Case number **S207536**

2d Civil No. B234711
L.A.S.C. Case No. BC 408319

**IN THE SUPREME COURT**
**STATE OF CALIFORNIA**

AVERY RICHEY,

Plaintiff and Appellant,

v.

AUTONATION, INC., *et al.*

Defendants and Respondents

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On Review from
Court of Appeal, Second Appellate District, Division 7, Case No. B234711
Superior Court, County of Los Angeles, Case No. BC 219557
Honorable Malcolm H. Mackey, Judge Presiding

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# APPLICATION FOR LEAVE TO FILE PROPOSED BRIEF OF *AMICUS CURIAE* CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

# [PROPOSED] BRIEF OF *AMICUS CURIAE* CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT AVERY RICHEY

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# APPLICATION FOR LEAVE TO FILE PROPOSED BRIEF OF *AMICUS CURIAE* CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

The California Employment Lawyers Association (CELA) requests permission to file a brief as *amicus curiae* in support of Plaintiff and Appellant Avery Richey. CELA is a statewide organization of over 1,000 attorneys primarily representing employees in employment termination and discrimination cases.

CELA has appeared as *amicus curiae* in many cases before this Court, including *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, *Little v. Auto Stiegler, Inc.,* (2003) 29 Cal.4th 1064, *Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, *Pearson Dental Supplies, Inc., v. Superior Court (Turcios, RPI)* (2010) 48 Cal.4th 665, *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, *Runyon v. Board of Trustees of the California State University* (2010) 48 Cal.4th 760, and *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203.

## STATEMENT OF INTEREST

CELA, through its undersigned attorney, is familiar with the questions involved in this case and the scope of their presentation and believes that there is necessity for additional argument on the following points:

> The court of appeal did not commit reversible error in vacating the arbitration award due to a clear error of law by applying the "honest belief" defense, which is not, and should not be,

recognized in California, to defeat substantive rights under the Family Medical Leave Act and the California Family Rights Act.

If this request is granted, the following brief in support of Plaintiff and Appellant Avery Richey is respectfully submitted.

## DISCLOSURE REGARDING AUTHORSHIP OR MONETARY CONTRIBUTION

No party or counsel for any party authored any portion of the brief.

No party or counsel for any party made a monetary contribution intended to fund the preparation or submission of the brief.

No person or entity made a monetary contribution intended to fund the preparation or submission of the brief.

Date: August 7, 2013

Respectfully submitted,
For *Amicus Curiae* CELA:
Law Office of David J. Duchrow

_____
By: David J. Duchrow

**BRIEF OF *AMICUS CURIAE***
**CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION**

## I. Introduction

California Employment Lawyers Association ("CELA") submits this brief in support of Plaintiff and Appellant Avery Richey and argues that due to the error of law underlying the arbitration decision, the decision must be vacated.

The approach taken by CELA to reach that conclusion follows the route taken by the Court in *Pearson Dental*. In that case the Court took a two-step approach to determine whether (as in the present case) an arbitration award containing an error of law which would deprive an employee of substantive rights under the Fair Employment and Housing Act, Cal. Gov't Code § 12940 *et seq.,* must be vacated.

In *Pearson Dental* the Court addressed two questions: First, did the arbitrator make an error of law? Second, if the arbitrator did make such an error, was that sufficient grounds for the Court to vacate the arbitration award?

CELA will show that both of those questions must be answered in the affirmative in this case, and respectfully requests this Court to affirm the decision of the Court of Appeal.

CELA also agrees with Richey that the proper standard of review is *de novo* rather than the hybrid, untested and ill-defined "manifest disregard" standard offered by AutoNation.

## II. Facts

For the purpose of this appeal, Appellant does not contest the factual findings of the arbitrator. (See, e.g., Answer Brief p. 16 ¶2)

The Court of Appeal summarized the facts pertinent to the issues:

> 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) 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. 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.

