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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JOHN STEPHENS, Plaintiff and Appellant, v. COUNTY OF TULARE et al., Defendants and Respondents.	F044123 (Super. Ct. No. 205376) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Tulare County. Patrick J. O'Hara, Judge.

Thomas J. Tusan for Plaintiff and Appellant.

Kathleen Bales-Lange, County Counsel, and Crystal E. Sullivan, Deputy County Counsel, for Defendant and Respondent County of Tulare.

No appearance for Defendant and Respondent Bill Wittman, as Tulare County Sheriff-Coroner.

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Government Code section 31725 is a remedial statute enacted to protect county employees who have been dismissed from their jobs due to a work-related disability.[1] If the employee is subsequently denied a disability retirement on the ground he or she is *not* disabled, the statute requires the county to reinstate the employee as of the day following the date of dismissal, i.e., to reinstate the employee and make up his or her lost salary and benefits.

The appellant in this case is a county worker who left his job in 1997 on account of a work-related injury. His application for a disability retirement was denied in 2002, and he returned to work in 2003, to the same job classification but to a different work assignment meant to accommodate his physical limitations. The county refused, however, to pay the employee's back salary and benefits on the ground he had not been "dismissed" from his job within the meaning of section 31725. The employee petitioned the court for a writ of mandate directing the county to reinstate him retroactively. The court denied the petition, and the employee has appealed. We will conclude the employee was "dismissed," and will reverse accordingly.

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1 Unless noted otherwise, all further statutory citations will refer to the Government Code. Section 31725 provides in part:

> "Permanent incapacity for the performance of duty shall in all cases be determined by the board [of retirement].
>
> "If the medical examination and other available information do not show to the satisfaction of the board that the [employee] is incapacitated physically or mentally for the performance of his duties in the service and the member's application [for disability retirement] is denied on this ground[,] the board shall give notice of such denial to the employer.… If [a writ] petition [for judicial review of the denial] is not filed[,] or the court enters judgment denying the writ, whether on the petition of the employer or the member, and the employer has dismissed the member for disability[,] the employer shall reinstate the member to his employment effective as of the day following the effective date of the dismissal."

FACTS AND PROCEEDINGS

John Stephens started working for the Sheriff's Department (the Department) of Tulare County (the County) in 1994 as a "detention specialist three" (DS III) or "floor officer" assigned to the Bob Wiley Detention Facility. His duties included transporting prisoners and writing reports, and it required him to carry a gun and a large set of keys.

In 1995, and again in 1996, Stephens suffered a work-related injury to his right thumb (he is right-handed) for which he sought workers' compensation benefits. When Stephens returned to the job after the 1996 injury, he was assigned to work as a control room officer (instead of as a floor officer) to accommodate the work restrictions imposed by his doctor, John Edwards, M.D. A note from Dr. Edwards, dated May 29, 1997, stated in part: "[John Stephens] has sympathetic dystrophy of [right] thumb. He should not engage in any … repetitive use of [right] hand [and] thumb -- writing[,] grasping[,] etc. for longer than 15-20 min[.] time intervals."[2]

As a control room officer, Stephens's main task was "[o]pening and shutting doors for the other officers" by "[p]ushing buttons," a job he said required him to use both hands, and sometimes caused his thumb to become swollen and painful. When he complained he was being required to exceed his work restrictions, Stephens was referred for a "WORK SITE EVALUATION," performed on June 17, 1997, by Kimber Carter, an "O.T.R." with the "VISALIA HAND CENTER." Carter's subsequent report stated in part:[3]

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[2] The County, in its respondent's brief, quotes from what it claims are other doctors' reports regarding Stephens's injury, but which do not appear anywhere in the record on appeal. These include a report from a Dr. Ten supposedly made in October of 1996, and two more reports by Dr. Edwards said to have been made in April and July of 1997. We will disregard them. (*Knapp v. City of Newport Beach* (1960) 186 Cal.App.2d 669, 679.)

[3] According to Carter's report, Stephens's injury had been diagnosed as a "Right Thumb Hyperextension Injury with Superficial Radial Nerve Involvement." The report does not identify the source of this diagnosis.

"[Stephens] works currently either four nights on and four nights off or three nights on and three nights off from 7:00 p.m. to 7:00 a.m. rotating.… [He] states that the problem on his job is that his modified job as control room officer is not adhering to the M.D. prescription of no right hand-thumb [*sic*] tasks greater than 15-20 minute intervals. [He] states that with his current job he frequently injures his hand as his hand swells.… [¶] …

"In the control room [Stephens] must use bilateral upper extremities to push the buttons to open and close the prison doors. This activity lasts for 3-15 minutes. After that [Stephens] must patrol the clear glass to make sure the floor officers are all right and to check on the prisoners. Pushing these buttons is not performed at a constant rate as compared to typing or assembly work performed six to eight hours plus. The night position primarily opens and closes the doors, [and prepares] documents[,] most frequently for the first 3½ hours of [the] shift[,] after which the activity of the prison decreases and other activities [occur] such as mail entry [and] documenting on wrist bands. The control room officer duties also requires [*sic*] [Stephens] to document. While performing this writing and documentation activity[,] [Stephens] writes for brief periods of time, 5-15 minutes, before he is needed to patrol the control room and secure the facility, again checking on the prisoners and the floor officers from the control room. The control room officer is also required to enter data into the computer. This task can be performed one-handed and single keys and numbers, not complete sentences, are entered. The control room officer has the ability to constantly change his body position. The night control room officer, as well as the day control room officer[,] does not go down to the floor for prisoner contact, even in prisoner confrontation situations. It is his responsibility to maintain the control room.

