the honest belief defense or to employ the *McDonnell Douglas* framework placing the burden on the employee to disprove the employer's subjective intent when a claim alleges interference with substantive FMLA rights. In *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, for example, the Ninth Circuit expressly rejected application of the *McDonnell Douglas* burden-shifting framework when an employer interferes with an employee's FMLA rights: "[T]he issue is one of *interference* with the exercise of FMLA rights under [section] 2615(a)(1), not retaliation *or* discrimination." (*Bachelder*, at p. 1124; see also *Diaz v. Fort Wayne Foundry Corp.* (7th Cir. 1997) 131 F.3d 711, 712 ["The question in a discrimination case is whether the employer treated one employee worse than another on account of something (race, religion, sex, age, etc.) that a statute makes irrelevant. A firm may treat all employees equally poorly without discriminating. A statute such as the FMLA, however, creates substantive rights. A firm *must* honor

statutory entitlements . . . ."].) Recognizing the confusion among the circuits, the *Bachelder* court observed, "This semantic confusion has led many courts to apply anti-discrimination law to interference cases, instead of restricting the application of such principles [to retaliation claims under United States Code section 2615(a)(2)]." (*Bachelder,* at p. 1124, fn. 10.)

Instead, *Bachelder* applied what it called a "negative factor" test: Under DOL regulations it is unlawful for an employer to "use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions." (*Bachelder, supra,* 259 F.3d at p. 1122, quoting 29 C.F.R. § 825.220(c).)[17] As the court concluded, this regulation "plainly prohibits the use of FMLA-protected leave as a negative factor in an employment decision. In order to prevail on her claim, therefore, [the plaintiff] need only prove by a preponderance of the evidence that her taking of FMLA-protected leave constituted a negative factor in the decision to terminate her. She can prove this claim, as one might any ordinary statutory claim, by using either direct or circumstantial evidence, or both. [Citations.] *No scheme shifting the burden of production back and forth is required*." (*Bachelder,* at p. 1125, italics added, fn. omitted.)

Other courts have similarly placed the burden of proof on the employer defending a claim it interfered with an employee's substantive FMLA rights. In *Smith v. Diffee Ford-Lincoln-Mercury, Inc.* (10th Cir. 2002) 298 F.3d 955, for instance, the Tenth Circuit held the DOL's implementing regulation (29 C.F.R. § 825.216(a)) "validly shifts to the employer the burden of proving that an employee, laid off during FMLA leave, would have been dismissed regardless of the employee's request for, or taking of, FMLA leave." (*Smith,* at p. 963.) In fact, as the Ninth Circuit observed in comparing cases on this point,

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17 Section 825.220(c), title 29, of the Code of Federal Regulations provides "[E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under 'no fault' attendance policies."

"the plain language of the pertinent DOL regulations provides that the burden is on the employer to show that he had a legitimate reason to deny an employee reinstatement." (*Sanders, supra,* 657 F.3d at p. 780; see also *Clay v. United Parcel Service, Inc.* (6th Cir. 2007) 501 F.3d 695, 714 ["the burden is on the employer 'to establish its reasonable reliance on the particularized facts that were before it at the time the decision was made'"].)[18]

Having grappled with these principles for more than a decade, most federal courts now recognize two distinct theories for recovery on FMLA claims, that is, (1) the "'entitlement or interference'" theory under title 29 United States Code section 2615(a)(1) and (2) the "'retaliation or discrimination'" theory under section 2615(a)(2). (*Sanders, supra,* 657 F.3d at p. 777 [discussing cases].) To prevail on an entitlement or interference claim, an employee must prove that: (1) he or she was an eligible employee; (2) the defendant was an employer as defined under FMLA; (3) the employee was entitled to leave under FMLA; (4) the employee gave the employer notice of his or her intention to take leave; and (5) the employer denied the employee FMLA benefits to which the employee was entitled. (*Sanders*, at p. 778.)

Critically, the right to reinstatement remains "the linchpin of the entitlement theory," because "'FMLA does not provide leave for leave's sake, but instead provides leave with an expectation that an employee will return to work after the leave ends.'"

