

is discriminated against or harassed on the basis of her breastfeeding and related medical conditions. Under the FEHA, an employee may recover compensatory damages, punitive damages, and attorneys' fees and costs.

### **Bottom line**

You should carefully review and update your policies and procedures covering accommodations for expressing breast milk to ensure they're fully compliant with both federal and state law. Furthermore, you should ensure your policies reflect the FEHA's broadened scope to include breastfeeding and medical conditions related to breastfeeding.

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### EMPLOYMENT AT WILL

## **Employee prevails: It's wrongful termination, not job abandonment**

by Karimah Lamar

*In California, at-will employment permits employers to discharge employees for no reason, an arbitrary reason, or even an irrational reason. However, even at-will employment has its limitations. You cannot terminate an employee for unlawful reasons. In one recent case, an employer claimed it fired an employee because she abandoned her job, which is a permissible discharge under employment at will. But the employee countered that she was fired because she filed a police report alleging criminal activity. So what really happened?*

### **Girl fight**

Geraldine Kyles was a preschool teacher for Garr Child Care Inc. for more than 10 years when she was placed on administrative leave after she was involved in a physical altercation with a coworker. She always maintained that she was the victim of assault.

After Kyles was placed on administrative leave, she received a series of conflicting letters from Garr about her employment. The evidence was sketchy on how much communication she had with her employer while she was on administrative leave. She contended that she discussed filing a police report with a supervisor and was told that she would be fired if she did so. While Garr adamantly denied that its supervisor made such statements, its credibility wasn't helped by its ever-changing and conflicting stories surrounding the mystery of Kyles' termination.

### **Liar, liar, liar**

Garr ultimately decided that the reason for Kyles' termination was job abandonment. However, that

belated reason came after Garr also said she was terminated for being involved in the altercation with the coworker in the first place.

There was no dispute that a little over a month after the altercation, Kyles received a letter essentially stating that Garr was making a third attempt to reach out to her about her employment and would like to talk to her about returning to her previous position. The letter went on to say that if the preschool didn't hear from her by the end of the month, it would assume she had abandoned her job.

Shortly after the altercation, however, Kyles had received a different letter stating that she engaged in violence in direct violation of school policy and such behavior would not be tolerated. The school emphasized that its aim was to provide students with a happy environment and ensure the same to parents who leave their children in its care. Consequently, the letter stated, she was being discharged, and the decision was final. Kyles sued her former employer for wrongful termination.

### **Court rules in favor of employee**

Kyles won at the lower court, but Garr appealed. The sole issue on appeal was whether the lower court abused its discretion when it ruled in Kyles' favor after concluding her assertion that she was fired for filing a police report was credible despite a letter from Garr asking to meet with her before it made a decision about her employment.

The appellate court found that the lower court did not abuse its discretion but correctly found that Kyles' making, or failing to withdraw, her complaint about criminal activity to law enforcement was protected activity. As a result, firing her on the basis of that report was a violation of public policy that defeated Garr's ability to rely on its at-will-employment defense to her wrongful termination claim. *Kyles v. Garr Child Care Inc.* (California Court of Appeal, 2nd Appellate District, 8/16/13, unpublished).

### **Bottom line**

Unfortunately, it isn't uncommon for an employer to have conflicting reasons for firing someone. While it wasn't clear from the facts of the case why the employer had different reasons for this employee's termination, it's logical to conclude that more than one person was communicating with her. Moreover, the preschool likely had no clear guidelines for how to terminate an employee under these circumstances. Usually, that's due to a lack of or a breakdown in policies and procedures. Review your own policies and procedures to ensure they're effective so you can avoid similar costly mistakes.

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## PROBATIONARY PERIOD

# There is nothing figurative about statutes

by Alka Ramchandani

*This article provides a takeaway analysis of a recent California Court of Appeal decision involving the literal interpretation of a statute governing probationary school employees, which may seem draconian to the ordinary person.*

## **Probationary period isn't leave-friendly**

Erica Cox was hired as a probationary counselor at Crenshaw High School in the Los Angeles Unified School District. She worked a normal six-hour workday. When she was hired in 2007, the school district assigned her a seniority date of March 12, 2009. She completed her first school year in the 2007-08 term.

At the beginning of the 2008 school year, Cox went out on maternity leave from September 2 to October 31. When she returned from leave in November, she resumed her normal six-hour workday. The 2008-09 school year had a total of 182 workdays.

Cox was classified as a second-year probationary employee for the 2009-10 term. According to the school district, she hadn't completed her probationary status for the 2008-09 school year because she didn't satisfy Education Code Section 44908's "complete school year" requirement. Under that code section, an employee must be in "attendance . . . for at least 75 percent" of the total number of school days during the year. Cox had to work 136.5 days to meet that requirement for the 2008-09 school year; she worked only 135 days.

In March 2010, the school district notified Cox that she wasn't selected for a certificated position for the 2010-11 year. On March 10, she received a layoff notice, and on June 24, the school district issued her a final layoff notice.

Cox filed a petition for relief under Code of Civil Procedure Section 1085. She argued that she had worked an additional 30 hours in 2008 while she was on maternity leave, which meant she exceeded the 136.5-day requirement under Section 44908. In support of her claim, she submitted several declarations, including one of her own, in which she stated that she applied for a grant application on behalf of the school district while she was on maternity leave.

Cox supported her declaration with evidence that she was paid an extra five hours, beyond her normal six hours, on three consecutive workdays in November. Her declaration also stated that she worked eight hours on Saturday, November 8, 2008, and seven hours on Sunday, November 9. She argued that those hours allowed her to surpass the 136.5-day requirement.

The trial court excluded Cox's declaration because it contained information contrary to her earlier deposition testimony. The court also sustained the school district's written objections on the grounds that her declarations lacked foundation. The court concluded that there was no competent evidence in the record to support her allegations that she worked for the school district while she was on maternity leave.

Cox also argued she actually worked 74.7% of the 2008-09 school year, and that percentage, when rounded up, satisfied the "completed school year." The trial court rejected that argument as well. She then appealed the trial court's decision.

## **Working at home is no-no for probationary employee**

Cox's appeal was based on two issues: (1) The trial court erroneously excluded admissible evidence that would have established she had worked the required number of hours and (2) the school district failed to credit her with the total number of hours she had worked. The court of appeal found that the trial court properly excluded her declarations and rejected her argument that the school district failed to credit her with the total number of hours she had worked.

Education Code Section 44929.21(b) mandates that a probationary employee must serve "two complete consecutive school years in a position or positions requiring certification qualifications" before becoming a permanent employee. Section 44908 defines a "complete school year" as at least 75% of the number of days the regular schools of the district in which she is employed are maintained. Sections 13328 and 13304 require "75 percent attendance by probationary teachers as a condition of achieving permanent status." So, under the statutes, Cox needed to complete two consecutive school years with at least 75% attendance to become a permanent employee.

After reviewing the relevant statutes, the court reasoned that even if it admitted all of Cox's evidence, her claims would still fail. Regardless of whether the school district paid her for the extra hours she worked, she didn't satisfy the "complete school year" requirement. The court pointed out that the statute refers to "days," not "hours." Therefore, even if she worked an extra five hours on three consecutive days after she completed her normal six-hour workday, those hours wouldn't amount to extra "days" worked.

The court further reasoned that weekends don't count as days worked because Section 44908 excludes weekends. The school year is based on the "number of days the regular schools of the district . . . are maintained." That means the school needs to be "open" for

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