*Richey v AutoNation*, *Inc.* (2012) 210 Cal. App. 4th 1516 at p. 1519-20

## III. Argument

### A. The Court of Appeal Did Not Commit Reversible Error in Vacating the Arbitration Award Due to a Clear Error of Law Affecting Substantive Rights.

The two-step approach utilized in *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, guides the decision as to whether the Court of Appeal erred in vacating the arbitration award:

> [W]e address two questions: First, did the arbitrator make an error of law . . .? Second, if the arbitrator did make such an error, was that sufficient grounds for the [appellate] court to vacate the arbitration award?

*Id.*, at p. 672-673.

#### 1. The Arbitrator Committed an Error of Law by Utilizing the "Honest Belief" Standard in a Case Where Such Honest Belief Is Not Authorized by the Law Governing the Claims Before Him, Specifically an Entitlement Interference Case for an Employee on Leave for His Own Medical Needs.

Mr. Richey's claims were submitted to arbitration under the terms of an adhesive 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 claims and defenses arose from the complaint which Mr. Richey had filed in Superior Court, in which he alleged, among other claims, violation of CFRA and FMLA by his former employer when it terminated him from employment while on protected leave. Since the law governing those claims does not include an "honest belief" defense, and since the arbitrator specifically ruled against Mr. Richey on that incorrect basis, the arbitrator committed an error of law requiring that the arbitrator's decision be vacated.

Amicus CELA respectfully requests this Honorable Court to fully affirm the Court of Appeal's holding that "The Arbitrator Committed Clear Legal Error in Basing His Decision Solely on Power Toyota's Honest Belief Richey Had Abused His Leave." (*Richey v. AutoNation, Inc.* (2012) 210 Cal. App. 4th 1516, at p. 1526.

The reasoning behind this conclusion begins with the unwaivable statutory right created in the CFRA and the FMLA.

### a. Richey Based His Claims in Part on Unwaivable Statutory Rights Created in the FMLA and the CFRA

Both the CFRA and the FMLA grant employees who work for covered employers up to twelve work weeks of family care or medical leave in a 12-month period. *Gov't Code* § 12945.2. An employee may take unpaid leave either for his or her own serious health condition, or

to care for certain family members with a serious health condition. *Gov't Code* § 12945.2(c)(3). While the employee remains on leave, the employer must continue the employee's health benefits, and the leave is not considered a break in service for seniority or other purposes. *Gov't Code* § 12945.2(f)(2), (g). When the leave ends, the employer must reinstate the employee to the same or a comparable position. *Gov't Code* § 12945.2(a).

Both the CFRA and the FMLA are controlled by administrative regulations. 2 Cal. Code Regs. §§ 7297.0 through 7297.11; 29 C.F.R. §§ 825.000, *et seq*. The CFRA incorporates the FMLA's regulations "[t]o the extent that they are not inconsistent." 2 Cal. Code Regs. § 7297.10.

An employee is guaranteed reinstatement under the CFRA, 2 Cal. Code Regs. § 7297.2(a), 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 § 7297.2, subdivisions (c)(1) and (c)(2).

**b. "Honest Belief" Is Not among the Defenses Provided by CFRA for an Interference with Leave Claim.**

The only defenses against a claim of failure to provide guaranteed reinstatement are found in 2 Cal. Code Regs. § 7297.2(c) set forth in full in the margin.[1] "Honest belief" is not among them. Thus, the arbitrator

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[1] 2 Cal. Code Regs. § 7297.2(c) provides:

Permissible defenses.

(1) Employment Would Have Ceased

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.

> (A) If an employee is laid off during the course of taking CFRA leave and employment is terminated, the employer's responsibility to continue CFRA leave, maintain group health plan benefits and reinstate the employee ceases at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise.

(2) "Key Employee."

A refusal to reinstate a "key employee" to his or her same position or to a comparable position is justified if the employer shows, by a preponderance of the evidence, that all of the following conditions exist:

exceeded his authority by failing to adhere to the laws governing the claims before him. This constitutes legal error.