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18 "The majority of the circuits [other than the Seventh Circuit] . . . agree with this textual reading. The Eighth, Tenth and Eleventh Circuits, relying on the plain text of 29 C.F.R. § 825.216(a), have all held 'that the regulation validly shifts to the employer the burden of proving that an employee . . . would have been dismissed regardless of the employee's request for, or taking of, FMLA leave.' [Citations.] That approach is also consistent with the [United States] Supreme Court's admonition that the burden of proof should 'conform with a party's superior access to the proof.'" (*Sanders, supra,* 657 F.3d at p. 780, fn. omitted; see *Hurlbert v. St. Mary's Health Care System* (11th Cir. 2006) 439 F.3d 1286, 1293-1294.)

(*Sanders, supra,* 657 F.3d at p. 778; accord, *Edgar v. JAC Products., Inc.* (6th Cir. 2006) 443 F.3d 501, 507; *Throneberry v. McGehee Desha County Hosp.* (8th Cir. 2005) 403 F.3d 972, 978.) When an employer defends against an interference claim alleging a failure to reinstate an employee, the employer must demonstrate "a legitimate reason to deny [the] employee reinstatement." (*Sanders,* at pp. 779-780 [reversing because jury instruction improperly placed burden on employee to disprove employer's stated reason for discharge]; see also *Edgar,* at p. 508 ["[b]oth the statute and the DOL regulation likewise establish that interference with an employee's FMLA rights does not constitute a violation if the employer has a legitimate reason unrelated to the exercise of FMLA rights for engaging in the challenged conduct"].) "If an employer interferes with the FMLA-created right to medical leave or to reinstatement following the leave, a deprivation of this right is a violation regardless of the employer's intent." (*Smith v. Diffee Ford-Lincoln Mercury, Inc., supra,* 298 F.3d at p. 960; accord, *Sanders,* at p. 778; *Colburn v. Parker Hannifin/Nichols Portland Div.* (1st Cir. 2005) 429 F.3d 325, 332.) In short, "an employer's good faith or lack of knowledge that its conduct violates FMLA does not protect it from liability." (*Liu v. Amway Corp.* (9th Cir. 2003) 347 F.3d 1125, 1135; *Bachelder, supra,* 259 F.3d at p. 1130.)

c. *California courts have similarly interpreted CFRA*

California courts have applied these same principles to CFRA claims. (See, e.g., *Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 487-488 ["[v]iolations of the CFRA generally fall into two types of claims: (1) 'interference,' claims in which an employee alleges that an employer denied or interfered with her substantive rights to protected medical leave, [fn. omitted] and (2) 'retaliation' claims in which an employee alleges that she suffered an adverse employment action for exercising her right to CFRA leave"].)

Following the reasoning of *Bachelder, supra,* 259 F.3d 1112, Presiding Justice Klein, writing for Division Three of this court in *Faust, supra,* 150 Cal.App.4th 864, stated: "An interference claim under the FMLA (and thus the CFRA) does not involve the burden-shifting analysis articulated by the United State Supreme Court in *McDonnell*

Douglas, supra, 411 U.S. 792. As stated in *Bachelder* 'there is no room for a *McDonnell Douglas* type of pretext analysis when evaluating an "interference" claim under this statute.' A violation of the FMLA 'simply requires that the employer deny the employee's entitlement to FMLA leave.'" (*Faust,* at p. 879, quoting *Liu v. Amway Corp., supra,* 347 F.3d at p. 1135.)

In *Faust, supra,* 150 Cal.App.4th 864 an employee had been initially certified for leave based on a psychiatric condition induced by the reaction of his supervisor and fellow workers to his report of workplace violations. When that leave expired, the employee submitted an additional certification form from his chiropractor stating he was suffering from a subluxation of the spine. (*Id.* at p. 870.) The employer discharged him, apparently believing in good faith the chiropractor's certification was insufficient. (*Id.* at p. 872.) The court reversed summary judgment entered in favor of the employer on the employee's interference claim after concluding the employer had failed to adequately communicate with the employee and had improperly rejected the employee's certification of his serious medical condition because it had been prepared by a chiropractor rather than a physician. (*Id.* at pp. 881-884.) The court also found the employer had not carried its burden of establishing a legitimate, nonretaliatory reason for the employee's discharge on the employee's retaliation claim. (*Id.* at p. 885; see also *Dudley v. Dept. of Transportation* (2001) 90 Cal.App.4th 255, 261.)