"The currently [*sic*] recommendations from the physician is [*sic*] that [Stephens] perform no longer than 15-20 minutes of upper extremity activity at one period of time and then have a break. Currently the control room officer job is adhering to this prescription. [Stephens] is able to do 5-15 minutes of hand tasks and then patrol the control room for one to five minutes without using his hands. [He] does use his hands frequently but not at a constant rate and is able to take a break after 15-20 minutes of hand

activity. [Stephens] is referred back to his physician if continued problems with his thumb arise."[4]

This assessment of Stephens's work regimen was based on his assignment to the control room of housing unit 3. It seems he was also assigned on a rotating basis to work sometimes in the *central* control room, where, he would later testify, there was more for him to do that required use of his right hand. It was this assignment to the central control room that he claimed caused him to have to work beyond his limitations.

In August 1997, Stephens was found to be a "Qualified Injured Worker" eligible for vocational rehabilitation under the workers' compensation program. This finding presumably reflected a determination that Stephens's physical limitations resulting from his injury were permanent and stable, and that there was no modified light duty position available for him in the Department on a permanent basis.[5]

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[4] Control room officer is an assignment normally performed by a "detention services officer" (DSO), a position paid less than a detention specialist. Although Stephens was doing the work of a service officer, he continued to be paid as a DS III.

[5] Former Labor Code section 4635, which was repealed in 2003 (11 Stats. 2003, ch. 635, § 14.3), provided in part:

> "(a) 'Qualified injured worker' means an employee who meets both of the following requirements: [¶] (1) The employee's expected permanent disability as a result of the injury, whether or not combined with the effects of a prior injury or disability, if any, permanently precludes, or is likely to preclude, the employee from engaging in his or her usual occupation or the position in which he or she was engaged at the time of injury, hereafter referred to as 'medical eligibility.' [¶] (2) The employee can reasonably be expected to return to suitable gainful employment through the provision of vocational rehabilitation services, hereafter referred to as 'vocational feasibility.'"

Sergeant Lehner's Memo

On September 8, 1997, Stephens complained to his supervisor, Sergeant Sheri Lehner, about his rotation to the central control room. Lehner recounted the conversation in a memo she wrote on September 10 to her superior, Captain Janet Perryman.[6] Lehner wrote in part:

> "On 9-8-97, at approx. 0300hrs., D.S. John Stephens requested to speak to me in private.… [H]e stated the following: 'I think there is a misunderstanding about my light duty and what the Doctor's note says. It says that I am to have no extensive use of my right hand for more than 15 minute intervals per hour.' He said that he had heard that he was being moved from his current assignment of Control Room Officer in Unit 3 to Central Control, and that he had explained to Sgt. Paskwietz on 9-5-97 that this would violate his medical note, and that Sgt. Paskwietz stated that he did not care.
>
> "I told Stephens that I would review his medical excuse, and discuss it with Lt. Hinesly later in the day. At 0730hrs. the same date, I consulted Lt. Hinesly regarding this matter. He instructed me to continue with the plan of team rotation to different positions, including Officer Stephens being rotated into Central Control …. At approx. 2200hrs., I met with Officer Stephens in the Control Room of Unit 3. I advised him that he would be going to Central Control at 2300hrs., when we were fully staffed, and that he would remain there for the rest of the shift. He replied, 'Okay, but don't be surprised if things start happening tomorrow morning when I call my Lawyer. I am permanently disabled in my right hand, and I'll own the county.…'
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> "I then told Stephens … that he still was to report to Central Control at 2300hrs.… [H]e then stated, ' … Anyway, don't be surprised if my thumb swells up and I have to call in sick tomorrow.'…

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[6] Captain Perryman would later become the assistant sheriff in charge of adult jail facilities, and would change her name to Janet Hinesly. We will continue to refer to her as Janet Perryman, because that is the name that appears most often in the documents in this case, and because it distinguishes her from a Lieutenant Hinesly who also worked at the Bob Wiley Detention Facility.

