

EMPLOYMENT LAW UPDATE

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California Law

**Summary Judgment is denied where employer failed to notify employee of rights under the California Family Rights Act.**

***Faust v. California Portland Cement Company (2007) 07 C.D.O.S. 5133***

*By Ari Baruth and Jason Geller*

Plaintiff Michael Faust began working at Portland Cement in 1977. In 2003 he was a lube specialist in a garage supervised by Schrader. In February 2003, Faust sent an email to plant manager Bruce Shafer, stating unnamed employees engaged in internal theft. Shafer showed the email to Anderson, the human resource representative. The next day, the other employees starting giving Faust the cold shoulder (his co-worker did not pick him up so Faust had to walk to the site). Faust, after learning that everyone had heard about the email, began to have a panic attack. Faust feared for his safety, so he completed a time-off slip, only to have the request denied. Faust went back to work, driving a fuel truck without radio support, and he experienced anxiety. A supervisor, Bergloff, agreed Faust should leave, and Faust never returned.

Five days later, Faust began a psychiatric program and he filed a claim for worker's compensation benefits. Faust provided Portland with proof of medical impairment, and his psychiatrist told him to stay away from stressful situations. Faust's chiropractor wrote a note to Portland saying Faust is unable

to perform regular job duties for several weeks. The human resources representative left a message for Faust, wanting to talk about a problem with the chiropractic certificate. Faust's wife returned the call, leaving a message that Andersen could speak with her and that Faust was too stressed to speak with Andersen. Thereafter, Andersen sent Faust a letter saying the paperwork from the chiropractor was incomplete. Andersen never informed Faust of the availability of medical leave under CFRA or FMLA, and Faust did not know of CFRA's protections. Andersen sent a letter to Faust terminating his employment.

Faust filed suit against Portland, alleging disability discrimination, harassment, retaliation, wrongful termination, violation of CFRA, discrimination because of exercise of CFRA rights, and unfair competition. The trial court granted summary judgment for Portland, finding that Portland duly terminated Faust for insubordination in taking an unauthorized leave of absence. The trial court did not mention that Portland failed to advise him of any rights under CFRA. Faust appealed.

On appeal, the Court addressed the alleged violation of CFRA based on Portland's failure to provide Faust with medical leave and termination of his employment. The Court also addressed the claim that Portland discriminated against Faust because of his exercise of his rights under CFRA.

Portland contended that 1) Faust's chiropractor was not a "certified health provider", 2) Faust did not give Portland proper notice of a CFRA-qualifying leave, and 3) Faust was properly terminated for refusing to cooperate with Portland's legitimate, good faith requests for additional information.

The Court of Appeal held that Portland's failure to establish it had complied with an employer's obligations under CFRA precluded it from obtaining summary judgment with respect to Faust's CFRA claims. No facts indicated that Portland posted notice or gave notice to Faust of his rights under CFRA. The Court noted that the facts demonstrated that Faust provided verbal notice sufficient to make the employer aware that he needed leave pursuant to CFRA. Also, the employer admitted the work status report from the chiropractor contained stated reasons for CFRA leave. Portland terminated Faust on April 15, 2003, while he was still on leave pursuant to the chiropractor's report, and less than 7 weeks after his last day on the job.

Portland unsuccessfully argued that Faust unreasonably failed to respond to Portland's inquiries regarding his condition. The Court held that Portland unreasonably failed to communicate with Faust, as Andersen (HR) was told Faust was too stressed to speak with anyone from Portland. Andersen could have spoken with Mrs. Faust, Faust's

attorney or the chiropractor. Therefore, Faust cannot be said to have unreasonably refused to respond to Portland's questions seeking information because three other people were available to speak.

Further, the Court held that a physician is not the only health care provider who can certify a serious health condition under CFRA. A chiropractor is not necessarily precluded from certifying a serious health condition.

Faust established a prima facie case that he was entitled to CFRA leave and was terminated shortly after notice to the employer. Thus, the burden shifted to Portland to establish a legitimate, non-retaliatory reason for the termination. However, Portland refused to communicate with any of Faust's representatives, undermining Portland's contention that it legitimately fired Faust for ignoring Andersen's inquiries.

Finally, Portland unsuccessfully claimed Faust did not have a disability within the meaning of FEHA, it did not know whether Faust had a disability and Faust was not discharged because of a disability. However, Portland did not contact any designated person and Portland did not pursue any accommodation of Faust's disability, so the grant of summary judgment was erroneous.

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