

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

HENRY AVILA,

Plaintiff and Appellant,

v.

CONTINENTAL AIRLINES, INC.,

Defendant and Respondent.

B196603

(Los Angeles County
Super. Ct. No. BC340950)

ORDER MODIFYING OPINION
[NO CHANGE IN JUDGMENT]

The opinion filed August 11, 2008, is hereby modified as follows:

1. On page 3, line 7 of the first paragraph, delete the word “prearranged” and insert

“the need for absences ha[d] been pre-arranged and/or required documentation ha[d] been submitted and approved by the employee’s manager prior to the absence.” Although the attendance policy did not so state, a Chelsea human resources manager testified that absences due to emergency situations that were not prearranged could later be excused.

2. On page 4, line 21, after the words “Bellamy and Johnson” add the words, **at that meeting**

3. On page 4, line 22, delete the word “delivered” and add the following words

hand delivered to Chelsea

4. Add to footnote 8 on page 16, the following sentence:

We apply the California authorities and cite FMLA authorities only as additional persuasive material. We note that FMLA and CFRA authorities may diverge in certain respects. (See *post* at p. 24, fn. 12.)

5. On page 17, in the third full paragraph, line 2, add the following sentence after the word “forms.”

Plaintiff said referring to the Kaiser forms, “I gave it to the manager on duty. I don’t remember who. Usually it’s left on the desk, and I don’t know who takes it from there.”

6. On page 21, line 7, after the citation to the Cal. Code Regs., add the following sentence:

Under CFRA and the implementing regulations, an employer should not be able to terminate for absences a worker known to be sick or injured without first determining if that employee qualifies for and wants leave.

7. Delete the first full sentence on page 22 and in its place add the following sentence:

The reasoning of the authorities, the purpose of CFRA, and public policy militate against Continental’s analysis of CFRA.

8. Following the citations in the first full paragraph on page 22, line 8, add the following sentence:

The decision maker must have knowledge, but just knowledge of the protected conduct—the absences. Knowledge that the conduct was protected is not required.

9. On page 22, line 11, add the following sentence after the sentence ending with “absences.”

In considering causation, we recognize that CFRA protects the right to take leave, not, as Continental suggests, the right to request leave.

10. On page 25, line 8, delete the word “judgment” and in its place insert the word

adjudication

The petition for rehearing is denied.

This modification does not change the judgment.

MOSK, J.

ARMSTRONG, Acting P. J.

I would grant the Petition for Rehearing.

KRIEGLER, J.