> "On 9-10-97, at shift change (0700hrs.), Officer Stephens entered the Sergeant's office[] where myself and Sgt. Montoya were briefing. At this time Sgt. Montoya shook hands with [Stephens] and asked him how he was doing. [Stephens] replied, 'Good Sarge how about you[?]' He then looked at me and asked if he was clear to leave. I told him he was, and asked him how his hand was doing after his shift. [Stephens] held up his right hand and said, ['']It's swollen, but oh well.'…"

When asked later for her reaction to what Stephens had said, Sergeant Lehner testified: "Well, he did indicate to me that he was not supposed to have to use the thumb for -- I believe it was no longer than 15 minutes at a time. [¶] And that was 12-hour shifts. So it is my opinion he wasn't able to function. We can't always give him a break every 15 minutes in that capacity, so it would, in fact, injure his thumb." Consequently, Lehner said, "I felt compelled to notify my immediate supervisor immediately. It was clear to me at that point that Mr. Stephens was looking to put the County at liability for whatever reason." She added: "I was very concerned, ordering him to do a job that he had specifically told me was causing problems to his injury."

Lehner's memo made its way to Captain Perryman, who later testified: "My concern after receiving this memo was that continuing John Stephens in the light duty position as Detention Service Officer, was going to further aggravate his injury to his thumb. Which I do recall at that time was being described as a severe sprain. [¶] And I went to my management meeting with this information. We had a discussion about other positions that might accommodate his injury to his thumb; determined that there were none. [¶] And I was directed to generate a memo and serve it to Mr. Stephens, directing him to take time off until the issue was resolved."

Perryman's September 12, 1997 Letter

Perryman's letter to Stephens, which was hand delivered to him at his house on September 12, 1997, read in part as follows:

> "You have been working in a modified work assignment (light duty) at the Bob Wiley Detention Facility due to an injury to your right hand. Your

> doctor, John Edwards, has described your restrictions as 'no inmate contact, some right hand activities - no more than (2) hours per day, writing limitations of 15-20 minute intervals, no power gripping or pulling of the right hand[.'] The Department has made efforts to accommodate your return to work and reviewed job assignments and duties performed in the [Detentions] Division. The tasks required in operating a control room at the facility appeared to accommodate the doctor's listed restrictions for use of your right hand. You have in fact worked in a housing control room for sometime [*sic*]. [¶] …
>
> "Because of your statements [to Sergeants Lehner and Montoya,] we believe that we will not be able to provide a modified work assignment at this time. *This letter is to confirm to you that you are not to return to work until further notice. At*[7] *such time as your condition improves and you are able to return to work with no restrictions, or improves to the point that you are able to perform the 'light duty' tasks required in Central Control without further complaint or injury, you will be expected to submit time sheets reflecting OFF DUTY/SICK/PERSONAL.* I understand you have an open job injury claim for this problem ([Lab. Code, §] 4850) that has yet to be resolved. Until notified by Worker's Compensation[,] we will expect your time sheets to reflect use of your personal sick leave." (Italics added.)

Perryman would later testify that this was not intended to be a dismissal letter. "The letter was generated and served on Mr. Stephens to make sure that he understood that our concern for him was that we not further injure his thumb. And that he needed to do what had to be done in terms of return to work, with no restrictions, as a … Detention Specialist Three, which is commonly referred to as a gun-toter. Or to be well to the point where he could serve in the capacity of a Detention Service Officer, which is the light-duty position that we had temporarily provided him with. [¶] And that one of those things would happen. And he would come back or he would prevail on his worker's comp claim."

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7 We assume Perryman meant to say Stephens was required to take personal sick leave "*Until* such time as your condition improves …."

Stephens, in his testimony, acknowledged he had complained to Lehner and others that his duties in the central control room in particular caused his thumb to swell and exceeded Dr. Edwards's work restrictions. Stephens denied, however, that he asked for, or intended (or threatened) to take, sick leave as a result. He would have returned to work, he said, but for Perryman's September 12, 1997 letter.

Referring to Stephens's complaint about his assignment to the central control room, Perryman was asked what the differences are, if any, between that and Stephens's previous assignment to the control room of a housing unit. She responded:

> "The primary difference between a person working in a control room of a housing unit and central control, would be who they dealt with and the request to open or close the door or to communicate over the intercom. [¶] In a housing unit, a large percentage of those transactions would have to do with inmates; and in central control you would deal exclusively with staff, either custodial staff, maintenance, health department. [¶] Very little contact with inmates."

Thus, Perryman agreed with the statement that "the actual physical requirements of using your thumb to push buttons is [*sic*] not significantly different from one assignment to the other."

However, we do not understand Stephens's complaint to have been that the button pushing in the central control room was different, only that there was more of it. Asked why he believed the central control room assignment was incompatible with his work restrictions, Stephens replied: "Because it is more activity. Opens all the controls to the front sally ports and everything, and there's more activity. More use of the hand."

On September 17, and again on November 26, 1997, Stephens received a "NOTICE OF POTENTIAL ELIGIBILITY FOR VOCATIONAL REHABILITATION" from AIGCS, Inc., the administrator of County's workers' compensation program, stating that the County "[d]oes not have a job available within your work restrictions." At some point during this period Stephens did, in fact, receive some vocational training in computers.