Citing *Faust,* Division Five of this court has observed a rule allowing an employer to rely on a good faith but erroneous belief about the legitimacy of its actions toward an employee "would be inconsistent with the antidiscrimination provisions of CFRA, and would encourage employers to have their managers remain ignorant of both the law and the facts relating to CFRA leave." (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1259.) Considering a question of the employer's obligation under CFRA to implement leave absent a clear employee request, the court cautioned, "a principle allocating to an employee-plaintiff the burden of proving that a manager subjectively knew that an employee's conduct was legally protected would, in effect, require a plaintiff to negate an employer's good faith as part of the employee's prima

facie case. There is no authority to support such a principle. Under CFRA and its implementing regulations, the *employer* bears the burden to determine whether an employee's leave is protected—that is, to 'inquire further of the employee if it is necessary to have more information about whether CFRA leave is being sought . . .' (Cal. Code Regs., tit. 2, § 7297.4, subd. (a)(1)), and ultimately 'to designate leave, paid or unpaid, as CFRA or CFRA/FMLA qualifying. . . .' (Cal. Code Regs., tit. 2, § 7297.4, subd. (a)(1)(A).) Once an employee has submitted a request for leave under CFRA, the employer is charged with knowledge that the employee's absences pursuant to the leave request are protected, and may not thereafter take adverse employment action against the employee based upon—that is, 'because of'—those protected absences." (*Avila*, at p. 1260, fn. omitted.)[19]

Against this backdrop, the Supreme Court in *Lonicki*, *supra*, 43 Cal.4th 201, held an employer may not terminate an employee taking CFRA leave based solely on the fact the employee is working part time in another comparable job. Lonicki, a hospital worker, had obtained certification from her physician authorizing a one-month medical leave for work-induced stress. Her employer required Lonicki to consult a second physician who concluded she was able to return to work without restrictions. At her own expense Lonicki consulted a psychiatrist who agreed she was suffering from work-related

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[19] The omitted footnote acknowledges, without deciding, the issue "whether an employer's mistaken good faith belief that its conduct was legal is a defense to a CFRA retaliation claim. (Compare *Bachelder v. America West Airlines, Inc.*[, *supra*,] 259 F.3d [at p.] 1130, fn. 19 ['employer's good-faith mistake as to whether its action violates the law is not a defense to liability' under FMLA] with *Medley v. Polk Co.* (10th Cir. 2001) 260 F.3d 1202, 1207-1208 ['an employer who discharges an employee honestly believing that the employee has abandoned her job and is otherwise not using FMLA leave for its . . . "intended purpose" . . . would not be in violation of FMLA, even if its conclusion is mistaken' (fn. omitted)].) That issue is not before us." (*Avila, supra,* 165 Cal.App.4th at p. 1260, fn. 12.)

depression and indicated her leave should be extended for an additional three weeks. Meanwhile, however, the hospital terminated her because of her absence. (*Lonicki*, at pp. 206-208.)

Lonicki sued the hospital, alleging it had violated her CFRA rights by questioning the validity of her medical condition without following the procedure outlined in section 12945.2, subdivision (k)(3). In response, the hospital successfully moved for summary judgment on the ground Lonicki had not been entitled to CFRA medical leave because, during her absence, she had worked part time performing similar functions at another hospital. (*Lonicki, supra*, 43 Cal.4th at p. 207.) Although the Supreme Court agreed with the lower courts the hospital was not precluded from challenging her medical condition even though it had failed to pursue the statutory procedure, the Court concluded summary judgment had been improperly granted because Lonicki's part-time job did not conclusively establish her medical condition was insufficiently serious to warrant leave under CFRA from her full-time job. The "relevant inquiry," according to the Court, "is whether a serious health condition made her unable to do her job at defendant's hospital, not her ability to do her essential job functions 'generally. . . .'" (*Lonicki*, at p. 214, quoting Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2006) ¶ 12.266, p. 12-28 ["A showing that an employee is unable to work in the employee's current job due to a serious health condition is enough to demonstrate incapacity. The fact that an employee is working for a second employer does not mean he or she is not incapacitated from working in his or her current job."], and at pp. 214-215, quoting *Stekloff v. St. John's Mercy Health Systems* (8th Cir. 2000) 218 F.3d 858, 861, 862 ["a demonstration that an employee is unable to work in his or her current job due to a serious health condition is enough to show that the employee is incapacitated, even if that job is the only one that the employee is unable to perform"; "the inquiry into whether an employee is unable to perform the essential functions of her job should focus on her ability to perform those functions in her current environment"]; see also *Hurlbert v. St. Mary's Health Care System, supra*, 439 F.3d at pp. 1295-1296 ["[u]pon consideration of the declared purposes of the FMLA and its legislative history, we hold

that a demonstration that an employee is unable to work in his or her *current job* due to a serious health condition is enough to show that the employee is incapacitated, *even if that job is the only one the employee is unable to perform*"].)[20]

