Supreme Court Case Number: **S207536**

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

AVERY RICHEY,

Plaintiff/Appellant

vs.

AUTONATION, INC., et al.

Defendants/Respondents.

Court of Appeals, Second Appellant District,
Division Seven, Case No. B234711
Los Angeles County Superior Court, Case No. BC408319
Hon. Malcolm H. Mackey

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I.
INTRODUCTION

Plaintiff/Appellant Avery Richey (hereinafter referred to as "Appellant" or "Mr. Richey") requests that the California Supreme Court affirm the Appellate Court's decision, *Richey v. AutoNation, Inc.* (2012) 210 Cal.App.4th 1516, because *"as in Pearson Dental, and particularly in the light of the parties' agreement for claims to be decided 'solely upon the law,' the arbitrator exceeded his powers with 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." Id. at* 1539-1540. Furthermore, the arbitrator failed to make findings of fact and conclusions of law sufficient to ensure his analysis complied with the requirements of the Fair Employment and Housing Act, Government Code § 12940 et seq. (hereinafter "FEHA") as to Mr. Richey's claims under the California Family Rights Act, Government Code § 12945.2 (hereinafter "CFRA"), and other FEHA claims.

Appellant brought claims against Defendant/Petitioner AutoNation, Inc., Defendant/Petitioner Webb Automotive Group, Inc., Defendant/Petitioner Mr. Wheels, Inc. and Defendant/Petitioner Rudy Sandoval (hereinafter all Defendant/Petitioners will be referred to collectively as "Petitioners"; and hereinafter Defendant/Petitioner AutoNation, Inc., Defendant/Petitioner Webb Automotive Group, Inc., and Defendant/Petitioner Mr. Wheels, Inc., will collectively be referred to as "Power Toyota") for violation of the Fair Employment and Housing Act, Government Code § 12940 et seq. ("FEHA") in Superior Court. The case was stayed by the trial court after it granted a motion to compel arbitration made by Petitioner, and the case was ordered to arbitration. (2CT 252). A Final Award on Arbitration Proceeding was issued by the Arbitrator, Hon. Luis A. Cardenas, (Judge Ret.). (3CT 537-556)(hereinafter Hon. Luis A. Cardenas will be referred to as "Arbitrator").

Legal errors, which are clearly evident from the Final Award of Arbitrator, denied Mr. Richey unwaivable statutory rights contained in CFRA.

II.

STATEMENT OF THE CASE

A. PROCEDURAL FACTS

1. The Case Was Stayed And Ordered Into Arbitration

Mr. Richey was an assistant sales manager employed by Power Toyota at the time of his termination. (3CT 539). While employed by Power Toyota Mr. Richey was required to sign a mandatory arbitration agreement as part of his employment with Power Toyota.[1] (2CT 284-288). After Mr. Richey was terminated by Power Toyota he brought suit against Petitioners in Superior Court. (1CT 76-136). Petitioners filed a motion to compel arbitration. (Motion, opposition and reply at 1CT 143-2CT 251). The trial court granted Petitioners motion to compel arbitration and stayed the case pending resolution of the arbitration proceedings. (2CT 252-255).

2. The Arbitration Agreement Explicitly Limited Petitioners' Legal Defenses To Law Governing The Appellant's Claims

The Arbitration Agreement signed by Mr. Richey, and which Petitioners compelled Mr. Richey into arbitration states:

> *"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."* (2CT 287).

3. The First Amended Complaint Was Submitted As Mr. Richey's "Statement Of Claims" For The Arbitration

Petitioners and Appellant submitted the causes of action against Petitioners contained in the First Amended Complaint for arbitration. (2CT 291-354 and 1CT 76-136). Appellant's First Amended Complaint, which was filed in Superior Court, was deemed by both parties to be the "Statement of Claims" for arbitration. (2CT 291), see C.C.P. § 1297.231. Petitioners did not file an Answer to Appellant's First Amended Complaint. The parties submitted their case for arbitration to the arbitration service,

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[1] Declaration of Peter Vano in support of Petitioner's motion to compel arbitration states an agreement to arbitrate is a condition of employment with Power Toyota. (1CT 163-164).

JAMS. (2CT 291). The jurisdiction of the Arbitrator was established by contract (i.e. Arbitration Agreement). (4CT 642).

4. The Parties Served Arbitration Briefs On Each Other, And The Arbitrator, Prior To The Arbitration Hearing

Petitioners served their Respondents' Arbitration Brief on Appellant and Arbitrator prior to the arbitration hearing. (4CT 689-726). Appellant served Claimant Avery Richey's Arbitration Brief on Petitioners and Arbitrator prior to the arbitration hearing. (3CT 585- 4CT 622).

a. Appellant Made Claims In Arbitration For Violations Of His Rights Under CFRA

In Appellant's First Amended Complaint, Appellant alleged claims against Power Toyota for violations of his rights under CFRA for retaliation and discrimination because he took qualifying CFRA medical leave, and for Power Toyota's failure to reinstate him in the same or similar position after his CFRA medical leave was to end, as well as several other FEHA claims. (1CT 97-100). Appellant delineated his claims for violations of his rights under CFRA to the Arbitrator in his Arbitration Brief. (4CT 585-609). Additionally, Appellant outlined his claim for failure to reinstate in his Post-Arbitration Hearing Brief, which incorporated the facts presented during the arbitration hearing. (2CT 360-3CT 478).

5. The Parties Submitted Post Hearing Arbitration Briefs To Arbitrator After The Arbitration Hearing Was Concluded

Post-hearing arbitration briefs were submitted to the Arbitrator after the arbitration hearing. (2CT 360-3CT 478 and 3CT 479-536). The Arbitrator did not allow reply briefs or opposition briefs. (2CT 285). The post-hearing arbitration briefs were due on the same day to the Arbitrator. After both parties submitted their post-hearing arbitration briefs the matter was deemed submitted and the Arbitrator commenced preparation of the interim arbitration award. (4CT 643). The Final Award on Arbitration Proceedings was served on the parties. (4CT 661).

6. The Award Of The Arbitrator Was In Favor Of The Petitioners

In the Final Award on Arbitration Proceedings the Arbitrator ruled in favor of Petitioners as to all of Appellant's claims. The Final Award on Arbitration Proceedings awarded no party any costs. (4CT 659-660).

7. Hearing On Appellant's Motion To Vacate Arbitrator's Final Award

Appellant filed Plaintiff Avery Richey's Notice of Motion, and Motion to Vacate Arbitrator's Final Award Pursuant to Code of Civil Procedure § 1285 et seq. in superior court before the Hon. Judge Malcolm H. Mackey. (2CT 263-3CT 556). In response to Appellant's motion, Petitioners filed their Response to Plaintiff Avery Richey's Petition to Vacate Arbitrator's Final Award, and Defendants' Cross-Petition to Confirm The Arbitration Award. (3CT 558-576). Accompanying Petitioners opposition and cross-petition, Petitioners filed the Declaration of Frank Cronin (3CT 577- 4CT 663) and lodged a proposed order and judgment (4CT 750-752). Appellant filed a Reply. (4CT 669-726). Petitioners objected to Appellant's reply. (4CT 727-729).

The hearing on Appellant's motion was on June 17, 2011. (4CT 733). At the hearing Judge Mackey denied Appellant's motion. (Reporters Transcript on Appeal, hereinafter referred to as "RT", pp. B17-B18), and confirmed the Arbitrator's Final Award. (4CT 733).

a. The Trial Court Entered Its Order

On June 17, 2011, the trial court entered its order denying Appellant's motion. The trial court provided its legal reasoning for denying Appellant's motion in its order. Additionally, nowhere in the order did the trial court mention anything about awarding costs to Petitioners. (4CT 734-738). Judge Mackey erred by denying Appellant's motion to vacate the Arbitrator's award, and by confirming the Arbitrator's Final Award for the reasons stated below.

8. The Court Of Appeal Reversed The Judgment Confirming The Arbitrator's Award

Appellant appealed from the order and judgment confirming an Arbitration Award, and awarding costs of $1,400 to Petitioners. The Court of Appeal reversed the judgment confirming the arbitration award and remanded the matter with directions to

deny the petition to confirm the arbitration award, grant the petition to vacate the award pursuant to C.C.P. § 1286.2(a)(4), and to conduct further proceedings not inconsistent with its opinion, including if appropriate, an order requiring binding arbitration before either a new or the original arbitrator. *See Richey v. AutoNation, Inc.* (*supra*) 210 Cal.App.4th at 1541.

a. Mr. Richey Appealed Other Issues, Which Became Moot When The Appellate Court Reversed The Arbitration Award

Additionally, Mr. Richey's appeal also included an appeal as to the award of costs of $1400 ordered by the trial court. Mr. Richey appealed the cost award because the trial court committed reversible error in awarding the costs. The trial court committed reversible error because: (1) Petitioners did not file and serve a memorandum of costs on Appellant pursuant to California Rules of Court, Rule 3.1700; (2) No noticed motion for attorney fees was filed; (3) No evidence was presented to the trial court to justify awarding costs or attorney fees prior to it entering judgment; (4) the attorney fee award could not be based upon contract or statute, (5) the arbitration award that was confirmed did not include an award of costs, and (6) the trial court never notified Appellant of its intention to make a cost award prior to entering judgment.

Mr. Richey's appeal as to the $1400 award of costs became moot, when the Court of Appeal reversed the judgment confirming the arbitration award. Thus, a decision as to Mr. Richey's appeal as to the $1400 cost award was never been made.