The Court should resist AutoNation's invitation to add a non-statutory defense to the entitlement claim under CFRA.

It is doubtful that the "honest belief" defense should even apply to a claim by an employee who is out on leave for his or her own medical conditions. The few cases which allow the defense do so to allow an employer to avoid liability when the employee is proven to act outside the purposes of the leave which was granted, most often in cases of leave to take care of a family member, not for the employee's own medical needs. As noted in the appellate decision in the present case:

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> (A) The employee requesting the CFRA leave is a salaried employee, and
>
> (B) The employee requesting the leave is among the highest paid ten percent of the employer's employees who are employed within 75 miles of the worksite at which that employee is employed at the time of the leave request, and
>
> (C) The refusal to reinstate the employee is necessary because the employee's reinstatement will cause substantial and grievous economic injury to the operations of the employer, and
>
> (D) The employer notifies the employee of the intent to refuse reinstatement at the time the employer determines that the refusal is necessary under (C) above, and
>
> (E) In any case in which the leave has already commenced, the employer shall give the employee a reasonable opportunity to return to work following the notice prescribed in (D) above.

> [N]o 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 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*.

*Richey v. AutoNation*, *supra,* at p. 1536-37.

CELA does not advocate application of the "honest belief" defense for any claims involving CFRA or FMLA, but acknowledges that it has been used by other courts in other jurisdictions; but its use in cases involving an employee lying about caring for a family member are different from the case before the Court, when the employee is claimed

to have been less than honest regarding his own medical claims.

For the former type of claim, it seems possible that a lay person could determine through his or her own observations whether the absent employee is acting in accordance with the requested leave when that employee is seen engaging in activities far from the ailing family member, or when the employee admits that he is no longer caring for that individual. But when the employee requires leave for his or her own medical condition, an untrained lay person (possibly with a financial motivation) is in no position to determine the employee's medical condition. Even the admittedly flimsy "investigation" undertaken by Mr. Richey's coworkers sheds no light on the issue of Mr. Richey's medical condition; it only determined that he was providing his services for his own business.

Moreover, the issue of whether the employee's medical condition warrants the requested leave may be determined through a statutory process, involving choosing a third medical professional, whose opinion is final. Power Toyota declined to utilize that statutory procedure.

Further, Mr. Richey's leave was from employment only with Power Toyota, not from all employment. Nothing about his leave had any legal effect on Mr. Richey's ability to work part time for another business, in this case his own business. In that regard CELA requests this Court to follow the reasoning of the Court of Appeal:

> [T]he 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. . . . 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*"].)

*Richey,* 24 Cal. App. 4th at p. 1535-1536

**i. The Honest Belief Defense Is Irrelevant When Leave is Denied.**

The "honest belief" defense would allow an irrelevant issue to be addressed: the employer's state of mind. As stated above, an employee who is granted leave may not be deprived of that leave unless the medical reason for the leave is found not to exist. "Honest belief" relates to the employer's state of mind while doing something which independently violates CFRA, i.e., denying an employee leave to attend to their own medical needs, so the employer's state of mind while doing that act is irrelevant. If *what* an employer does (terminate an employee on medical leave) violates CFRA by itself, *how* it is done (in good faith or not) is irrelevant. CFRA bars an employer from terminating an employee on leave, regardless of state of mind.

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### ii. The "Honest Belief" Defense Is Inconsistent with the Issue of Whether the Employee's Conduct Would Allow Leave to Be Cancelled.

The "honest belief" defense, if allowed, would be inconsistent with the need to find whether employee was doing anything inappropriate while on medical leave sufficient to cause the employer to cancel the leave, often by terminating the employee. It would leave the determination not in the hands of medical personnel, but rather in the hands of the employer's snitches, whose ignorance of law or medicine actually enhances the "honest belief" upon which the employer would rely. It is unlikely that the legislature intended the act to be enforced in this manner. It is noteworthy that nothing in arbitrator's decision states that Mr. Richey had done anything for which AutoNation could terminate him.