Thus, despite the fact *Lonicki* was decided in the context of summary judgment, it necessarily stands for the proposition that an employer may not, in terminating or failing to reinstate an employee who has been granted CFRA leave, defend a lawsuit from that employee based on its honest belief the employee was abusing his or her leave. Instead, the employer must demonstrate evidentiary facts sufficient to carry the burden of proof imposed by CFRA and FMLA.

In fact, no California case supports the arbitrator's conclusion an employer may rely solely on its subjective, albeit honest, belief an employee has engaged in misconduct to justify its denial of an employee's CFRA rights. AutoNation argues, and the arbitrator agreed, that Richey's termination was justified by the decision in *McDaneld, supra,* 109 Cal.App.4th 702, in which Division Two of the Fourth Appellate District upheld an employer's motion for summary judgment against an employee accused of misusing

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[20] In *Lonicki* the defendant hospital was a trauma center that had undergone layoffs and restructuring that increased the stress associated with the plaintiff's job. Distinguishing the demands of the plaintiff's full-time job at the trauma center from her part-time job, Justice Kennard, writing for the Court, stated: "When a serious health condition prevents an employee from doing the tasks of an assigned position, this does not necessarily indicate that the employee is incapable of doing a similar job for another employer. By way of illustration: A job in the emergency room of a hospital that commonly treats a high volume of life-threatening injuries may be far more stressful than similar work in the emergency room of a hospital that sees relatively few such injuries. Also, the circumstance that one job is full time whereas the other is part time may be significant: Some physical or mental illnesses may prevent an employee from having a full-time job, yet not render the employee incapable of working only part time." (*Lonicki, supra,* 43 Cal.4th at p. 215.)

CFRA leave based in part on the decisions in *Kariotis, supra,* 131 F.3d 672 and *Medley v. Polk Co., supra,* 260 F.3d 1202. To the contrary, the *McDaneld* court expressly cited administrative findings that the employee had, in fact, engaged in activities incompatible with the intended purpose for his leave (caring for his injured father) and had then lied about his actions. (*McDaneld,* at p. 706.) The decision, therefore, does not violate the CFRA requirement an employer bear the burden of proving a misuse of CFRA leave, notwithstanding its partial reliance on the now-suspect analysis in *Kariotis* and *Medley.*

In sum, we reject AutoNation's contention an employer may simply rely on an imprecisely worded and inconsistently applied company policy to terminate an employee on CFRA leave without adequately investigating and developing sufficient facts to establish the employee had actually engaged in misconduct warranting dismissal. Whether the arbitrator's ruling resulted from his improper acceptance of the honest belief defense or the employer's reliance on a policy that violated Richey's substantive right to reinstatement,[21] neither comports with the substantive requirements of CFRA.

3. *The Arbitration Award in this Case Involving Unwaivable Statutory Rights Must Be Vacated Based on the Arbitrator's Clear Legal Error and Failure To Provide Meaningful Findings of Facts and Conclusions of Law*

Notwithstanding the general rule of limited judicial review of arbitration decisions, the Supreme Court has expressly recognized "public policy exceptions" warranting greater judicial scrutiny: "For example, when unwaivable statutory rights are at stake, this court has repeatedly held that review must be "'sufficient to ensure that arbitrators comply with the requirements of the statute.'"" (*Cable Connection, supra,* 44 Cal.4th at p. 1353, fn. 14, quoting *Armendariz, supra,* 24 Cal.4th at p. 106; accord, *Pearson Dental, supra,* 48 Cal.4th at p. 679.) In *Pearson Dental,* which, as the case at bar, involved "arbitration awards arising from mandatory arbitration employment

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21 As we discuss below, the arbitrator never addressed Richey's contention Power Toyota's policy barring secondary employment while on medical or family leave, but not during regular employment, violated CFRA.