On February 11, 1998, Stephens and the County signed a compromise and release settling his workers' compensation claim for $7,000. This appears to be in addition to the amount Stephens received, or would receive, while on a paid leave of absence pursuant to Labor Code section 4850.[8]

On November 18, 1998, Stephens applied to the County's Retirement Board (the Board) for a service-connected disability retirement. The application was denied in July of 2001. Stephens's petition for writ of mandate, seeking review of the Board's decision, was denied by the superior court in an order filed on October 23, 2002. Neither Stephens nor the County appealed from this order.[9]

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[8] Labor Code section 4850, which applies to public safety employees, states in part:

> "(a) Whenever [a public safety employee] … is disabled, whether temporarily or permanently, by injury or illness arising out of and in the course of his or her duties, he or she shall become entitled, regardless of his or her period of service … , to a leave of absence while so disabled without loss of salary in lieu of temporary disability payments or maintenance allowance payments … , if any, which would be payable under this chapter, for the period of the disability, but not exceeding one year, or until that earlier date as he or she is retired on permanent disability pension …."

It appears Stephens received Labor Code section 4850 payments for one year ending on December 20, 1998.

[9] In the meantime, on June 21, 1999, Perryman wrote to Stephens about a new "return-to-work" position the Department proposed to create, as follows:

> "A recent review of your last medical evaluation indicates that you may be capable of performing a modified work assignment. I have attached a copy of a job analysis for the position of Detentions Duty Officer [DDO] which you might be able to perform.… [¶] If you wish to continue your employment with the Tulare County Sheriff's Department, contact Lieutenant Stan Tollison … to determine your status and possible accommodations. If we do not hear from you by … July 21, 1999[,] we will consider it as your resignation and appropriate steps will be taken."

[Fn. continued.]

Stephens's Request for Reinstatement

On October 29, 2002, Stephens's attorney, Thomas Tusan, wrote the Department pursuant to section 31725 requesting that Stephens be reinstated, with back pay, to his job effective September 13, 1997. On November 21, 2002, Tusan filed a tort claim on behalf of Stephens for back salary and benefits. The claim was rejected on December 2, 2002.

On December 5, 2002, the Department (Captain Gutsch) sent a letter to Stephens regarding his return to work, stating in part:

> "2. As it is the decision of the Board of Retirement that you are not substantially incapacitated, and thus able to work, the County is ready to reinstate you to employment. To implement that reinstatement, you are directed to contact Lt. Curt Mitchell … no later than December 20, 2002, to initiate an interactive review of restrictions …, to discuss arrangements for your return to work[,] and to discuss your new assignment. Prior to the County reinstating you to the full range of duties of the DS III position, you must meet with the Department to review any restrictions that you may have in performing your usual and customary job task.…"

In response, Tusan wrote to Lieutenant Mitchell on December 19 to schedule a meeting to discuss "return to work issues," which meeting eventually was set for January 13, 2003. Captain Gutsch, in a letter dated December 20, acknowledged the upcoming "interactive accommodations meeting," but added:

> "You responded through counsel, Mr. Tusan, that you were not able to return to work on December 20, 2002, as you were instructed. Because counsel has requested a meeting date of January 13, 2003, to accommodate his schedule, December 20, 2002 will be the date used to determine any

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Attorney Tusan contacted Lieutenant Tollison, who assured him Stephens would receive the same salary and benefits in the DDO position as he had received as a DS III, and that he would not be required to work in a control room. On this basis, Tusan wrote to Perryman on July 7 accepting the job offer on Stephens's behalf. However, on August 11, 1999, Lieutenant Tollison wrote to Stephens withdrawing the offer on the ground the County had not approved the DDO position.

back pay compensation, as the County was prepared to return you to work that day."

It was agreed at the January 13, 2003 meeting that Stephens should be reevaluated by Dr. Edwards to determine the current status of his injury, and the restrictions, if any, that would apply upon his return to work. Following an examination on February 6, 2003, Dr. Edwards found that Stephens was suffering from a "[p]ost traumatic regional pain syndrome involving the right thumb," and that his "current [work] limitations have not changed much from when last seen some years ago." He described these limitations as a "preclusion from writing activities for longer than 15 to 20 minutes at a time without having 30 to 40 minutes break. He [Stephens] is precluded from any constant and/or frequent gripping, grasping, pulling, and pushing involving the right hand."

Stephens initiated the present action on May 23, 2003 by filing a petition for writ of mandate directing the County to reinstate him as of September 13, 1997, with back pay and benefits, pursuant to section 31725.[10] The court ordered the County to appear at a hearing on August 27 to show cause why Stephens should not be reinstated.