B. FINDING OF FACTS AND LEGAL REASONING OF ARBITRATOR

The facts on which Appellant relies, are not intended to dispute any facts found by the Arbitrator as he stated in his Final Award. In fact, Appellant's Answer Brief on the Merits is based upon the finding of facts made by the Arbitrator. Since Appellant is not disputing any facts found by the Arbitrator, the issues raised by Appellant are limited to issues of law, and legal error, which resulted in Appellant being denied unwaivable statutory rights under CFRA.

1. The Arbitrator's Jurisdiction Over The Matter Was Limited By The Arbitration Agreement

In the Arbitrator's Final Award he writes:

"*Jurisdiction to arbitrate is established by contract.*" (4CT 642). Thus, the Arbitrator's jurisdiction over the arbitration was limited to, and controlled by, the Arbitration Agreement.

2. The Arbitrator Found That The Appellant Was On Approved CFRA Medical Leave When He Was Terminated

The Arbitrator found that Appellant was on approved CFRA leave when he was terminated by Power Toyota. See Final Award, page 13, line 14, and lines 23-24. (4CT 651). The Arbitrator stated in his award:

"Since Power Toyota applied CFRA/FMLA correctly, the dispute is narrowed to the issue of whether Mr. Richey could be terminated while away from work on a medical disability." (4CT 651).

Appellant suffered a back injury while moving furniture at home. See Final Award, page 4, lines 9 and 10. (4CT 645).

Appellant filed for CFRA and FMLA leave due to his back injury, which was granted and extended several times by Matrix (Matrix was the entity handling the medial leave on behalf of Power Toyota[2]). (4CT 645).

Dr. Finkelstein, Mr. Richey's treating doctor, told Matrix that Appellant was not able to work until May 28, 2008. See Final Award, page 4, lines 17-20. (4CT 645). Appellant's testimony at the arbitration hearing was that Dr. Finkelstein gave Appellant permission to work at his restaurant part-time, while he was unable to work at the car dealership full-time. (4CT 646).[3]

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[2] Arbitrator also used "Power Toyota" in his Final Award on Arbitration Proceedings to identify Mr. Richey's employer. It is undisputed that Power Toyota was used as a d.b.a. by Mr. Wheels, Inc. (4CT 703). Appellant alleged that Power Toyota was an integrated enterprise. (2CT 366-369 and 3CT 422-426).

[3] The Appellate Court found from its review of the record that *"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." Richey v. AutoNation, Inc. (supra)* 210 Cal.App.4th at 1523fn.7.

3. No "Good Faith" Or Fair Investigation Into Mr. Richey's CFRA Leave Was Ever Conducted By Power Toyota

Mr. Gagnet (Mr. Richey's boss), heard "rumors" that Mr. Richey was working at his restaurant, while he was on the CFRA leave. Mr. Gagnet asked some employees to drive to Mr. Richey's restaurant, where they observed him for a few minutes. They testified they observed him hang a sign with a hammer, sweeping, and bending over. Another of Mr. Richey's supervisors, Mr. Barcelo also visited Mr. Richey's fish restaurant for about 20 minutes. Mr. Barcelo testified that in his opinion Mr. Richey was working at the restaurant. See Final Award, page 5, lines 11-20. (4CT 645). This was the extent of Power Toyota's inquiry into Mr. Richey's leave as found by the Arbitrator.

Further, Power Toyota did not attempt to obtain the opinion of a second health care provider pursuant to Government Code § 12945.2(k)(3)(A).

4. Mr. Richey Was Terminated

Mr. Richey was terminated by Power Toyota on May 1, 2008. The reason that Mr. Richey was discharged was based upon the company's findings that Mr. Richey was in violation of policy, to wit: engaging in outside employment while on FMLA/CFRA leave. (4CT 647).

5. The Arbitrator Ruled In His Award That The Outcome Of This Matter Is Determined By Law Rather Than Events

This appeal is about errors in law made by the Arbitrator, and not about disputing facts found by the Arbitrator.

The Arbitrator stated:

"There are many factual disagreements between the two sides of this dispute. But ultimately, the resolution of this matter is governed more by law than events."

See Final Award, page 7, lines 9-10. (4CT 648).

The Arbitrator wrote:

"a substantial portion of the issue in this case can be resolved by applying the legal guidelines provided by the legislature and the appellate court." (4CT 648).

6. The Arbitrator Found Appellant Was On A Valid CFRA Leave, In Good Standing, And Had Provided His Certifications Verifying His Leave

The Arbitrator found that the Appellant was in good standing on CFRA medical leave when he was terminated. The Arbitrator found:

"He was on valid leave and had provided his certifications. Both claimant and Power Toyota were in good standing under CFRA/FMLA" see Final Award, page 14, lines 22-24. (4CT 655).

7. The Arbitrator Concluded That The Issue He Needed To Decide To Determine Liability In This Matter Was Whether Power Toyota Could Terminate Appellant Rather Than Reinstate Him At The Conclusion Of His CFRA Medical Leave

The Arbitrator found the issue he needed to decide to determine liability in this matter, as to Appellant's claim of failure to reinstate from CFRA medical leave, was whether Power Toyota could terminate Appellant while he was on CFRA leave, rather than reinstate him at the conclusion of his leave on May 28, 2008. See Final Award, page 14, lines 25-26. (4CT 655).

a. The Arbitrator Erroneously Used A "Honest Belief" Defense Garnered From Minority Federal Court Decisions Related To FMLA Leave, Ignored California Law As To CFRA Leave, And Did Not Follow The Proper Legal Analysis For A CFRA Failure To Reinstate Claim

The Arbitrator stated in his Final Award that the case law, not the facts, provide the answer to his question as to whether Appellant could be terminated while he was on CFRA leave, instead of reinstating him on May 28, 2008 when he was to return from CFRA leave. See Final Award, page 14, line 28. (4CT 655). The Arbitrator cited to minority opinion federal cases regarding FMLA leave, not CFRA leave, to erroneously contend that there is a "good faith belief" defense to a CFRA claim of failure to reinstate. The Arbitrator used a series of minority federal decisions apply to FMLA to hold that

there was a "good faith" or "honest belief" defense, which also applied to the California law under CFRA. (4CT 656).

The Arbitrator cited to *Medley v. Polk* (10th Cir. 2001) 260 F.3d 1202 and *Kariotis v. Navistar* (7th Cir. 1997) 131 F.3d 672, to find a "good faith" or "honest belief" defense applied to CFRA failure to reinstate claims.

The Arbitrator made a legal error, which denied Appellant an unwaivable statutory right, when he decided:

> *"The case law, as recited above, allows Power Toyota to terminate Mr. Richey if it has an "honest" belief that he is abusing his medical leave and/or is not telling the company the truth about his employment."* See Final Award, page 17, lines 24-26. (4CT 658).

Importantly, the Arbitrator does not believe that there needs to be a finding of actual abuse of medical leave or actually not telling the truth related to medical leave, but only a honest good faith belief by the employer that this was the case.

b. The Arbitrator Never Found Appellant Was Using His Leave Improperly But Only That Power Toyota Had A Good Faith Honest Belief He Was, And The Arbitrator's Legal Analysis Was Based Upon A Good Faith Honest Belief Rather Than Any Actual Wrongdoing By Appellant

It should be pointed out that the Arbitrator based his decision that the Appellant could be fired on a "good faith honest belief", rather than a finding that Appellant was actually doing anything inappropriate while on medical leave.

The Arbitrator stated:

> *"Reasonable minds may debate all day whether Mr. Richey was 'working' at the restaurant or doing activities that were so minimally physical that his conduct was consistent with his doctor's certificates regarding his back."* See Final Award, page 17, line 14, page 18, line 15. (4CT 659).

The Arbitrator also stated:

"Also, it is undisputed that Mr. Richey had a medically verified injury, a doctor's note granting him an off work status, and the approval of Matrix[4] to be on CFRA and FMLA leave." See Final Award, page 12, lines 17-18. (4CT 653).

In short, the Arbitrator never found Appellant was actually doing anything inappropriate, but instead found that there was a reasonable good faith honest belief by Power Toyota that he might be, and according to the Arbitrator this was a sufficient non-discriminatory reason for which Power Toyota could terminate Appellant.

8. The Arbitrator Found Power Toyota Had A Poorly Written Policy That Was Subjectively Applied Related To Accepting Work While On FMLA Leave

The Appellant owned and helped out at his outside business/restaurant before he went out on CFRA leave. (3CT 539-540).

The Arbitrator stated:

"The Handbook comments on outside employment on page 19. (The arbitrator will discuss the application of the Handbook policy regarding outside employment later in this award)." Final Award, page 5, line 3. (4CT 646).

Power Toyota's policy as to FMLA leave stated:

"You are not allowed to accept employment with another company while you are on approved FMLA leave." AutoNation Handbook, page 19. (2CT 212).

However, Appellant did not accept employment with another company while he was on approved leave. Appellant was not an employee, but was the owner of a restaurant. See Final Award, page 17, lines 1-3. (4CT 658). Beyond this, the policy did not state it applied to CFRA. In other words, the policy was silent as to CFRA leave.

When referring to Power Toyota's policy that *"You are not allowed to accept employment with another company while you are on approved FMLA leave,"* the Arbitrator stated:

---

[4] Matrix was the entity that Power Toyota used to handle and administer medical leaves of its employees as an agent of Power Toyota. See Final Award, page 4, lines 19-20. (4CT 645).

"The arbitrator readily concedes that this is a poorly written policy." See Final Award, page 16, line 26 to page 17, line 1. (4CT 657-658).

