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PERSPECTIVE

When law produces results at odds with common sense

By Jeffrey W. Kramer

"If the law supposes that," said Mr. Bumble, squeezing his hat emphatically in both hands, "the law is a ass — a idiot."

— Charles Dickens, "Oliver Twist."

This quote is brought to mind by the California Court of Appeal's recent employment law decision in *Richey v. AutoNation, Inc*. The *Richey* decision illustrates what has gone wrong in the incredibly complex and befuddling world of employment law — much of it judicially created or judicially exacerbated. There are three important reasons why society should care about cases like this. When the law produces results at odds with common sense, people lose respect for the law. When the law becomes so complex that experienced judges cannot get it right, the law serves mainly the lawyers, at the expense of those who must be governed by it. And when the legal process becomes so cumbersome and protracted that it affords no practical remedy, the result cannot be described as justice.

The facts in *Richey* are these. AutoNation's subsidiary, Power Toyota, hired Avery Richey in 2004 to sell cars. Richey performed well, and was quickly promoted to assistant sales manager. For the next three years, Richey thrived in this new position, earning a comfortable income that was often in six figures. The trouble began late in 2007, when Richey began organizing and building out his new restaurant. His time on the job dropped from an average of 60 hours per week to 38, and his supervisors noticed that he was "distracted" and "a bit off his game." As a result, they met with him to discuss performance and attendance issues. Shortly thereafter, Richey reported that he hurt his back moving furniture, produced a note from a doctor to this effect, and went out on medical leave under the California Family Rights Act (CFRA), and its federal corollary, the Family and Medical Leave Act (FMLA). The timing of Richey's leave coincided nicely with the opening of his new restaurant.

Shortly after Richey took his leave, his supervisor began getting reports that Richey was working at his restaurant. The supervisor sent Richey a letter reminding him of the company's policy that an employee may not work another job while on leave. The policy was in the employee handbook and was communicated in writing to every employee who went out on leave. Each year, employees in Richey's region were fired for violating this policy. The letter told Richey to call if he had any questions. Richey received the letter, read it, and ignored it.

With no response from Richey, the supervisor sent an employee to drive by Richey's restaurant to see if the reports were true. The employee saw Richey sweeping, bending over, and hanging a sign with a hammer. Eight different company employees stopped by the restaurant and saw Richey working there, taking orders and performing other tasks. The supervisor consulted the company's human resources department and then sent Richey a letter firing him for violating the company's policy against outside employment while on leave.

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Richey responded by filing a lawsuit, alleging discrimination, hostile work environment and retaliation based on his taking medical leave and his race. Richey did not sue his employer, Power Toyota, but instead sued its parent company, AutoNation, and two Power Toyota employees, who were not parties to his arbitration agreement. This gambit failed, however, when the court ordered arbitration because the arbitration agreement expressly covered Power Toyota's parents, subsidiaries and managers.

Richey then pursued his grab bag of discrimination claims in arbitration. The arbitrator was a retired and respected superior court judge with 35 years of judicial experience. The arbitrator held 11 days of evidentiary hearings, listened to the testimony of 19 witnesses called by Richey alone, reviewed voluminous documents, filled 11 legal pads of notes, and reviewed post-hearing briefs totaling 177 pages of legal argument, not counting exhibits. Richey admitted that he was working at his restaurant in violation of the company's policy. The arbitrator ruled against Richey, finding no evidence of racial discrimination, no rush to judgment by the company, and "overwhelming" evidence that Power Toyota and Richey's supervisor acted without any discriminatory motive.

Richey filed a motion in the superior court to vacate the arbitration award. His case was heard by another well-respected judge with 30 years of judicial experience. The court rejected Richey's arguments that the arbitrator had made key legal errors and also concluded that the arbitrator's award was not reviewable for legal error. In reaching this latter conclusion, the court followed state Supreme Court precedent and other well-established case law, the import of which is that arbitration awards should be final and binding in the absence of fraud or other conduct affecting the fairness or legitimacy of the arbitration proceeding.

Richey appealed, and here his fortunes changed. In a lengthy and complex opinion, the Court of Appeal concluded that the arbitrator had incorrectly applied the "honest belief" defense to Richey's medical leave claim, rather than imposing the burden on the employer to disprove each of Richey's defenses. The court also ruled that the arbitrator's decision was, unlike most arbitration awards, reviewable for legal error, because "unwaivable statutory rights" under the CFRA were at stake.

The *Richey* decision remands the case to the superior court, with directions to vacate the award and conduct further proceedings that are likely to include another arbitration before a different arbitrator. After more than four-and-a-half years of expensive and time-consuming litigation, the employer is back to square one. Is this any way to run a legal system?

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It is important to note that no judge or arbitrator has concluded that Power Toyota, or its parent and managers, did anything wrong. No judge or arbitrator has concluded that Richey was the victim of racial discrimination. No judge or arbitrator has concluded that Richey did not deserve to be fired for abusing medical leave so he could work in his new restaurant.

Did Power Toyota treat Richey unfairly? He let his job performance at the car dealership suffer so he could start up a restaurant. He took medical leave because he supposedly could not work, and then continued working at his restaurant. He ignored his employer's letter telling him that he was violating the company's policy. The policy was routinely applied to numerous other employees in his region year after year. His termination was not a rash decision by some ill-advised or hostile supervisor, but instead was a considered decision made after consultation with the company's human resources department.

Did Richey get a fair shake from the legal system? He received an 11-day arbitration hearing before an impartial, highly-experienced and knowledgeable jurist, was represented by competent legal counsel and was given the opportunity to present as many witnesses and as much documentary evidence as he could muster. The arbitrator based his decision on the law, as best he could identify it, rather than on passion, prejudice or irrelevancy. There is no suggestion in the record that the arbitration proceeding itself was unfair or tainted in any way.

The legal battle continues because the Court of Appeal has identified a legal error in a complex body of law so subtle that two experienced trial court judges could not detect it. But this alone would not have been enough. The legal battle also continues because the court has applied California's notoriously hostile case law governing employment-related arbitration, to review an arbitration award for legal error. In doing so, the court, obliterated four of the major advantages of binding arbitration, which are supposed to be privacy, reduced legal expense, faster dispute resolution and finality.

Finally, what about common sense? Does the *Richey* decision comport with people's understanding of what is logical and fair? Does it offer comfort to honest, hard-working and loyal employees? Does it reassure skeptical employers that California offers a friendly environment for business? Or will the lessons be that it often pays to game the system, and that employers may be better off tolerating substandard job performance and dishonest employees, because doing something about them may be too difficult and costly?

You be the judge. But this case leaves me shaking my head in disappointment. Mr. Bumble, I feel your pain.

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