On June 6, 2003, the Department (Captain McLaughlin) wrote to Stephens that, after reviewing Dr. Edwards's report, "it has been determined that the work restrictions do not affect the essential functions of the Detention Specialist III position." Therefore

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10 Stephens also sought to recover attorney fees pursuant to section 800, which states in part:

> "In any civil action to appeal or review the award, finding, or other determination of any administrative proceeding under this code … , where it is shown that the award, finding, or other determination of the proceeding was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his or her official capacity, the complainant if he or she prevails in the civil action may collect reasonable attorney's fees, computed at one hundred dollars ($100) per hour, but not to exceed seven thousand five hundred dollars ($7,500), where he or she is personally obligated to pay the fees, from the public entity, in addition to any other relief granted or other costs awarded."

the letter directed Stephens, at the risk of being disciplined for insubordination, to contact the Department within five days "to discuss your return to work date and assignment."

Stephens's Return to Work

Stephens returned to work for the Department on July 1, 2003 as a DS III, but in a modified assignment where he would not have direct contact with the inmates. That is, notwithstanding Captain McLaughlin's statement in his June 6th letter -- that Stephens's work restrictions did not affect the "essential functions" of a DS III -- Perryman (who by then was the assistant sheriff) later testified as follows:

> "Q. [By the County's attorney] Okay. Upon his [Stephens's] return to work in July of '03, is it your understanding that he's able to perform the full essential functions of the Detention Specialist Three position?
>
> "A. [By Perryman] Are you asking is he currently?
>
> "Q. Correct.
>
> "A. No, he is not.
>
> "Q. Is he performing a modified position that's the equivalent to some other classification?
>
> "A. Yes, he is.
>
> "Q. And what class is that?
>
> "A. Detention Service Officer.
>
> "Q. What is he not doing of the Detention Specialist Three position, to accommodate his present restrictions? [¶] Is he carrying a gun?
>
> "A. He's not carrying a gun. [¶] He does not have direct contact with inmates. He's not carrying the large key ring, that is required to be carried to move inmates throughout the jail facility. [¶] He's not writing crime reports, incident reports. Other than maintaining logs and an occasional incident report for something that might have occurred that he was a witness to."

Moreover, Perryman testified these accommodations were "one and the same" as the accommodations the Department had made for Stephens in 1997. She had instructed Stephens not to come to work in 1997, she said, "[b]ecause he was not able to work within those parameters without further injuring his thumb." In other words, Perryman agreed, her September 12, 1997 letter was intended to tell Stephens "don't come back if you are going to get injured."

The Court's Decision

Given Stephens's reinstatement effective July 1, 2003, the principal issue at the August 27 hearing was whether Stephens was entitled to recover salary and benefits back to September 13, 1997, and in particular whether Perryman, in her September 12, 1997 letter, had effectively "dismissed" him for purposes of section 31725. If section 31725 was found to apply, the issue then was the amount of Stephens's back salary and benefits, i.e., the amount he would have made as a DS III, less what he earned in other jobs or he received in workers' compensation and other benefits. By Stephens's estimate, he was owed about $125,000.

The trial court, in an order filed on September 19, 2003, concluded Stephens "was never dismissed by the County, nor did the County ever refuse a request by Mr. Stephens to return to work. Therefore, [he] does not come under the provisions of [section] 31725 in order to be entitled to back pay."

The court noted Perryman's letter instructed Stephens he should not return to work "At [see fn. 7, *ante*] such time as your condition improves and you are able to return to work with no restrictions, or improves to the point that you are able to perform the 'light duty' tasks required in Central Control without further complaint or injury ….'" The court went on:

> "… The testimony was that Mr. Stephens never returned to work nor did he ever request to be returned to work by informing the County that he could perform the duties as set forth by his doctor in the modified position

…, even though he testified that nothing has changed and today he is performing those same duties.

"… Mr. Stephens always had the option of returning to the position that his doctor said he was capable of performing. The evidence shows that the County was trying to get Mr. Stephens to return to work, either in his already existing modified position, and/or a new position.

"… Once Mr. Stephens requested to go back to work, the County returned [him] to his modified position July 1, 2003, to his same duties he was performing when he was placed on sick leave. Mr. Stephens testified that nothing had changed since he was placed on sick leave and his returning to work. [¶] …

"Clearly, [Perryman's] letter contemplates that Mr. Stephens is still an active County employee utilizing leave time. At no time was [he] advised in this letter that he was dismissed from employment. Although the letter does state 'do not return to work until further notice,' it goes on to tell Mr. Stephens that he will be placed on sick leave until he can report back to work under certain conditions. These were conditions that only Mr. Stephens could determine. There is no reasonable interpretation of this letter that the conditions preceding Mr. Stephens's return to work were within the County's ability to determine.… Mr. Stephens'[s] doctor never changed his recommendation as to Mr. Stephens's ability to perform this modified position. Mr. Stephens always had a doctor's release and could have gone back to work if he had informed the County that he was willing and able.… [¶] …

"Based upon this evidence, the only reasonable determination the court can make is that Mr. Stephens could have been performing these duties all along but never complied with the letter of September 12, 1997, by informing the County that he could perform. At his first request to return to work, he was returned to work to the modified position he was previously performing, as the County said they would do in the letter."

This appeal followed.

DISCUSSION

The issue here is whether, for purposes of section 31725, Stephens was effectively "dismissed" from his job on September 12, 1997.