The Arbitrator found that several witnesses testified, as to Power Toyota' FMLA policy, to include Mr. Vano,[5] that there were circumstances where Power Toyota would allow employees to be involved in other endeavors, while on FMLA leave, depending on the nature of the endeavors. (4CT 653).

The Arbitrator found that:

"Mr. Vano explained, if an employee came to management and discussed the nature of the other job, a determination would be made whether the employee's duties at Power would be adversely affected or not, and permission would be granted or denied accordingly." See Final Award, page 17, lines 10-12. (4CT 658). Nowhere did the Arbitrator find that the policy as stated by Mr. Vano was in writing or that Appellant was even given notice of it.

The Arbitrator found that Power Toyota's actual FMLA policy as applied, was subjective, discretionary, and was not universally applied to all employees. See Final Award, page 16, line 21 to page 17, line 12. (4CT 657-658).

The Arbitrator acknowledged that Appellant was vigorously arguing that a policy that targeted employees taking legally protected FMLA or CFRA leave, which was discretionary, not universally applied, and was vague and ambiguous, was per se illegal and a violation of CFRA. Final Award, page 16, lines 21-22. (4CT 657; also see 3CT 430-453).

C. The Arbitrator Showed A "Manifest Disregard For The Law," Because He Was Presented The Applicable Law, But Chose To Ignore It When Making The Arbitrator's Final Award

In Appellant's closing brief, Appellant apprised the Arbitrator of the applicable law, however, the Arbitrator choose to ignore it when making the Arbitrator's Final Award. The Arbitrator committed legal error, and failed to do the necessary legal

[5] It is undisputed that Mr. Vano was the Senior Director of Human Resources and could create regional policy. See Respondents' Closing Brief on page 14, lines 18-19. (3CT 492).

analysis to determine liability in Appellant's case as to each of Appellant's causes of action. Further, other than Appellant's failure to reinstate from CFRA leave claim, the Arbitrator failed to make the necessary factual findings to determine liability as to Mr. Richey's other CFRA and FEHA claims. (1CT 76-136, and 3CT 537-556). Moreover, because of the legal errors committed by the Arbitrator, his failure to perform proper legal analysis, and his failure to find facts necessary to determine liability, the effect was essentially denying Appellant a legitimate arbitration hearing on the merits. Instead, the Arbitrator did an end run around Appellant's statutory rights by erroneously creating a "honest belief defense" to a failure to reinstate from CFRA medical leave cause of action. (3CT 552-554). Beyond this, the Arbitrator's legal analysis was so flawed as to the rest of Appellant's FEHA causes of action that the Arbitrator made the wrong conclusions as to liability.

The Arbitrator was informed that the written policy in Power Toyota's employee handbook, regarding FMLA leave targeted persons who took legally protected medical leave, and therefore was a per se violation of the California Family Rights Act, Government Code § 12945.2, because it discriminated against and retaliated against employees specifically who took legally protected medical leave. The Arbitrator was apprised of the law, Government Code § 12940(f) and 2 CCR § 7297.7 which makes it illegal to discriminate against a person who exercises their right to take CFRA leave. (3CT 411-412). The Arbitrator was also apprised of the FMLA regulations incorporated by 2 CCR § 7297.10, to include 29 CFR § 825.220(a), prohibiting interference or restraining or denial of any right provided by the Act. (3CT 446-447). However, the Arbitrator ignored these issues, and failed to do any legal analysis to determine the legality of the Power Toyota's FMLA policy as stated in the Power Toyota's employee handbook.

The Arbitrator was informed that Appellant was alleging that Power Toyota had no universal policy regarding an employee working while on medical leave. (3CT 432). In fact, the Arbitrator wrote:

"Several management witnesses, such as Mr. Vano, agreed that there were circumstances where Power Toyota would allow employees to be involved in other endeavors; it would depend on the nature of the other activity." (3CT 553).

The Arbitrator agreed that:

"Under CFRA/FMLA it is "unlawful for any employer to "interfere restrain, or deny the exercise of or the attempt to exercise, any right provided under CFRA/FMLA."[6] (3CT 550).

However, the Arbitrator never made a finding, or analyzed the legality of Power Toyota's policy that targeted employees taking FMLA leave, and whether it interfered with, restrained, denied the exercise of CFRA rights, or retaliated against employees for taking CFRA leave. For example, the Appellant owned and helped out at his outside business/restaurant before he went out on CFRA leave. (3CT 539-540). The Arbitrator never analyzed or made findings as to how the Appellant could participate in running his business/restaurant before he went out on CFRA leave, but then during the CFRA leave was not allowed to do so. Even though this policy was a clear restraint on taking FMLA/CFRA leave because Power Toyota's policy interfered with Appellant taking CFRA leave. The Arbitrator ignored, and never explained why such a policy was not a restraint on Appellant exercising his CFRA rights.

The Arbitrator was apprised of the elements that must be found to determine whether unlawful retaliation occurred for Appellant taking CFRA leave. The Arbitrator was provided the CACI instructions for retaliation. (i.e. CACI instruction 2620) (3CT 451-453). However, the Arbitrator failed to do a proper analysis based upon Appellant taking CFRA leave, to determine whether there was unlawful retaliation in violation of FEHA, based upon making findings as to the proper legal elements like those found in CACI Instruction 2620. The Arbitrator never found whether a "motivating reason" for Appellant's termination was him taking CFRA leave, but chose to ignore making this necessary finding of fact to determine unlawful retaliation, before making his Final Award.

Instead, the Arbitrator wrote in his Final Award:

"The McDonnell Douglas [411 U.S. 792 (1973)] framework is "now routine" and provides the proper approach for claims under Title VII." See Final Award, page 14, lines 10 and 11. (4CT 655). As will be shown below this is legal error because this analysis is used in summary judgment situations, and never should be used to determine to determine liability as to a failure to reinstate claim under CFRA, or even discrimination claims.

The Arbitrator was informed that Appellant was alleging that Power Toyota failed to meet the applicable notice requirements regarding Appellant's CFRA leave, however, the Arbitrator choose to ignore it and failed to make any factual findings or do any legal analysis on this issue. (3CT 431-432, and 433). In fact, the Arbitrator acknowledged Appellant's right to receive notice of his rights by stating:

> *"The employer must provide information to the employee on his or her rights to leave under CFRA and FMLA."*

Further, the Arbitrator wrote as to the policy in the employee handbook:

> *"The arbitrator readily concedes that this is poorly written. Mr. Richey testified he read this section and came to the conclusion he was not violating company policy, because he had not accepted employment with another company but was the owner of a restaurant."* (3CT 553).

The Arbitrator found that Appellant was only provided notice that his being at his business/restaurant, while on CFRA medical leave, was a violation of company policy, only after he was taking the leave. (3CT 554). However, the Arbitrator never explained or analyzed how providing notice of employee rights and responsibilities so late after the commencement of the leave, was sufficient under the CFRA/FMLA regulations presented to him in Appellant's closing brief. (3CT 431-432, and 433). Once again the Arbitrator chose to ignore the issue.

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[6] See Government Code § 12945.2(t) by amendment in 2012.

The Arbitrator was informed of the necessary elements to determine liability for a failure to reinstate claim pursuant to CFRA. (3CT 434-442). The Arbitrator was apprised of the two statutory defenses for a failure to reinstate claim after CFRA medical leave. (3CT 442-443). Additionally, the Arbitrator was informed that there was no "good faith" honest mistake defense to CFRA violations. The Appellant's closing brief stated:

> *"There is no "good faith" defense, or honest mistake defense, to a CFRA violation. The permissible defenses are stated in 2 CCR § 7297.2(c). Plaintiff is bringing his claim pursuant to CFRA, which does not recognize a good faith defense. Beyond this even most federal courts reject a "good faith" honest mistake defense to a FMLA violation. Most federal courts hold the employer's subjective intent is irrelevant in interference claims. The courts hold FMLA rights are substantive floors for employer conduct, establishing employee entitlements. The employee only need show the employer denied such an entitlement. Diaz v. Fort Wayne Foundry Corp. (7th Cir. 1997). 131 F.3d 711, 712-713; Edgar Corp. v. JAC Products, Inc. (6th Cir. 2006) 443 F.3d 501, 508 and 511; also see Xin Liu v. Amway Corp. (9th Cir. 347 F.3d 1125, 1135, also see Bachelder v. American West Airlines, Inc. (9th Cir. 2001) 259 F.3d 1112, 1130."* (3CT 444).

The Arbitrator failed to address the law cited by Appellant stating that there was no honest mistake/belief defense, to include case law that applied directly to CFRA medical leave, and instead chose to ignore this law when making his Final Award.

Appellant alleged that Power Toyota failed to accommodate Appellant for a disability and failed to enter into an interactive process with Appellant (1CT 15-17, and 3CT 444-445). However, the Arbitrator failed to making any findings as to these causes of action, and chose to ignore them.

The Arbitrator bypassed all the necessary factual findings and the necessary factual analysis, to determine liability in a FEHA case as proposed in CACI Instructions, and instead circumvented it all with his honest belief defense.