### iii. The "Honest Belief" Defense Has Been Rejected in California As Well as in Many Other Jurisdictions.

The "honest belief" defense has been nearly universally rejected by all except a few scattered jurisdictions. See *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112; *Xin Liu v. Amway Corp.* (9th Cir. 2003) 347 F.3d 1125; and *Faust v. California Portland Cement Co.* (2007) 150 Cal. App. 4th 864.

### iv. An "Honest Belief" Can Still Be Biased.

Allowing an employer to circumvent the CFRA and FMLA by substituting their "honest belief" is an invitation for employment decisions to be influenced by the decision-maker's inherent unconscious biases.

The "honest belief" doctrine assumes that people are able to credibly identify the "real" motives for their own actions with precision. However, social science research has significantly undermined fundamental assumptions about the manner in which biases influence decisionmaking. "This approach is plainly inconsistent with what empirical social psychologists have learned over the past twenty years about the manner in which stereotypes, functioning not as consciously held beliefs but as implicit expectancies, can cause a decisionmaker to discriminate against members of a stereotyped group." Linda Hamilton Krieger and Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 Cal. L. Rev. 997 (2006) , at p. 1035 ("Krieger and Fiske")

There is some attraction to the assumption that decisionmakers are able to identify the "true" motivations for their actions, and are thereby able to assert with "honesty," and more importantly, accuracy, the reasons for their decisions. But research has shown that "[m]uch of human mental process, including those processes mediating interpersonal perception and judgment, occur . . . outside of the perceiver's mindful attentional focus." Krieger and Fiske at 1030-31. As the authors paraphrase: If you ask an employer at the moment of the decision what his reasons for making a decision were, he might well not

be aware that one of the reasons was that the applicant or employee was a woman, even if her sex did, in fact, influence his judgment. *Id.*

Individuals are notoriously unreliable in being able to identify the reasons why they make certain decisions. See David L. Faigman, Nilanjana Dasgupta and Cecilia Ridgeway, *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 Hastings L.J. 1389 (2008) (hereinafter *A Matter of Fit*) at 1404 ("One of the most important discoveries in empirical social psychology in the twentieth century is that people's perceptions and behavior are often shaped by factors that lie outside their awareness and cannot be fully understood by intuitive methods such as self-reflection.").

Consequently, it is entirely possible for someone both to have been influenced by bias in making a decision, and for them to "honestly believe" that the decision was made for "legitimate business reasons" and free of bias. *Id.* at 1404-07. The authors discuss research that shows that people are able neither to identify the reasons why they make a decision with any reliable amount of accuracy, nor to "report the reasons guiding their thoughts and actions honestly . . . especially when it comes to socially sensitive topics where there are clear social norms about 'correct' responses (social desirability bias) or when the topic motivates participants to present their attitudes, motivations and actions in the best possible light, consistent with their conscious values (self-presentation bias)."

Likewise, in *Unconscious Bias and Self-Critical Analysis: the Case for a Qualified Evidentiary Equal Employment Opportunity Privilege* (Deana A. Pollard, 74 Wash. L. Rev. 913) the abstract for

which is set forth in the margin,[2] the author notes that unconscious biases come into play in discrimination cases. Allowing the "honest belief" as a defense would ignore those subjective biases, of which the decision-maker would likely have no knowledge. See also *Unconscious Bias Theory in Employment Discrimination Litigation,* Audrey J. Lee, 40 Harvard Civil Rights-Civil Liberties L. Rev. 482.

In short, allowing the employer to rely on his or her own "honest" belief may still allow the employer to circumvent the law, by building in the employer's unconscious biases which influence employment decisions, especially those affecting the disabled, i.e., those who may seek CFRA and FMLA leave.