Section 31725

Section 31725, which is part of the County Employees Retirement Law of 1937 (§ 31450 et seq.), and which appears in the article dealing specifically with disability retirement (§ 31720 et seq.), states as follows:

> "Permanent incapacity for the performance of duty shall in all cases be determined by the board [of retirement (see § 31459, subd. (c))].
>
> "If the medical examination and other available information do not show to the satisfaction of the board that the member [i.e., the employee] is incapacitated physically or mentally for the performance of his duties in the service and the member's application [for disability retirement] is denied on this ground the board shall give notice of such denial to the employer.… *If [a] petition [for judicial review of the denial] is not filed or the court enters judgment denying the writ, whether on the petition of the employer or the member, and the employer has dismissed the member for disability[,] the employer shall reinstate the member to his employment effective as of the day following the effective date of the dismissal.*" (Italics added.)

Several courts, including this one, have construed the italicized portion of the statute (which was added by amendment in 1970) to determine in a variety of factual situations whether an employee has been "dismissed." We will discuss these decisions in chronological order.

The first, *McGriff v. County of Los Angeles* (1973) 33 Cal.App.3d 394 (*McGriff*), concerned application of section 31725 insofar as it was inconsistent with a county civil service rule permitting the release of an employee with a medical incapacity (but without prejudice as to reemployment if the employee's condition improved). The trial court held that section 31725, being the later and more specific provision, was controlling, and so issued a writ of mandate directing the county to reinstate McGriff. The appellate court affirmed. (*Id.* at p. 399.) For our present purposes, *McGriff* is significant in that it held

the intent of section 31725 is to avoid putting a disabled worker in the position of having neither a job nor a retirement income; "to eliminate severe financial consequences to an employee resulting from inconsistent decisions between an employer and the Retirement Board as to whether a particular employee is incapacitated and unable to perform the duties of his position." (*Ibid*.)

Leili v. County of Los Angeles (1983) 148 Cal.App.3d 985 (*Leili*) arose in a situation much like the one now before us. Leili, a firefighter, suffered job-related back injuries in 1973 and 1974 for which he received workers' compensation. In 1976, the fire department notified Leili his work restrictions were incompatible with his job, and took him off active duty. Leili's 1977 application for a service-connected disability retirement was denied in 1980. The county then returned him to active duty, but denied his request for lost salary and benefits during the time he was off work. Leili filed a petition for writ of mandate. It was denied, and he appealed.

The appellate court reversed. It held on the strength of *McGriff* that section 31725 is intended to provide a way out of the "powerless position" in which Leili found himself, where "the county fire department had determined that he was unable to work because of his work restrictions and the retirement board had determined that he was not entitled to a disability retirement." (*Leili*, *supra*, 148 Cal.App.3d at pp. 987-988.)

The court found the situation in *Leili* "legally indistinguishable" from the one in *McGriff* (*Leili*, *supra*, 148 Cal.App.3d at p. 989), but we note some factual differences that are instructive here. The employee in *McGriff* was "terminated" or "released" from her job, and was later reinstated only upon a court order. (*McGriff*, *supra*, 33 Cal.App.3d at p. 395.) The employee in *Leili*, by contrast, was "taken off active duty," and was later returned to active duty pursuant to section 31725 without a court order; the only issue, as in this case, was whether he was entitled to be reinstated retroactively. (*Leili*, at p. 987.) Thus, *Leili* can be read to say that one may be "dismissed" within the meaning of section

31725 without being "terminated" in the sense of being fired, as where he or she is put on temporary inactive status or, conceivably, on some type of medical leave.

Phillips v. County of Fresno (1990) 225 Cal.App.3d 1240 (*Phillips*) is a decision by this court. Phillips was a deputy sheriff who suffered on-the-job stress, neck, and knee injuries that prompted him to take a medical leave of absence in 1981. He applied for a service-connected disability retirement later that year, but his application was denied in 1983. He then asked to be reinstated pursuant to section 31725 despite his belief, which was shared by the sheriff, that he was not capable of performing the customary duties of a deputy. The sheriff refused to return Phillips to active duty without a medical release, and neither Phillips nor the county sought review of the retirement board's decision, so Phillips remained on an unpaid medical leave until 1987, when he was returned to active duty by the new sheriff. Shortly afterward, Phillips filed a petition for writ of mandate seeking reinstatement to his position "'as of the date [he] was relieved of his duties and status as a paid employee ….'" (*Id.* at p. 1247.) The county opposed the petition on the ground, among others, that Phillips had never been dismissed from county employment within the meaning of section 31725. The trial court granted the petition and ordered the county to reinstate Phillips retroactively.

We affirmed the order notwithstanding the county's claim that section 31725 only applies when the employee has been dismissed by his or her employer, and not when the employee has voluntarily taken a medical leave of absence. We explained:

> "Eligibility for disability retirement benefits does not turn upon whether the employer has dismissed the employee for disability or whether the employee has voluntarily ceased work because of disability. Likewise, availability of the remedy provided by section 31725 does not depend upon whether the employee has been forced by the employer to cease work because of a disability or has voluntarily stopped working for that reason." (*Phillips*, *supra*, 225 Cal.App.3d at p. 1256.)