D. Appellant Made A Motion To Vacate The Arbitrator's Final Award Pursuant to C.C.P. § 1286.2(a)(4)

The Appellant made a motion to vacate the Arbitrator's Final Award pursuant to C.C.P. § 1286.2(a)(4) to the trial court. Appellant did not argue that there were any errors as to any findings of fact made by the Arbitrator, but only argued that based upon the Arbitrator's findings of fact, the Arbitrator committed several legal errors denying Mr. Richey his unwaivable statutory right to reinstatement from his qualifying CFRA leave, and that the Arbitrator failed to issue a written arbitration decision that revealed the essential findings of fact as to each of Appellant's causes of action being brought against Power Toyota, as required by *Armendariz v. Foundation Health Psychcare Services*, Inc. (2000) 24 Cal.4th 83, 107. (Appellant's motion with attached exhibits 1-7, 2 CT 263 - 3 CT 556; Appellant's reply brief with attached exhibit 8, 4 CT 669-726). Appellant argued:

> *"[T]he Arbitrator acted in excess of his authority by issuing a Final Award without stating the essential findings and conclusions of law, as to each of plaintiff's causes of action, on which his award was based. See Armendariz v. Foundation Health Psychcare Services, Inc. (supra) 24 Cal.4th at 107. Thus, the legal error by the Arbitrator goes to all plaintiff's causes of action, not just the failure to reinstate claim, and the entire Arbitrator's Final Award should be vacated.*
>
> *The only cause of action that the Arbitrator gives sufficient facts to determine his essential findings and conclusions on which the award is based, is for Plaintiff's Failure To Reinstate Claim, based upon CFRA. However, the findings and conclusions in the Final Award show conclusively that the Arbitrator*

committed legal errors that denied plaintiff his statutory right of reinstatement under CFRA from his medical leave."

(4 CT 672-673).

III.

LEGAL ARGUMENT

In the present case, the Arbitrator's legal errors, to include the acceptance of the "honest belief" defense to Mr. Richey's CFRA failure to reinstate claim, effectively denied Mr. Richey a hearing on the merits of his CFRA claims, and denied his statutory right to reinstatement from his CFRA leave. Additionally, the Arbitrator's failure to make findings of fact and conclusion of law as to each cause of action brought by Mr. Richey, also effectively denied Mr. Richey a hearing on the merits of his claims because the necessary findings were never made.

"[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."

Pearson Dental Supplies, Inc. v. Superior Court (Turicos)(2010) 48 Cal.4th 665, 680. The Arbitrator's acceptance of an erroneous "honest belief" defense to Mr. Richey's CFRA failure to reinstate claim directly denied Mr. Richey his unwaivable statutory right, and was a more substantive and more a direct denial of a statutory right, than in *Pearson Dental* where the plaintiff was denied his statutory rights because of an erroneous procedural determination that his claims were time barred. *See Id.* Moreover, as in *Pearson Dental*, Mr. Richey was no less denied a hearing on the merits because of erroneous legal defenses, improper legal analysis, and failure to find facts necessary to determine liability as to each cause of action.

The Arbitrator's Final Award was based upon legal errors, which denied Appellant his statutory rights under CFRA.

"[C]ourts may, indeed must, vacate an arbitrator's award when it violates a party's statutory rights or otherwise violates a well-defined public policy." *Department of Personnel Admin. v. Calif. Correctional Peace Officers Assoc.* (2007) 152 Cal.App.4th 1193, 1200 (Scotland, P.J., with Nicholson and Cantil-Sakauye, JJ. concurring in opinion). Thus, the failure of the trial court to vacate the Arbitrator's Final Award, which denied Mr. Richey his unwaivable statutory rights under FEHA was legal error, which is appealable.

A. A De Novo Standard of Review Applies

Appeals regarding whether an arbitrator exceeded his powers are reviewed de novo. *Kelly Sutherlin McLeod Architecture, Inc. v. Michael D. Schneickert* (2011) 194 Cal.App.4th 519, 528. In the present case, the review should be conducted de novo.

B. The Arbitrator's Legal Errors That Denied Appellant Unwaivable Statutory Rights Under CFRA Are Appealable.

In *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 101, the California Supreme Court stated,

"it is evident that an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA."

In *Armendariz*, the court began its analysis by *"acknowledging the difficulties inherent in arbitrating employees' statutory rights."* *Id. Armendariz* delineated conditions that must be present for a court to compel arbitration of a FEHA case. The *Armendariz* Court held that an arbitrator deciding FEHA claims must issue a written arbitration decision, so that there will be a basis to perform a limited judicial review. *Id.* at 107. The California Supreme Court stated:

"[F]or such judicial review to be successfully accomplished, an arbitrator in a FEHA case must issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based." Id.

Thus, an arbitrator must issue a written arbitration decision to allow for limited judicial review of FEHA claims. *Id. at* 106-107; *also see Pearson Dental Supplies, Inc. v. Superior Court (supra)* 48 Cal.4th at 679.

In *Armendariz v. Foundation Health Psychcare Services, Inc. (supra)* 24 Cal.4th at 106, the court clarified that *Moncharsh v. Heily & Blasé* (1992) 3 Cal.4th 1, did not prohibit an appeal when an arbitrator's error would deny a party a statutory right. *In Armendariz v. Foundation Health Psychcare Services, Inc.* (*supra*) 24 Cal.4th at 106, the California Supreme Court stated:

> *"In Moncharsh we acknowledged that judicial review may be appropriate when "granting finality to an arbitrator's decision would be inconsistent with the protection of a party's statutory rights." Id.*

In *Pearson Dental Supplies, Inc. v. Superior Court (supra)* 48 Cal.4th at 677-679 (citing *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 106-107), the court held that there is a limited review of arbitration awards in FEHA cases. Moreover, the California Supreme Court held that a court may vacate an arbitration award pursuant to C.C.P. § 1286.2(a)(4) for legal error that denies a party an unwaivable statutory right under FEHA. *See Id.* at 680. In *Pearson Dental*, the court pointed out that the arbitrator's written decision should not be viewed as "*an idle act*", but rather a precondition to adequate judicial review of the award so as to enable employees subject to a mandatory arbitration agreements to vindicate their rights under FEHA. *Id.* at 679.

Other courts have echoed the principles set forth in *Armendariz* and *Pearson Dental*, that courts may vacate an arbitration award when the arbitrator exceeds his powers by "*issuing an award that violates a well-defined public policy or statutory right.*" *Kelly Sutherlin McLeod Architecture, Inc. v. Michael D. Schneickert* (*supra*) 194 Cal.App.4th at 531.

C.C.P. § 1286.2 requires a court to vacate an arbitration award if it determines:

> *"The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision on the controversy submitted."* See C.C.P. § 1286.2(a)(4)

In the present case, without judicial review the mandatory arbitration agreement would serve as a vehicle to deny Mr. Richey his statutory rights found in CFRA. Mr.

Richey had a statutory right under CFRA to be reinstated after his medical leave, and be protected from interference with his CFRA rights. Mr. Richey was denied his unwaivable CFRA rights.

1. An Arbitration Award Should Be Vacated When Inconsistent With The Protection Of A Party's Statutory Rights

An arbitration award containing a legal error that violates an unwaivable statutory right should be vacated as being in excess of the arbitrator's power. *See Pearson Dental Supplies, Inc. v. Superior Court* (*supra*) 48 Cal.4th at 680; *Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 272. In such cases, the court must review the arbitrator's award sufficiently to ensure that the arbitrator complied with the requirements of the relevant statute. *Pearson Dental Supplies, Inc. v. Superior Court* (*supra*) 48 Cal.4th at 679 (citing *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 106-107).

C. The Manifest Disregard Of The Law Standard Proposed by Petitioners, Would Not Ensure That Arbitrators Comply With The Requirements Of FEHA, So Would Not Be A Sufficient Standard Under *Armendariz*

Petitioners propose a manifest disregard of the law standard be adopted to review arbitration awards. However, such a standard would not comply with the requirements set forth in *Armendariz,* that the judicial review be ***"sufficient to ensure that arbitrators comply with the requirements of the statute"*** *Armendariz v. Foundation Health Psychcare Services, Inc.* (*supra*) 24 Cal.4th at 107.

1. The Legal Standard For Judicial Review Must Ensure That An Arbitrator Comply With The Requirements Of FEHA And Not Through Legal Error Deny A Complainant An Unwaivable Statutory Right.

Pursuant to C.C.P. 1286.2(a)(4) the California Supreme Court has held that an arbitrator exceeds his powers when the arbitrator's award "*would be inconsistent with the protection of a party's statutory rights.*" *See Pearson Dental Supplies, Inc. v. Superior*

Court (supra) 48 Cal.4th at 676 (citing to *Moncharsh v. Heily & Blasé* (1992) 3 Cal.4th 1, 32).

The consistent legal standard should be that an arbitrator exceeds his powers pursuant to C.C.P. 1286.2(a)(4), and then his arbitration award should be vacated, when the arbitrator's written legal analysis[7] clearly denies the complainant a statutory right under FEHA, and the legal error(s) prevent the arbitration proceeding from fairly vindicating the claimant's statutory rights. Further, as in the present case, if the arbitration agreement denies the arbitrator the authority to resolve disputes on any other basis, other than the law governing the claims of the claimant, then the authority of the arbitrator must be restricted to following applicable law, and if the arbitrator exceeds his authority by using inapplicable law, or creating erroneous defenses to a claim that denies the claimant an unwaivable statutory right, then arbitrator exceeds his powers pursuant to C.C.P. 1286.2(a)(4), and his award should be vacated.