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[2] "Recent breakthroughs in social psychology have resulted in the ability to measure unconscious bias scientifically. Studies indicate that prejudiced responses are largely unconscious, the result of normal cognitive processing and stereotypical associations of which the prejudiced subject may be completely unaware. The studies also indicate that a subject's awareness of the discrepancy between her conscious, egalitarian value system and her unconscious prejudice is a critical step towards the convergence of her cognitive functioning and her egalitarian viewpoints. Antidiscrimination legislation requires a showing of intent to discriminate to obtain relief in all but a small percent of circumstances. The result is a legal framework that does not, and cannot, properly redress most instances of discrimination. While the use of unconscious-bias testing may be more effective than antidiscrimination legislation in identifying and redressing the cognitive phenomenon of discrimination, evidence law does not support its use because test results are not privileged against discovery in discrimination lawsuits. This Article argues that in light of the enormous potential social benefit of unconscious-bias testing, a qualified evidentiary privilege should be recognized to encourage its use."

### v. The "Honest Belief" Defense Provides an Incentive for Dishonest Testimony.

Allowing the defense also provides an employer an incentive to lie, aware of the resulting proof problems facing an employee. It is difficult at times to discern the inner decision making processes of an employer. An employee whose leave was cancelled in violation of the leave would be required to submit evidence to overcome an employer's self-serving statements about "honest" beliefs. That evidence may be very difficult to obtain.

Although the *McDonnell-Douglas* burden shifting analysis was developed in order to assist employees in proving the necessary element of intent, that type of burden shifting has been ruled out for CFRA and FMLA interference cases. See *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, and *Diaz v. Fort Wayne Foundry Corp.* (7th Cir. 1997) 131 F.3d 711.

### vi. The "Honest Belief" Defense Should Not Apply to the Present Case Because the Rule Itself Violates the Leave Laws.

Finally, the "honest belief" of the employer must be called into question because of the rule under which claims to have it terminated Mr. Richey. The rule Power Toyota relies upon allows it to restrict the activities of only a select group of employees: those <u>on FMLA leave</u>. The rule places a target on those employees, subjecting them to a rule

which could result in their termination. The rule exposes Power Toyota's hostility toward such employees. In light of that hostility, its "honesty" in its belief is questionable at best.

That "honesty" is also questionable since the Arbitrator found that there were circumstances under which Power Toyota would allow employees to be involved in other endeavors, depending on the nature of the other activity. (3 CT 553)

### 2. The Court of Appeal Did Not Commit Reversible Error by Vacating the Arbitration Award Which Was Based on an Error of Law.

#### a. Grounds for Vacating an Arbitration Award and Standard of Review

In the employment relationship, when the 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, after an arbitration award is issued, a Superior 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)

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 *Cal. Code of Civ. Proc.* § 1286.2.[3]

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[3]

1286.2. (a) Subject to Section 1286.4, the 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 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.

"[C]ourts are 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, Inc. v. DirecTV, Inc.* (2008) 44 Cal.4th 1334, at p. 1344.)

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 Civ. Proc.* § 1286.2 and the award is properly vacated when [1] 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 [2]when granting finality to the arbitration would be inconsistent with a party's unwaivable statutory rights. (*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665 at p. 679; see *Armendariz, supra*, 24 Cal.4th at p. 106; *Moncharsh*, at p. 32.)

Both of those grounds exist in the present case as discussed below.

**b. The Arbitrator's Decision Which Relies on the "Honest Belief" Defense Violates an Explicit Legislative Expression of Public Policy.**

As stated above, an arbitrator exceeds his or her powers within the meaning of *Code of Civ. Proc.* § 1286.2 when the decision violates an explicit legislative expression of public policy.

CFRA, part of the FEHA, is a statutory scheme which contains an

explicit legislative expression of public policy. In *Nelson v. United Technologies* (1999)74 Cal. App. 4th 597, an employee sued his former employer on a claim of wrongful discharge in violation of public policy, based on the public policy contained in the CFRA. The court analyzed the elements of the tort of wrongful discharge in violation of public policy based on the legal principles set forth in *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, and *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66. The court concluded that the CFRA contains an expression of public policy sufficient to support such a claim:

> [T]he CFRA policy satisfies all of the requirements identified in *Gantt/Stevenson*. Accordingly, just as an employee may state a tortious wrongful discharge claim against an employer subject to the FEHA based upon the FEHA policy prohibiting age discrimination, an employee may also bring a tortious wrongful discharge claim against an employer subject to the CFRA based upon the policy prohibiting discrimination under the FEHA's CFRA.