agreements that arbitrate claims asserting the employee's unwaivable statutory rights" (*Pearson Dental*, at p. 679), the Court held the trial court did not err in vacating an award based on legal error that effectively precluded a hearing on the merits of the employee's FEHA claims. (*Id*. at p. 680.) It did not decide, because it was unnecessary to resolve the case before it, whether *all* legal errors are reviewable in this context. (*Id*. at p. 679 ["Nor need we decide whether the rule suggested by plaintiff and amicus curiae California Employment Lawyers Association is correct that all legal errors are reviewable in this context . . . . We address only the case before us, and a narrower rule is sufficient for its resolution."].) [22]

We also need not decide whether it is proper to vacate an arbitration award based on *any* legal error in connection with mandatory arbitration of an employee's unwaivable statutory rights. Here, where the parties have agreed the arbitrator will resolve any claim "solely upon the law" and the purported legal error goes to both express, unwaivable statutory rights (the guarantee of reinstatement) and the proper allocation of the burden of proof, judicial review is essential to ensure the arbitrator has complied with the requirements of CFRA. In this instance, and on these facts, "'granting finality to [the] arbitrator's decision would be inconsistent with the protection of [Richey's] statutory rights.'" (*Pearson Dental, supra,* 48 Cal.4th at p. 680, quoting *Moncharsh, supra,* 3 Cal.4th at p. 32.)

a. *The arbitrator was required to resolve Richey's claims according to governing law*

"In cases involving private arbitration, '[t]he scope of arbitration is . . . a matter of agreement between the parties' [citation], and '"[t]he powers of an arbitrator are limited

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[22] In arguing the arbitrator's legal error in applying the honest belief defense is not subject to judicial review, AutoNation disingenuously asserts the Supreme Court in *Pearson Dental* "refused to adopt the rule that 'all legal errors are reviewable in this context.'" It is difficult for us to accept this as simply an innocent misreading of the Court's reservation of the question for another day.

and circumscribed by the agreement or stipulation of submission.'"'" (*Moncharsh, supra*, 3 Cal.4th at p. 8.) Ordinarily, "'[a]rbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action.'" (*Id*. at pp. 10-11; accord, *Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1182 ["[a]bsent an express and unambiguous limitation in the contract or the submission to arbitration, an arbitrator has the authority to find the facts, interpret the contract, and award any relief rationally related to his or her factual findings and contractual interpretation"].)

Here, the arbitration agreement, drafted and imposed by defendants on all employees as a condition of employment (see, e.g., *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 796 [discussing elements of unconscionability inherent in adhesive employment arbitration agreements]), required the arbitrator to resolve the dispute "based solely upon the law governing the claims and defenses set forth in the pleadings" and specifically to avoid imposing any quasi-legal principles "(including, but not limited to notions of 'just cause')." While this provision does not authorize judicial review as a matter of course, "contractual limitations on the arbitrators' powers can alter the usual scope of review." (*Cable Connection, supra*, 44 Cal.4th at pp. 1355-1356; accord, *Gravillis v. Coldwell Banker Residential Brokerage Co.* (2010) 182 Cal.App.4th 503, 515.) In light of this employer-mandated provision, the arbitrator's failure to address all of Richey's statutory CFRA claims and his reliance on a legally unfounded equitable defense to vitiate those claims warrant closer scrutiny of the award than might otherwise be appropriate.[23]

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[23] As Justice Baxter observed in the opening paragraph of his dissenting opinion in *Pearson Dental, supra*, 48 Cal.4th at page 683, the parties to the mandatory employment arbitration agreement in that case, unlike here, "did not agree to arbitral conformity with rules of law."

b. *The arbitrator's legal error effectively denied Richey a hearing on the merits of his CFRA claims*

In limiting its decision expanding judicial review to the circumstances before it, the Supreme Court in *Pearson Dental, supra*, 48 Cal.4th 665, emphasized the arbitrator's legal error in that case—an improper application of the tolling provision in the governing statute of limitations—"misconstrued the procedural framework under which the parties agreed the arbitration was to be conducted rather than misinterpreting the law governing the claim itself" and resulted in the employee being deprived of a hearing on the merits of his claim. (*Id.* at pp. 679-680.) The Court held, "[W]hen, as here, an employee subject to a mandatory employment arbitration agreement is unable to obtain a hearing on the merits of his FEHA claims, or claims based on other unwaivable statutory rights, because of an arbitration award based on legal error, the trial court does not err in vacating the award." (*Id*. at p. 680.)