Based upon this proposed standard, the Arbitrator's Final Award should be vacated in the present case.

a. The Arbitrator In FEHA Cases Cannot Be Allowed To Make Up His Own Law, Ignore Regulations, And Ignore California Precedent

It would be a violation of this principle set forth in *Armendariz* and *Pearson Dental* to allow an arbitrator to create erroneous legal defenses, fail to make relevant legal findings necessary to determine liability, fail to apply California law, and/or ignore disputed legal issues relevant to liability in the arbitrator's written legal analysis. *See Cable Connection, Inc. v. Direct TV, Inc.* (2008) 44 Cal.4th 1334, 1354, fn. 14 (citing to *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 106). Moreover, any standard for vacating an arbitrator's award, must meet the minimum

[7] The "*arbitrator in a FEHA case must issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based.*" *Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83, 107.

criteria set forth in *Armendariz* of ensuring that the arbitrator complies with the requirements of the statute, FEHA. *Id.*

b. The Denial Of Mr. Richey's Statutory Rights Is More Egregious Than In *Pearson Dental*, Because There Was An Arbitration Agreement Stating That The Arbitrator Shall Not Invoke Any Basis For His Award Other Than Controlling Law

According to, *Moncharish v. Heily & Blasé* (1992) 3 Cal.4th 1, 8, the scope of arbitration is a matter of agreement, and the powers of the arbitrator are limited and circumscribed by the agreement. As Justice Baxter observed in the opening paragraph of his dissenting opinion in *Pearson Dental* the parties to the mandatory employment arbitration agreement in that case, unlike here, "*did not agree to arbitral conformity with rules of law.*" *See Pearson Dental Supplies, Inc. v. Superior Court (supra)* 48 Cal.4th at 683. Here, the arbitration agreement, drafted and imposed by Power Toyota 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'*)." (2CT 287).

Any standard for Judicial Review should at minimum uphold the standard that was bargained for in the arbitration agreement. "An arbitrator's powers derive from, and are limited by, the agreement to arbitrate." *Kelly Sutherlin McLeod Architecture, Inc. v. Michael D. Schneickert (supra)* 194 Cal.App.4th at 528. Considering the terms of Power Toyota's mandatory arbitration agreement, the judicial standard of review in the present case, should reflect the terms of the mandatory arbitration agreement, which was used to compel Mr. Richey into arbitration. It would be completely unjust, unreasonable, and inequitable to use the terms in the arbitration agreement to compel Mr. Richey into

arbitration, and then when the terms benefit Mr. Richey to deny him the benefit of those terms (i.e. the requirement that California law would be adhered to).

D. The Court Should Not Adopt The Honest Belief Defense

As recognized by the Appellate Court:

"*Although Kariotis*[*v. Navistar Internat. Transport* (7th Cir. 1997) 131 F.3d 672] *is still followed in the Seventh Circuit (citation omitted), 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. See Richey v. AutoNation, Inc. (supra)* 210 Cal.App.4th at 1531.

1. Adopting A Good Faith Belief Defense To CFRA Failure To Reinstate Claims Would Completely Undermine The CFRA

In the present case, Petitioners argue that California should adopt a good faith honest belief defense to CFRA failure to reinstate or interference claims, which has been rejected by most federal courts. Adopting an honest good faith belief defense to CFRA claims would completely undermine the law, and be a complete mistake for several foreseeable reasons.

a. Medical Leave Is An Entitlement, Which An Employer Should Not Have The Power To Undermine

In *Edgar v. JAC Products, Inc.* (6th Cir. 2006) 443 F.3d 501, 507, the court explained the entitlement theory, which is a distinct theory of recovery under FMLA. The *Edgar* court stated as to the entitlement theory or right to reinstatement:

"*Under the entitlement theory (which some courts refer to as the interference theory), 'the issue is simply whether the employer provided its employee the entitlements set forth in the FMLA—for example, a twelve-week leave or reinstatement after taking a medical leave.' (citation omitted). The right to reinstatement guaranteed by 29 U.S.C. § 2614(a)(1) is the linchpin of the entitlement theory because 'the 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.'" Id.

The *Edgar* court further explains that:

"The employer's intent is not a relevant part of the entitlement inquiry." Id." The *"issue is the right to an entitlement, the employee is due the benefit if the statutory requirements are satisfied, regardless of the intent of the employer." Id.* at 508.

b. An Honest Good Faith Belief Allows An Employer To Play Doctor, And To Second Guess The Employee's Doctor

Mr. Richey was certified by his doctor that he was unable to work for Power Toyota until May 28, 2008. (4CT 645). The only person who should be able to determine if Mr. Richey was able to work at Power Toyota is his doctor, or if the employer questions the validity of the leave the employer could obtain a second medical opinion pursuant to Government Code § 12945.2(k)(3). It is absurd that an employer's honest, good-faith, belief as to an employee's ability to work at the job from which he is taking the leave, could be the bases for a termination, when a doctor certifies the employee is unable to work at the position from which he is taking the leave. Such a defense would allow the employer to play doctor.

Additionally, what an employee is capable of doing during a CFRA medical leave should be determined by a doctor, not the employer. It is just as absurd that an employer should be able to second guess a doctor's limitations on an employee as to how, when, where and under what conditions, an employee can work a second, different job, while on CFRA leave. The honest good faith belief defense is essentially license for ignorant employers, as long as their ignorance is sincere, to fire employees so long as they honestly believe the employee is not properly using the medical leave, regardless of the opinion of the employee's doctor. Such a defense would be a disastrous idea.

Certainly, it would be poor policy to empower employers to second guess doctors, and terminate employees based upon the employer's non-medical opinion as to what employees should, or should not, be doing while on leave for a serious medical condition.

Especially, since specific information about the employee's serious medical condition is protected by the employee's right of privacy. 2 Cal. Code Reg. § 7297.4(b)(2)(A) limits what an employer can ask about a serious medical condition for which an employee is requesting medical leave.

CFRA provides employers a procedure under Government Code § 12945.2(k)(3) to deal with situations when the employer has reason to doubt the validity of a medical leave. As determined in *Avila v. Continental Airlines, Inc.*(2008) 165 Cal. App.4th 1237, 1259-1260, the rule advocated by Petitioners would encourage employers to remain ignorant of both the law and the facts relating to the CFRA leave, because their ignorance, and/or ignorant beliefs, could be used as a defense to terminate an employee on CFRA leave.

c. An Employee's Serious Medical Condition Is Private, And An Employer Should Not Be Allowed To Second Guess A Doctor Based Upon A Superficial Investigation

CFRA is written to protect an employee's privacy related to specifics about his/her serious medical condition. CFRA does not envision an employer making surreptitious inquires to determine the medical status of an employee. CFRA intends doctors to make determinations about serious medical conditions. Furthermore, the good faith beliefs or lay opinions by the employer about the employee's serious medical condition are irrelevant. Pursuant to Government Code 12945.2(k)(1),

> *"An employer may require that an employee's request for leave because of the employee's own serious health condition be supported by a certification issued by his or her health care provider. That certification shall be sufficient if it includes all of the following:*
>
> *(A) The date on which the serious health condition commenced.*
>
> *(B) The probable duration of the condition.*
>
> *(C) A statement that, due to the serious health condition, the employee is*

unable to perform the function of his or her position."

Pursuant to 2 Cal. Code Reg. § 7297.0(a)(2),

"For medical leave for the employee's own serious health *condition, this certification need not, but may, at the employee's option, identify the serious health condition involved. It shall contain:*

(A) The date, if known, on which the serious health condition commenced,

(B) The probable duration of the condition, and

(C) A statement that, due to the serious health condition, the employee is unable to work at all or is unable to perform any one or more of the essential functions of his or her position."

Importantly, 2 Cal. Code Reg. § 7297.4(b)(2)(A) states:

" If the employer has reason to doubt the validity of the certification provided by the employee for his/her own serious health condition, the employer may require, at the employer's own expense, that the employee obtain the opinion of a second health care provider, designated or approved by the employer, concerning any information in the certification. The health care provider designated or approved by the employer shall not be employed on a regular basis by the employer.

1) The employer may not ask the employee to provide additional information beyond that allowed by these regulations.

Therefore, an employer when it comes to medical leave can only request information as allowed by 2 Cal. Code Reg. § 7297.0(a)(2). Pursuant to 2 Cal. Code Reg. § 7297.4(b)(2)(A), the employer is prohibited from asking specifics about an employee's serious medical condition, because CFRA contemplates opinions and conclusion about the employees serious medical condition to be made by doctors, not the employer. In fact, it is none of the employer's business as to what the employee's doctor will allow the employee to do while he/she is on medical leave.

E. CFRA Medical Leave Is An Entitlement And There Is No Honest Good Faith Defense

There is no honest good faith belief defense to a CFRA leave. California Courts and the 9th Circuit clearly use an entitlement theory when dealing with a claim of failure to reinstate. In *Faust v. California Portland Cement Company* (2007) 150 Cal.App.4th 864, 879, the court stated:

> *"A interference claim under the FMLA (and thus CFRA) does not involve the burden shifting analysis articulated by the United States Supreme Court in McDonnell Douglas v. Green (1973) 411 U.S. 792. As stated in Bachelder v. America West Airlines, Inc. (9th Cir. 2001) 259 F.3d 1112, 1131 (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.' (Xin Liu v. Amway Corp. (9th Cir. 2003) 347 F.3d 1125, 1135)."*

In *Avila v. Continental Airlines, Inc.*(2008) 165 Cal. App.4th 1237, 1260, the court stated:

> *"[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. (§12945.2, subd. (l)(1); Cal. Code Regs., tit. 2, § 7297.7, subd. (a); Dudley v. Department of Transportation (2001) 90 Cal.App.4th 255, 264"

1. The *Xin Liu* Case Specifically Holds That In CFRA And FMLA Cases There Is No Good Faith Honest Belief Defense

In *Xin Liu v. Amway Corp.* (9th Cir. 2003) 347 F.3d 1125, 1129, the court does an analysis specific to both FMLA and CFRA medical leave entitlements (this case was followed by *Faust v. California Portland Cement Company* (*supra*) 150 Cal.App.4th 864, 879). In footnote 4 of the *Xin Liu* case the court states:

"*Since CFRA adopts the language of the FMLA and California state courts have held that the same standards apply, we refer to FMLA leave only for the remainder of this opinion with the understanding that CFRA leave is also included.*" *Id.* at 1132.