*Nelson*, 74 Cal. App. 4th at 609. The opinion continues:

> [A]fter careful consideration, we believe the policy behind the CFRA is fundamental and substantial. The fact that the act is included within the FEHA supports the argument that the act reflects a fundamental and substantial policy. Assembly member

Moore's comments, emphasizing "the need to permit workers to take leave to care for their families without fear of job loss" and that "the bill should have the broadest possible implementation" also indicate that the policy supporting the CFRA is substantial and fundamental. Promoting the stability and economic security of families, which is one of the goals of the CFRA, likewise reflects a fundamental and substantial public policy.

In addition, the laws of other jurisdictions bolster the view that the policy within the CFRA is fundamental and substantial. Discrimination based upon an employee's taking family and medical leave has been determined to be a matter of sufficient gravity to warrant legislative action by the United States Congress through the federal Family and Medical Leave Act of 1993 (FMLA). (See, e.g., *Stevenson v. Superior Court, supra,* 16 Cal.4th 880, 897 (policy against age discrimination shown to be substantial and fundamental in that age discrimination in employment prohibited under federal law).) Under the FMLA, which parallels the CFRA, Congress declared that the purpose of the act was to "balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity; . . ."(29 U.S.C. § 2601(b)(1).)

*Nelson,* 74 Cal. App. 4th at 610-611.

In light of the statutory expression of public policy under the FEHA and CFRA, the arbitrator's use of the "honest belief" standard violated that policy, requiring the arbitration decision to be vacated.

### c. Granting Finality to the Arbitrator's Decision Incorporating the "Honest Belief' Defense Would Be Inconsistent with a Party's Unwaivable Statutory Rights under CFRA.

The second basis for vacating an employment arbitration decision is when granting finality to it would be inconsistent with a party's unwaivable statutory rights. *Pearson Dental*, *supra,* 48 Cal.4th 665 at p. 679; *Armendariz, supra*, 24 Cal.4th at p. 106. The award before the Court is inconsistent with Mr. Richey's unwaivable statutory rights under the CFRA and the FMLA, and must be vacated.

The CFRA and FMLA grant unwaivable statutory rights to an employee such as Mr. Richey. Mr. Richey sought leave for his own medical condition. That leave is an entitlement as a substantive right, guaranteeing Mr. Richey the right to reinstatement.

*Cal. Gov't Code* § 12945.2(a) states in pertinent part:

> Family care and medical leave requested pursuant to this subdivision shall not be deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position

upon the termination of the leave.

Both the FMLA (29 U.S.C. § 2614(a)(1); 29 C.F.R.§ 825.214) and the CFRA (quoted in the preceding paragraph), as well as 2 Cal. Code Regs. § 7297.2(a), (c), require that an employer reinstate the employee at the end of leave, to the same or an equivalent job, unless the employee is a "key employee" who is given appropriate notification.

The leave laws (FMLA and CFRA) allow two types of claims: (1) interference (entitlement) claims, and (2) discrimination / retaliation claims. The theory behind an entitlement claim is that the leave laws create *substantive* rights, including the right to take a leave if the qualifying conditions are met. *Smith v. Differ Ford-Lincoln-Mercury, Inc.* (10th Cir. 2002) 298 F.3d 955, 960-961.

The entitlement claim requires only that the employee prove that he or she was entitled to the right being sought (i.e., leave) and that the employer denied the right. Intent is irrelevant.

As stated in *Mora v. Chem-Tronics, Inc.* (S.D. Cal. 1998) 16 F.Supp.2d 1192, at 1219, "The FMLA is a strict liability statute in the sense that an employee need not delve into the employer's subjective intent to recover for alleged violations for interference."

