Organ Donor's Association-Disability Discrimination Claim Can Proceed, California Court Rules

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An employee who told his employer that he would need time off because he intended to donate a kidney to his sister and was fired two days before California's new Donor Protection Act became effective could pursue a claim for associational disability discrimination under the California Fair Employment and Housing Act, the California Court of Appeal has ruled. *Rope v. Auto-Chlor System of Washington, Inc.*, No. B242003 (Cal. Ct. App. Oct. 16, 2013). However, the employee could not assert a statutory claim under the Michelle Maykin Donor Protection Act, because the Act does not apply retroactively.

Background

Scott Rope worked for Auto-Chlor System of Washington, Inc., as a branch manager. When he was hired in September 2010, he informed Auto-Chlor that he planned to donate a kidney to his sister in February 2011 and requested a leave of absence to do so. Thereafter, Rope requested the maximum 30 days of paid leave under the then-newly-enacted Michelle Maykin Memorial Donation Protection Act ("DPA"), which would become effective on January 1, 2011. Auto-Chlor's Human Resources department subsequently told Rope he could take an unspecified amount of unpaid leave, but did not respond to Rope's requests for paid leave under the DPA, despite his repeated requests.

On December 30, 2010, two days before the DPA became effective, Auto-Chlor terminated Rope's employment, alleging poor performance. Rope sued Auto-Chlor for associational disability discrimination under the California Fair Employment and Housing Act ("FEHA") and for DPA violations. Auto-Chlor asked the trial court to dismiss the case, which it did. Rope appealed.

Applicable Law

The FEHA prohibits employers from discharging or otherwise discriminating against an employee due to his or her physical disability, including an association with a person who has, or is perceived to have, a disability. Cal. Gov't Code §§ 12940(a), (n).

With respect to the DPA, under California law, new statutes are presumed to operate only prospectively absent clear indication that the Legislature intended otherwise. *Elsner v. Uveges*, 34 Cal. 4th 915 (Cal. 2004); *Evangelatos v. Superior Court*, 44 Cal. 3d 1188 (Cal. 1988). However, a statute that merely "clarifies," rather than substantively changes, existing law will be applied retroactively.

Court Decision

As no California case law addresses associational disability discrimination under the FEHA, the appellate court in *Rope* examined cases interpreting the Americans with Disabilities Act ("ADA"), including the U.S. Court of Appeals for the Seventh Circuit's decision in *Larimer v. International Business Machines Corp.*, 370 F.3d 698 (7th Cir. 2004), the seminal case on associational disability discrimination. In *Larimer*, the Seventh Circuit court outlined three broad categories of associational disability discrimination, including that based on expense, at issue

in *Rope*. Discrimination based on expense occurs when an employee is terminated or otherwise subjected to adverse action because his or her spouse or child has a disability that is somehow costly to the employer.

Auto-Chlor argued that Rope failed to establish an associational disability discrimination claim of the "expense" variety because Auto-Chlor did not incur any expense associated with Rope's organ donation to his sister. The Court rejected this as overly narrow. Noting that both the ADA and FEHA should be construed broadly toward employee protection, the Court found that Rope pleaded sufficient facts to state a *prima facie* claim of associational disability discrimination under FEHA. Rope's complaint alleged he was terminated for pretextual reasons two days before the DPA became effective so that Auto-Chlor could avoid providing him with paid leave. The Court determined "the reasonable inference is that Auto-Chlor acted preemptively to avoid an expense stemming from Rope's association with his physically disabled sister." Accordingly, the Court permitted Rope's associational disability discrimination claim to proceed.

The Court dismissed Rope's DPA claim because the DPA cannot be applied retroactively. The DPA did not merely clarify existing law, the Court explained; it imposed new obligations and liabilities on private employers. Before January 2011, the Court pointed out, "no statute or case law notified Auto-Chlor it would be responsible for providing a month's paid leave to any employee. In the absence of notice by prior authority, applying the DPA to conduct preceding its effective date would be tantamount to an unfair change in 'the rules of the game' in the midst of a contest." (Citing *Evangelatos*.) Accordingly, the Court affirmed the dismissal of Rope's DPA claim.

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Rope highlights the risk of liability to employers who take adverse actions against individuals who have known associations with individuals with disabilities. Given the employer's decision to terminate the employee two days before the PDA's effective date, the Court could infer that the employer's decision was tainted by an unlawful motive, at least for purposes of allowing the claim to proceed in the early stages of the lawsuit.

For more information on this or other workplace developments, please contact Mark S. Askanas, at (415) 394-9400 or AskanasM@jacksonlewis.com, or the Jackson Lewis attorney with whom you regularly work.

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