Thus, the *Xin Liu* case analysis applies equally to FMLA and CFRA. As to a good faith honest belief defense to a CFRA claim, the *Xin Liu* court states:

"An employer's good faith or lack of knowledge that its conduct violates FMLA does not protect it from liability." (emphasis added). *Id.* at 1135.

Thus, the *Xin Liu* court states there is no honest, good-faith belief, defense to a CFRA failure to reinstate claim. *Id.* This is the law in California as to CFRA.

2. The Court In *Faust v. California Portland Cement Company* (2007) 150 Cal.App.4th 864 Also Looks To *Bachelder v. America West Airlines, Inc.* (9th Cir 2001) 259 F.3d 1112 For The CFRA Analysis As To A Failure To Reinstate Claim

In *Bachelder v. America West Airlines, Inc.* (9th Cir 2001) 259 F.3d 1112, 1130, the court holds that:

"[T]he employer's good faith or lack of knowledge that its conduct violated the Act is, as a general matter, pertinent only to the question of damages under the FMLA, not to liability."

Furthermore, the court states:

"An employer who acts in good faith and without knowledge that its conduct violated the Act, therefore, is still liable for actual damages regardless of its intent."

In footnote 19, the *Bachelder* Court states:

"That an employer's good-faith mistake as to whether its action violates the law is not a defense to liability is, similarly, commonplace in other areas of employment law."

As shown above, the Arbitrator and trial court erred when they applied a good faith honest belief defense to Appellant's claim that he was not reinstated to his job in violation of CFRA. Moreover, the error of the Arbitrator and trial court denied Appellant his unwaivable statutory right to reinstatement pursuant to CFRA.

The Arbitrator should have simply followed the CACI instruction 2600 for a CFRA failure to reinstate claim, but did not, and in his failure to do so denied Appellant an unwaivable statutory right to be reinstated from qualifying CFRA medical leave, and exceeded his authority by not following controlling law.

F. The Arbitrator Erred And Denied Appellant His Statutory Rights Under CFRA Because He Failed To Do The Proper Legal Analysis For Medical Leave To Determine Liability Of Power Toyota

The Arbitrator wrongly applied case law related to Family Care Leave (leave taken to care for a spouse, child or parent) under CFRA, to the present case, Mr. Richey's medical leave. In so doing the Arbitrator wrongly analyzed Appellant's CFRA medical leave claims based upon the intended purpose of Appellant's leave, as opposed to the proper analysis for CFRA medical leave which is concerned with whether an employee was unable to work in the job from which they took the leave. The Arbitrator in doing the wrong legal analysis stated:

"An employer may terminate an employee if it concludes a person on CFRA/FMLA is not using it for its intended purpose."

To support his misguided contention that an employer can terminate an employee for using CFRA medical leave for other than its intended purpose, the Arbitrator cited to

three cases involving family care leave, and not medical leave (i.e. *Moughari v. Pblix* (N.D. Fla. 1998) 1998 U.S. Dist. LEXIS 8951, *Nelson v. United Tech.* (1999) 74 Cal.App.4th 597, and *McDaneld v. Eastern Municipal* Water Dist. (2003) 109 Cal.App.4th 702. See Final Award, page 15, lines 4-15. (4CT 656). The fact that the Arbitrator looked to family care leave cases to support his contention that an employee taking medical leave, as was Appellant, can be terminated if an employer has a good faith honest belief that they are not using the leave for the intended purpose is very significant to understand how the Arbitrator performed the wrong legal analysis.

The intended purpose of a medical leave requires a medical opinion, and only a doctor's opinion would be relevant as to what an employee could or could not do while on medical leave. As shown below, according to Government Code § 12945.2 there is no intended purpose for medical leave under CFRA, the issue is whether the employee is unable to work in the position from which he is taking the leave.

1. Family Care Leave Under CFRA Is Taken To Care For A Parent, Spouse, Or Child

CFRA, Cal Government Code § 12945.2(c)(3) states:

"Family care and medical leave" means any of the following:

(A) Leave for reason of the birth of a child of the employee, the placement of a child with an employee in connection with the adoption or foster care of the child by the employee, or the serious health condition of a child of the employee.

(B) Leave to care for a parent or a spouse who has a serious health condition.

(C) Leave because of an employee's own serious health condition that makes the employee unable to perform the functions of the position of that employee, except for leave taken for disability on account of pregnancy, childbirth, or related medical conditions."

The cases that the Arbitrator cites for his contention that that an employer can terminate an employee for using CFRA leave for other than its intended purpose all relate to Family Care leave, which is taken for an intended purpose. The intended purpose for taking

family care leave under CFRA is stated at Government Code § 12945.2(c)(3)(A) and (B). Family care leave under CFRA is taken for the purpose of caring for a parent, spouse or child who has a serious health condition. While medical leave under CFRA is taken not for a particular purpose, but pursuant to Government Code § 12945.2(c)(3)(C), because of the employee's own serious health condition "***that makes the employee unable to perform the functions of the position of that employee***." (emphasis added).

In *Moughari v. Pblix* (North Dist. Fla. 1998) 1998 U.S. Dist. LEXIS 8951, 1-4, the employee took four weeks of FMLA leave because his spouse was injured in a car accident when she was pregnant and continued to have medical problems after the birth of the baby. Thus, this leave was family care leave for the purpose of caring for his wife and new baby.

In *Nelson v. United Tech.* (1999) 74 Cal.App.4th 597, 603, the employee took leave for the purpose of caring for his spouse who was having epileptic seizures. The CFRA statutory claim was apparently brought in the form of a discrimination claim, as opposed to a failure to reinstate claim as in the present case, because the court analysis the plaintiff employee's claim using the *McDonnell Douglas Corp.* v. *Green* (1973) 411 U.S. 792, 802, shifting burden analysis.[8] *See id.* at 613-614. Thus, this case is also in no way analogous to Appellant's case because Appellant's case involves a failure to reinstate claim and medical leave, not family care leave. In *Nelson*, the leave was taken for the purpose of caring for a spouse. *Id.* at 603.

In *McDaneld v. Eastern Municipal* Water Dist. (2003) 109 Cal.App.4th 702, 706, the plaintiff employee took CFRA family care leave for the purpose of allegedly taking care of his father and spouse. The appeals court accepted findings that the purpose of the plaintiff employee's leave, was for reasons other than caring for his father or spouse. *Id.* at 706. In *McDaneld*, the case is about an employee being caught using family leave when he had stopped caring for the family member that he was taking the leave to care

[8] If the plaintiff employee brought a claim under CFRA for failure to reinstate or interference with his CFRA rights, the court should not have used a shifting burden analysis pursuant to the

for. Furthermore, the employee plaintiff did not dispute the employer defendant's allegation of not using the leave to care for his father. The case does not find there is a good faith defense that an employer can use to terminate an employee taking CFRA leave. Additionally, this case is a non-analogous family leave case. *Id.* at 707.

The Arbitrator wrongly analyzed Appellant's medical leave case as it was being taken for a particular purpose like in family care leave cases. The CFRA family leave cases are different from medical leave cases because family leave is taken to care for a spouse, parent, or child, while medical leave is taken because the employee has a serious health condition that causes the employee to be unable to work in the position from which they are taking the leave. see Government Code § 12945.2(c)(3).

Both the Arbitrator and the trial court erred, and denied Appellant his unwaivable statutory rights under CFRA, by holding that a good faith honest belief that the Appellant was not using his leave for the intended purpose was a valid legal defense to a CFRA claim of failure to reinstate from qualifying medical leave. In a medical leave case the issue is whether the employee is unable to work in the position from which he/she is taking the leave. see Cal Government Code § 12945.2(c)(3)(C); *also see Lonicki v. Suttner Health Central* (2008) 43 Cal.4th 201, 216. As opposed to a CFRA family care leave which is taken for the purpose of caring for a spouse, parent of child. See Government Code § 12945.2(c)(3)(A) and (B).

2. When Taking Medical Leave Under CFRA The Issue Is Whether An Employee Is Unable To Work In The Position That They Are Taking The Leave From

The California Supreme Court case, *Lonicki v. Suttner Health Central* (2008) 43 Cal.4th 201, delineates the law when an employee goes on medical leave while he has a second job, which he continues to work at. Moreover, the *Lonicki* case clearly shows that the reason an employee takes medical leave is because they cannot perform their assigned job, as opposed to an intended purpose.

McDonnell Douglas Corp. v. Green Case. See *Faust v. California Portland Cement Company* (2007) 150 Cal.App.4th 864, 879.

"Under both the CFRA and its federal counterpart, the FMLA, an employee is entitled to medical leave when, because of a serious health condition, the employee cannot perform the assigned job's duties." Id. at 213.

The *Lonicki* Court clearly holds that the analysis to determine whether an employee is qualified for protection under CFRA is based on determining whether the employee is capable of performing the job from which they are requesting CFRA medical leave. *Id.* at 214-215. The California Supreme Court states:

"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?" Id. at 214.