The county also maintained Phillips was not entitled to retroactive reinstatement because, believing himself to be disabled, he did not actively seek to return to work, and because the county concluded he was not capable of working in any event. We rejected these arguments as well.

> "… There is no language in section 31725 which limits its application to those employees who are ready and willing to return to work or which conditions reinstatement upon the *employer's* finding the employee capable of performing the job. [Italics added.]
>
> "Phillips concedes the decision of the Retirement Board left him with no choice but to demand reinstatement. While he could have sought judicial review of the Retirement Board's decision, the clear intent of section 31725 is to relieve the employee of the financial burden of litigation and to place the financial burden on the employer in order to bring about serious attempts between the agencies to resolve any disagreement regarding the employee's disability. [Citation.]
>
> "The County contends there is no inconsistency between the Retirement Board's decision denying disability retirement and the sheriff's decision denying immediate reinstatement. The County correctly notes the Retirement Board determines whether the employee suffers from *permanent* incapacity.… Therefore, the employer is not precluded from denying immediate reinstatement if the employer determines the employee suffers from *temporary* incapacity to perform the job. [¶] … [¶] [However,] [s]ection 31725 does not except from mandatory reinstatement those employees who are not permanently disabled according to a retirement board, but who are not presently ready to return to work according to the employer.…
>
> "We recognize the sheriff has the ultimate authority and responsibility to determine whether a deputy is fit to engage in active duty.… [But,] [s]ection 31725 does not mandate reinstatement to *active duty status*. The language and legislative intent reflect the purpose of the statute is to mandate reinstatement to *paid status*. [Italics added.] [¶] …
>
> "The employer cannot deny disability retirement on the basis of there being no disability and then claim disability in order to deny employment income. If the employer and Retirement Board do not agree that the employee is entitled to disability retirement, the employer's recourse is to seek judicial review of the Retirement Board's decision. If

> review is not pursued, the employee must be reinstated. Section 31725 recognizes no middle ground." (*Phillips*, *supra*, 225 Cal.App.3d at pp. 1256-1258.)

Phillips was followed by *Raygoza v. County of Los Angeles* (1993) 17 Cal.App.4th 1240 (*Raygoza*). Raygoza was a deputy marshal who applied for workers' compensation in 1983 claiming he had suffered a stress injury as the result of a shootout. His claim was granted in 1986, and the award included a work restriction precluding him from situations where he might have to use a weapon. In 1987, the marshal relieved Raygoza of duty (i.e., fired him) on the ground his work restriction was incompatible with the duties of a marshal, and there were no permanent light-duty positions available. The marshal also filed an application for disability retirement on Raygoza's behalf. It was denied in 1988, and the denial was reaffirmed by the retirement board in 1990, after a full administrative hearing requested by Raygoza (at which he claimed he was no longer disabled). Despite the board's decision, the marshal refused to reinstate Raygoza, who then filed a petition for writ of mandate. The court denied the petition, and Raygoza appealed. The appellate court reversed.

> "The trial court denied Raygoza relief because all jobs in the department require the carrying of a firearm. The only exception is the temporary duty of dealing with prisoners. To reinstate Raygoza without a firearm is to pay him a full salary to do nothing. [¶] …
>
> "We appreciate the dilemma in which the marshal finds himself. But the statute is plain on its face and makes no exception for a situation where the employer claims to have no job available in light of a workers' compensation restriction.… [¶] …
>
> "The set of circumstances here is admittedly strange. Raygoza applies for and gets a workers' compensation award because his 'psyche' has been damaged by the shootout, but a restriction attached to the award prohibits him from carrying a weapon. Not unreasonably, the marshal concludes he has no use for a gunless deputy. Raygoza, however, does not want to retire and forces the marshal to file an application, and later a writ petition, seeking retirement for him. Before the retirement board Raygoza, now cured (perhaps by the workers' compensation award?), maintains he

> can handle a gun and the job. The retirement board declines to order a disability pension. But Raygoza is still restricted from carrying a weapon because of the prior injury to his 'psyche.' So far as the marshal is concerned, Raygoza is disabled.
>
> "They cannot all be right. Raygoza is either fit or not. If he is, the marshal faces the uncomfortable prospect of putting an armed man on duty who once suffered a psychic injury connected to firearms. If Raygoza is unfit, he should be retired. But the retirement board has already eliminated that prospect. The result is that, whether Raygoza is truly fit or not, he is deemed fit, leaving the marshal the unpalatable chore of putting back on the payroll one he no doubt considers a liability and a danger. [¶] …
>
> "The Legislature decided that an employee in this situation either stays on the job or is given disability retirement. It, in essence, left the decision up to the retirement board. The Legislature's intent is plain. Raygoza cannot be denied both work and disability retirement. If there is a hole in the statutory scheme, the county has to go to the Legislature for a patch." (*Raygoza*, *supra*, 17 Cal.App.4th at pp. 1243-1247.)