Similarly, in *King v. Preferred Technical Group* (7th Cir. 1999) 166 F.2d 887 at 891, "[D]eprivation of this right [to take leave] is a violation regardless of the employer's intent . . . ."

The Tenth Circuit has opined:

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> The interference or entitlement theory is derived from the FMLA's creation of substantive rights. 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, supra,* 298 F.3d 960-961.

**d. Granting Finality to the Arbitrator's Decision Incorporating the "Honest Belief" Defense Would Be Inconsistent with a Party's Unwaivable Statutory Rights under the FEHA**.

Specifically addressing the issue in the context of "a mandatory employment arbitration agreement, i.e., an adhesive arbitration agreement that an employer imposes on the employee as a condition of employment," the Supreme Court recognized in *Pearson Dental* "'that an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA' [emphasis added, citation omitted], 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].)

CFRA is part of the FEHA, *Cal. Gov't Code* §§ 12900 *et seq.*; thus, *Pearson Dental* applies equally to the present case as to the

situation in that case.

To ensure full vindication of an employee's CFRA, FEHA and other 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, Inc. v. DirecTV, Inc.* (2008) 44 Cal.4th 1334, 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 that 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.) The Court created a rule sufficient to resolve the case before it, concluding that 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*.)

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### B. *De Novo* Is the Proper Standard of Review on Appeal.

The validity and enforceability of an arbitration clause is a question of law subject to *de novo* review, absent conflicting extrinsic evidence. (*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, and thus whether the award should have been vacated on that basis, is a question of law reviewed on appeal *de novo*. (*Reed v. Mutual Service Corp.* (2003) 106 Cal. App. 4th 1359, 1365.

For those same reasons, the standard urged by AutoNation ("Manifest Disregard for the Law") is not a proper standard because it does not comply with *Armendariz*; it would not meet the standard of requiring vacating an award when inconsistent with the protection of a party's statutory rights. Not only is AutoNation trying to change the rules in arbitration by allowing a new defense, it also is seeking to change the rules on appeal by seeking a new standard of review. Yet the standard it seeks is virtually undefinable and should be rejected in favor of the established standards of arbitration and judicial review as set forth in the preceding sections of the Argument.

## IV. Conclusion

Arbitration is often promoted as being"faster and cheaper" than the courts, but if "faster and cheaper" is the ultimate goal, a coin toss would be the optimal method of deciding disputes. But society and the

legislature do not want coin tosses to decide matters involving important substantive statutory rights; instead, what is wanted is a process which is fair, based on the law, with certain procedural safeguards.

In the present case, the employer specified in its adhesive contract that disputes would be decided by an arbitrator who must base the decision on the "law" of the claims asserted. The arbitrator failed to do so, committing legal error which requires that the decision be vacated. "Honest belief" is not, and should not be, a defense to an entitlement claim by an employee on leave for his or her own medical condition. AutoNation, however, wants to allow the arbitrator to change the rules at the end of the game.

CELA respectfully requests this Honorable Court to affirm the appellate court in full, and in particular the following passage:

> [P]articularly in the 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. *Richey v. AutoNation, Inc.* (2012) 210 Cal. App. 4th 1516, 1539-40.

Date: August 7, 2013

Respectfully submitted,
For Amicus Curiae CELA:
Law Office of David J. Duchrow

_____

By: David J. Duchrow

## CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of 6661 words as counted by the Corel WordPerfect X3 word processing program used to generate the brief.

Dated: August 7, 2013 BY:_____
DAVID J. DUCHROW

PROOF OF SERVICE

I am employed in the County of Los Angeles at 501 Santa Monica Boulevard, Suite 505, Santa Monica, California 90401-2443. On the date of mailing, I am over the age of eighteen, and not a party to the above-described action.

On August 7, 2013, I served the within:

BRIEF OF *AMICUS CURIAE* CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

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Executed on August 7, 2013, at Santa Monica, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

_____

David J. Duchrow

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