The *Lonicki* Court further held 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 that the employee is unable to perform." Id.

As if talking about the Appellant's case, the *Lonicki* Court states:

"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." Id. at 215.

As in the present case, the *Lonicki* Court specifically talks about the issue of an employee who could works part-time, but not full-time. The Court states:

"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." Id.

The *Lonicki* Court clearly holds that an employee who can only work part-time can take CFRA medical leave from his full-time position, and continue to work at the part time position. *See Id.*

Importantly, the *Lonicki* Court held:

We therefore conclude that under section 12945.2's subdivision (c)(3)(C), which entitles an employee to medical leave when suffering from a "serious health

condition" that "makes the employee unable to perform the functions of the position of that employee" (italics added), the italicized phrase refers to the job assigned to the employee by his or her employer; it does not refer, as the Court of Appeal here held, to "an inability to perform the essential job functions generally, rather than for a specific employer." Id. at 216.

The *Lonicki* Court clearly holds that the issue as to the Appellant's case is did the serious health condition make him unable to perform his full-time job as an assistant sales manager for Power Toyota. As already shown, any honest good faith belief by the Power Toyota that the Appellant was not using his leave for the intended purpose is irrelevant to a failure to reinstate claim under CFRA.

G. The Arbitrator Disregarded His Duty To Issue A Written Arbitration Award That Revealed The Essential Findings Of Fact And Conclusions Of Law On Which His Award Was Based.

The Arbitrator exceeded his powers, and acted with manifest disregard of *Armendariz*, by issuing an arbitration award that did not reveal "*the essential findings and conclusions on which*" his award was based as to each of Appellant's claims. *Armendariz v. Foundation Health Psychcare Services, Inc. (supra)* 24 Cal.4th at 107. Moreover, *Armendariz* obviously intended the arbitration award be sufficient for a court to determine whether the arbitrator complied with the "*requirements of the statute*", on which a unwaivable statutory right is based. *See Id.*

In the present case, as already stated above, the Arbitrator never made findings of fact and conclusions of law that were relevant and necessary to determining liability as to each and every of Appellant's FEHA causes of action. By not making necessary and relevant findings as to each of Mr. Richey's claims, the Arbitrator essentially denied Mr. Richey a hearing on the merits as to those claims. As in *Pearson Dental Supplies, Inc. v. Superior Court (supra)* 48 Cal.4th 665, 680, Mr. Richey was also denied a hearing on the merits, and thus, the arbitration award should be vacated.

H. Power Toyota's Policy Regarding Accepting Employment While On FMLA Leave Violates CFRA And Cannot Be Used As A Non-Discriminatory Reason To Terminate An Employee Taking CFRA Leave

In California, CFRA incorporates the Federal Regulation controlling FMLA in to CFRA.

Title 2, California Code of Regulations § 7297.10 states:

"To the extent that they are not inconsistent with this subchapter, other state law or the California Constitution, the Commission incorporates by reference the federal regulations interpreting FMLA"

Furthermore, the Federal Regulations on FMLA, 29 CFR 825.702(d)(1) states

"If FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, require an employee to take a job with a reasonable accommodation. However, ADA may require that an employer offer an employee the opportunity to take such a position. An employer may not change the essential functions of the job in order to deny FMLA leave. See § 825.220(b)."

Thus, it would have been a violation of CFRA for Power Toyota to require Appellant to return to work with some accommodations so he could do the essential functions of his full-time job.

Pursuant CFRA at Title 2, California Code of Regulations § 7297.10, federal regulation 29 CFR § 825.220(a) is incorporated into CFRA. 29 CFR § 825.220(a) prohibits an employee "*from interfering with, **restraining**, or denying the exercise of (or attempts to exercise) any rights provided by the Act. ...* " Furthermore, interference claims have been codified into CFRA. See Government Code § 12945.2(t) (by amendment 2012).

Clearly Power Toyota policy in its Handbook is a restraint on FMLA leave, and is discriminatory against FMLA medical leave because it targets medical leave under the FMLA as opposed to other leaves. In the present case, the policy restrains employees who own businesses from visiting their businesses while taking CFRA leave for fear that

they might be terminated based upon a good faith belief they are doing something inappropriate at their business.

1. The Written Policy In The Handbook Targeting Persons Taking FMLA Is On Its Face A Discriminatory Policy Because It Only Applies To FMLA Leave

A written policy that targets persons taking protected medical leave under the FMLA, and which imposes a different condition of employment (i.e. not accepting employment with another company while on approved FMLA leave (see 2CT 212) on the protected activity is per se discriminatory. Moreover, as applied to Appellant it is per se discriminatory because it was used against Appellant because he owned a business, which he visited before and during his CFRA leave.

The Power Toyota FMLA policy discriminates against persons who are taking CFRA leave because if Appellant was not taking CFRA leave there would be no policy violation. Applying Power Toyota's FMLA policy to employees who take CFRA/FMLA leave is per se discriminatory and per se a restraint, because it discriminates against them and restrains them from the ability to own and participate in a business while on CFRA leave. To demonstrate how discriminatory the policy is, it becomes clear when interchanging the protected status of taking CFRA leave, with race. Obviously, it would be illegal to have a policy explicitly stating that a Black employee cannot accept employment with another company while working for Power Toyota. Here, the policy that an employee cannot accept employment with another company while on FMLA leave would be just as illegal because it targets FMLA leave as the central factor in violating the policy.

Government Code § 12945.2(l) provides that it shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because … an individual's exercise of the right to family care and medical leave … . In *Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 261, the elements for a cause of action for retaliation for taking CFRA medical leave are stated as: (1) the defendant was an employer covered by CFRA; (2) the

plaintiff was an employee eligible to take CFRA leave; (3) the plaintiff exercised her right to take leave for a qualifying CFRA purpose; and (4) the plaintiff suffered an adverse employment action, such as termination, fine, or suspension, because of her exercise of her right to CFRA leave.

Since the Arbitrator's finding of facts fulfill each element to find a cause of action for retaliation in violation of CFRA, the Arbitrator erred and denied Appellant his unwaivable legal right to be protected from discrimination and retaliation based upon taking CFRA medical leave.

Moreover, the policy targeting persons taking FMLA cannot be said to be a non-discriminatory reason to support a termination. It is per se discriminatory on its face. The Power Toyota policy is a specific policy that targets employees who take legally protected medical leave and discriminates against them as to owning a business like a fish market, or working a second job as in the *Lonicki v. Suttner Health Central* (2008) 43 Cal.4th 201, case. Furthermore, this policy is only meant to interfere with employees taking FMLA leave so it violates 29 CFR § 825.220(a).

Beyond all this, objectively, it is not the same to visit a business as a business owner, before and after taking CFRA leave, and accepting outside employment while on FMLA/CFRA leave. Pursuant to the wording in Power Toyota's FMLA policy, Mr. Richey did not violate it, and Power Toyota knew Mr. Richey had not violated it. There was no good faith, but only discriminatory animus, in the decision to not reinstate Mr. Richey after his CFRA leave.

a. Power Toyota's Policy As To FMLA Leave Did Not Give Appellant Notice It Applied To CFRA, Or That It Applied To Doing Things For One's Own Business

The Arbitrator found that Power Toyota's Employee Handbook policy as to FMLA leave was poorly written because it was not clear that it applied to Appellant. The Appellant had not accepted employment with another company while on medical leave, but was an owner of a restaurant before he even began the leave. (4CT 657- 658). Beyond this the written policy did not state it applied to CFRA leave. (see 2CT 212).

29 CFR § 825.300(c), as incorporated by 2 CCR § 7297.10, requires employers to give written notice to employees detailing specific expectations and obligations of the employee at the commencement of the FMLA leave. In the present case, the only possible notice was the written policy in the Handbook. However, the policy did not inform Appellant that he could be terminated for a good faith belief he may be performing tasks for his own business, or that the policy also applied to CFRA leave. The Handbook did not provide notice of the policy as stated by Mr. Vano, Senior Direct of H.R. Director, that:

> *"Mr. Vano explained, if an employee came to management and discussed the nature of the other job, a determination would be made whether the employee's duties at Power would be adversely affected or not, and permission would be granted or denied accordingly."* See Final Award, page 17, lines 10-12. (4CT 658).

Additionally, 29 CFR § 825.300(e), as incorporated by 2 CCR § 7297.10, states:

> *"Failure to follow the notice requirements set forth in this section may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered (see §825.400(c))"*

In the 2 Cal.C.Regs. § 7297.9(a) it states:

> *"If the employer publishes an employee handbook which describes other kinds of personal or disability leaves available to its employees, that employer shall include a description of CFRA leave in the next edition of its handbook which it publishes following adoption of these regulations."*

The 2004 Edition of the AutoNation Handbook does not contain any notice regarding CFRA medical leave. (1CT 190). Moreover, it fails to state any policy as to accepting employment with another company while on CFRA leave.

In *Mora Chem-Tronics, Inc.* (SD CA 1998) 16 F.Supp.2d 1192, 1223-1225, the court held an employee handbook did not provide adequate notice because it failed to provide information about intermittent leave and did not explain the interaction between conflicting FMLA and employer policies.

In the present case, it is legal error to use a vague, written policy, which did not specifically apply to Appellant's situation, as a reason to terminate Appellant. It is undisputed that the written policy, taken on its face, did not apply to Appellant owning a restaurant and doing tasks for the business while on CFRA leave. If the policy was legal, which it is not, Power Toyota could not terminate Appellant for reasons he did not receive written notice of, prior to the commencement of his CFRA leave.