The arbitrator's acceptance of the honest belief defense in this case had a similarly preclusive effect on Richey's ability to have his nonwaivable CFRA claims heard on the merits. To be sure, recognition of this purported equitable defense appears more substantive than the procedural determination the claims were time-barred in *Pearson Dental*. But, as discussed above, the honest belief defense relieves the employer of any obligation to establish its employee was, in fact, misusing authorized family leave and thus subverts the express statutory guarantee of the right to reinstatement, as well as the allocation of the burden of proof in an interference case. (See § 7297.2, subd. (c)(1) [employer has burden to prove employee would not otherwise have been employed at the time reinstatement is denied].)

Accordingly, as in *Pearson Dental*, and particularly in light of the parties' agreement for claims to be decided "solely upon the law," the arbitrator exceeded his powers within the meaning of Code of Civil Procedure section 1286.2, subdivision (a)(4),

by committing legal error that effectively denied Richey a hearing on the merits of his CFRA claims.[24]

c. *The arbitrator failed to make findings of fact and conclusions of law sufficient to ensure he complied with the requirements of the statute*

As described above, the arbitrator, while making multiple observations tending to support Richey's position, ultimately failed to make relevant findings of fact and conclusions of law related to his substantive CFRA claims. These issues include, but are not limited to, whether Richey was given adequate notice of Power Toyota's policies regarding CFRA leave (see *Faust, supra*, 150 Cal.App.4th at p. 880; *Avila, supra,* 165 Cal.App.4th at pp. 1256-1257 & fn. 10); whether Power Toyota's policy barring secondary employment during an employee's CFRA leave differed from the policy pertaining to secondary employment held by employees who were not on CFRA leave; whether, as a result, the policy itself violated CFRA; whether Richey's activities at the restaurant exceeded the limitations imposed by his physician, thus rising to a level of

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[24] We reject AutoNation's suggestion judicial review in the circumstances of this case, if any, should be bounded by the "manifest disregard of the law standard" followed by federal courts—that is, that legal error by the arbitrator is insufficient to justify vacatur of the award unless the error is so egregious as to be tantamount to an intentional disregard of the law. (See *Shearson/American Express, Inc. v. McMahon* (1987) 482 U.S. 220, 232 [107 S.Ct. 2332, 96 L.Ed.2d 185]; *Collins v. D.R. Horton, Inc.* (9th Cir. 2007) 505 F.3d 874, 879-880.) As the Court explained in *Pearson Dental,* when interpreting Code of Civil Procedure section 1286.2, "we need not and do not move in lockstep with the federal courts in matters of judicial review of arbitration awards." (*Pearson Dental, supra*, 48 Cal.4th at pp. 677-679, fn. 3.) Indeed, California courts generally apply "a strict review standard precluding vacatur for legal error that does not include a 'manifest disregard' exception," but the Supreme Court has expressly left open "the possibility of greater judicial review . . . in the case of rulings inconsistent with the protection of statutory rights." (*Ibid*.)

activity that could be found to constitute abuse of his leave; and whether Power Toyota carried its burden of proof on these issues. (See *Lonicki, supra,* 43 Cal.4th at pp. 214-215.)

In addition, the arbitrator failed to consider Richey's retaliation claims under CFRA, that is, whether Power Toyota applied its CFRA policies consistently to different employees and whether it terminated Richey because he took CFRA leave. (See, e.g., *Avila, supra,* 165 Cal.App.4th at pp. 1258-1259.)

For all these reasons, we reverse the judgment confirming the arbitration award and direct the superior court on remand to grant the petition to vacate the award pursuant to Code of Civil Procedure section 1286.2, subdivision (a)(4) ["[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted"].) Code of Civil Procedure section 1287 provides, if the arbitration award is vacated, the court may order a rehearing before a new arbitrator or, if vacated because the arbitrator exceeded his or her powers, a rehearing before the original arbitrator with the consent of the parties to the court proceeding.

DISPOSITION

The judgment confirming the arbitration award is reversed, and the matter remanded with directions to deny the petition to confirm the arbitration award, grant the petition to vacate the award and to conduct further proceedings not inconsistent with this opinion, including, if appropriate, an order requiring binding arbitration before either a new or the original arbitrator. Richey is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

JACKSON, J.

SEGAL, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.