I. The Arbitrator Denied Appellant His Unwaivable Right To Be Reinstated From CFRA Leave And Protected From Retaliation And Discrimination Related To His CFRA Leave, Because The Arbitrator Did Not Consider The Proper Legal Elements To Determine The CFRA Violations

The Arbitrator stated: *"The McDonnell Douglas [411 U.S. 792 (1973) framework is 'now routine' and provides the proper approach for claims under Title VII."* Final Award, page 14, lines 10 and 11. (4CT 655). This is 100% wrong. The *McDonnell Douglas* shifting burden analysis is for summary judgments only, and never should be applied to a CFRA failure to reinstate cause of action after an arbitration hearing or trial. In *Caldwell v. Paramount Unified School District* (1995) 41 Cal.App.4th 189, 204, the appellate court stated:

> *"In short, if and when the case is submitted to the jury, the construct of the shifting burdens "drops from the case," and the jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent, or that of the employer's race- or age-neutral reasons for the employment decision. Because the only issue properly put to the jury here on the issue of employment discrimination was whether the District's decision to not renew Caldwell's contract was motivated by age or race, the shifting burdens of proof were irrelevant to the jury*

deliberations. Consequently, the trial court should not have instructed the jury on McDonnell Douglas's three-stage burden of proof."

The *Caldwell* Court held that the trial court erred by instructing the trier of fact on the *McDonnell Douglas* shifting burden approach. *Id.* at 205. Thus, as to Appellant's discrimination and retaliation CFRA claims, the Arbitrator was doing an improper legal analysis. When he was analyzing discrimination the Arbitrator should have been determining whether a motivating factor in the termination of the Appellant was for an alleged illegal reason as asserted in the Appellant's complaint. (See CACI Instruction 2500, CACI Instruction 2505, CACI Instruction 2507, and CACI Instruction 2620). However instead, the Arbitrator was looking for a non-discriminatory reasons for the termination as if doing the first half of a *McDonnell Douglas* analysis. The problem with this approach is that in FEHA retaliation and discrimination claims, there can be multiple reasons for a termination. In *Mixon v. Fair Employment and Housing Comm.* (1987) 192 Cal.App.3d 1306, 1319 the court held that a plaintiff in a FEHA case need only prove that a motivating factor was an illegal reason, and that a plaintiff did not have to prove it was the sole reason. Thus, logically as to the Appellant's discrimination and retaliation claims, the Arbitrator finding a non-discriminatory motive for Mr. Richey's termination does not eliminate the logical possibility that there were multiple reasons for the termination to include illegal ones. The Arbitrator should have followed case law to determine whether an unlawful reason alleged by plaintiff was a motivating factor in the termination.

Beyond this, the most blatant error that denied Appellant an unwaivable statutory right, was the Arbitrator applying the *McDonnell Douglas* analysis to plaintiff's failure to reinstate claim under CFRA. It is never appropriate to apply a *McDonnell Douglas* analysis to a CFRA failure to reinstate cause of action. In *Faust v. California Portland Cement Company* (2007) 150 Cal.App.4th 864, 879, the court follows federal case law from the 9th Circuit regarding FMLA, to delineate the CFRA analysis for a failure to reinstate claim under CFRA. In analyzing an interference claim of a person's FMLA rights (to include failure to reinstate), the court holds that there is no *McDonnell Douglas*

Corp. v. Green burden shifting analysis when in a failure to reinstate claim under CFRA. *Id.* The *Faust* Court cites to two 9th Circuit court cases to determine the proper analysis for a failure to reinstate claim under CFRA, or interference with a CFRA right claim, *Bachelder v. America West Airlines, Inc.* (9th Cir 2001) 259 F.3d 1112, and *Xin Liu v. Amway Corp.* (9th Cir. 2003) 347 F.3d 1125 for the analysis in a failure to reinstate claim that is followed by CFRA. The *Faust* Court follows the federal 9th Circuit legal analysis to delineate the CFRA analysis for a failure to reinstate claim.

The Arbitrator erred by applying a *McDonnell Douglas Corp. v. Green* burden shifting analysis to Appellant's claim for failure to reinstate under CFRA. (4CT 655-659).

1. The Facts That The Arbitrator Found Show Power Toyota Were Liable Under CFRA When The Proper LegalAnalysis Is Used

The Arbitrator found that Appellant was on approved CFRA leave when he was terminated by Power Toyota. See Final Award, page 13, line 14, and lines 23-24. (4CT 651). The Arbitrator stated in his award:

> *"Since Power Toyota applied CFRA/FMLA correctly, the dispute is narrowed to the issue of whether Mr. Richey could be terminated while away from work on a medical disability."* (4CT 651).

Appellant suffered a back injury while moving furniture at home. See Final Award, page 4, lines 9 and 10. (4CT 645).

2 CCR § 7297.2 delineates the CFRA regulation regarding the right to reinstatement. 2 CCR § 7297.2(a) states:

> *"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)."

Appellant filed for CFRA and FMLA leave due to his back injury, which was granted and extended several times by Matrix (Matrix was the entity handling the medial leave on behalf of Power Toyota). (4CT 645). Dr. Finkelstein, Mr. Richey's treating doctor, told Matrix that Appellant was not able to work until May 28, 2008. See Final Award, page 4, lines 17-20. (4CT 645). Appellant's testimony at the arbitration hearing was that Dr. Finkelstein gave Appellant permission to work at his restaurant part-time, while he was unable to work at the car dealership full-time. (4CT 646).

As is evident from the legal analysis in the Arbitrator's Award, the Arbitrator was creating an erroneous legal analysis for a failure to reinstate claim under CFRA. Moreover, the Arbitrator's own finding of facts fulfill each element necessary to find liability in a failure to reinstate claim under CFRA. see CACI 2600.

2. CFRA Provides Only Two Defenses To Failing To Reinstate An Employee From Approved CFRA Leave

2 CCR § 7297.2 allows only two defenses to a failure to reinstate claim under CFRA, which are found in 2 CCR 7297.2, subdivision (c)(1) and (c)(2). A good faith honest belief is not delineated as a permissible defense to a CFRA failure to reinstate claim. The Appellant was denied his statutory unwaivable right to reinstatement after his CFRA leave because of the erroneous legal arguments and defenses created by the Arbitrator.

V.

CONCLUSION

Based on the forgoing, and reasons stated in *Richey v. AutoNation, Inc.* (*supra*) 210 Cal.App.4th 1516, Appellant respectfully requests that this Court affirm the Appellate Court's decision in its entirety. The clear legal errors by the Arbitrator denied Mr. Richey unwaivable statutory rights under FEHA. Pursuant to C.C.P. 1286.2, and for the reasons stated above, the Arbitrator's Final Award should be vacated because he

exceeded his powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

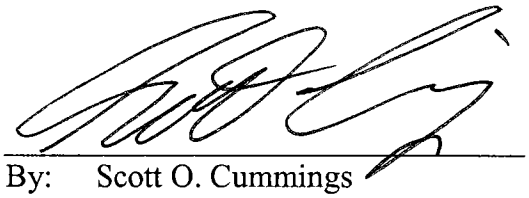
Appellant requests that the judgment confirming the arbitration award be reversed, and that this case be remanded to the trial court with directions to deny the petition to confirm the arbitration award, grant the petition to vacate the award pursuant to C.C.P. § 1286.2(a)(4), and order a rehearing before a new arbitrator, or if the parties and Arbitrator consent, order that the Arbitrator redraft the Final Arbitration Award consistent with the *Richey v. AutoNation, Inc.* (*supra*) 210 Cal.App.4th 1516 decision and/or this Court's decision.

Additionally, Appellant requests that he be awarded his costs on appeal.

Dated: June 12, 2013

Respectfully submitted,

Scott O. Cummings, Esq.



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CERTIFICATE OF WORD COUNT
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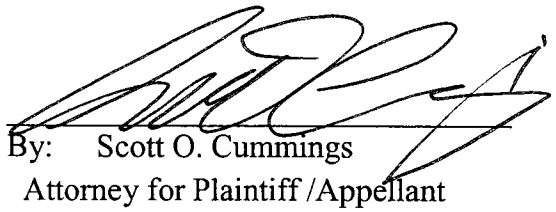
The text of this brief consists of 13,992 words as counted by the Microsoft Office Word 2013 word-processing program used to generate this brief.

Dated: June 12, 2013

Respectfully submitted,
Scott O. Cummings, Esq.



By: Scott O. Cummings
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PROOF OF SERVICE - By U.S. MAIL

I, the undersigned, am an attorney licensed to practice before all courts in the State of California and an employee in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1025 W. 190th Street, Suite 200, Gardena, California 90248.

On June 14, 2013, I served the **"ANSWER BRIEF ON THE MERITS"** by placing a true and correct copy thereof enclosed in a sealed envelope, addressed as follows, to the parties or entities listed below, and deposited the sealed envelope with postage thereon prepaid in the United States mail at Gardena, California:

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Gardena, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation or postage meter date is more than one day after date of deposit for mailing in affidavit.

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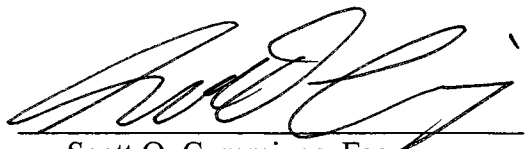
I certified under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on June 14, 2013, at Gardena, California.



Scott O. Cummings, Esq.