The next case to construe section 31725 was *Tapia v. County of San Bernardino* (1994) 29 Cal.App.4th 375 (*Tapia*). Tapia, a deputy sheriff working at the county jail, took a voluntary medical leave of absence in 1987 after injuring her neck and back in an altercation with an inmate. In 1989, the county's occupational health service determined Tapia was capable of performing only light duty, but no such assignment was available in her department. Her subsequent application for disability retirement was denied in 1990, and she returned to work shortly afterward. But the county denied Tapia's section 31725 request for back pay and benefits. She filed a writ petition; the trial court granted it; and the county appealed.

The appellate court rejected the county's claim a dismissal occurs for purposes of section 31725 only if an employer refuses to return an injured employee to work *after* the retirement board has determined the employee is not disabled. Referring to *Phillips*, the court said the "crucial factor" in applying section 31725 "is the inconsistency, rather than the sequence, of the decisions by the employer and the board [regarding the employee's disability]." (*Tapia*, *supra*, 29 Cal.App.4th at p. 382.) On this basis, the court concluded

Tapia had been dismissed in 1989 "when the county's occupational health service found that she was not medically qualified for regular duty coupled with the fact that the sheriff did not then approve her for light duty." (*Ibid.*) However, the court then went on to reverse the trial court's order on procedural grounds.

Hanna v. Los Angeles County Sheriff's Dept. (2002) 102 Cal.App.4th 887 (*Hanna*) involved a deputy sheriff, Robin Hanna, who went on medical leave in 1996 claiming she was suffering from stress-related injuries as the result of workplace harassment. She was awarded workers' compensation benefits in 1999, with a restriction precluding her from stressful employment and stating she was no longer able to work as a police officer. In light of this restriction, the sheriff denied Hanna's request for reinstatement. She applied for a disability retirement; the application was denied in 2000; and in 2001 Hanna filed a writ petition seeking reinstatement to full duty as a deputy sheriff, with back pay and benefits. The trial court granted the petition in reliance on section 31725, and ordered the county to reinstate Hanna to paid status as a deputy sheriff "'effective the day following the date of her dismissal *which occurred no earlier than August 11, 2000*.'" (*Id.* at p. 891, italics added.) The county appealed.

The county argued on appeal that Hanna had not been "dismissed" because it had offered her another position consistent with her work restrictions, albeit one that paid less than a deputy sheriff. The court rejected this contention and concluded on the strength of *Phillips* and *Raygoza* that the sheriff "had a mandatory duty to reinstate Hanna to paid status as a deputy sheriff once the Retirement Board's decision denying her application for disability retirement became final." (*Hanna*, *supra*, 102 Cal.App.4th at p. 892.) In addition, the court stated this duty arose "regardless of [Hanna's] work restriction. The Department may refuse to allow Hanna to perform some of the duties of a deputy sheriff, but it must pay her as a deputy sheriff." (*Id.* at p. 895.)

Thus, the issue in *Hanna* was not really whether Hanna had been dismissed, but to what position she was required to be reinstated following the denial of her application for

disability retirement: to her original position as a deputy sheriff notwithstanding her work restrictions, or to a lesser-paid position consistent with the restrictions? The answer, the court said, was to her original position regardless of any work restrictions.

Hanna is more significant for our present purposes for what it did *not* decide. The trial court held Hanna had been dismissed "'no earlier than August 11, 2000.'" (*Hanna*, *supra*, 102 Cal.App.4th at p. 891.) However, Hanna left work on medical leave in 1996. August 11, 2000 was the date she withdrew her appeal of the retirement board's denial of her application for disability retirement, i.e., the earliest date the board's decision might be said to have become final. Thus, the trial court in *Hanna* adopted the view expressly rejected by the appellate court in *Tapia*: that a dismissal occurs for purposes of section 31725 only if, and when, "'an employer refuses to return an employee to work *after* the retirement board's decision becomes final.'" (*Tapia*, *supra*, 29 Cal.App.4th at p. 382.) All *Hanna* added to this formulation was that the employee must be returned *to the same position*. Hanna apparently did not appeal from this part of the trial court's decision -- the part contrary to the holding in *Tapia* -- and so the appellate court had no occasion to discuss it.

Analysis

The County's position, and the one effectively adopted by the trial court, is that Stephens was not "dismissed" from his DS III position but he instead "took himself off work" in 1997, and remained off work until 2003, notwithstanding the Department's willingness throughout this period to provide him with a light-duty assignment consistent with the work restrictions imposed by Dr. Edwards. The following excerpts from the County's brief are representative.

> "… [T]he record is replete with evidence that rather than dismissing [Stephens], there were ongoing and substantial efforts to return him to work and that his absence from work was due to his own complaints that he could not perform the job within the work restrictions provided of the modified light duty job."

> "Only upon [Stephens's] complaints that he did not feel he could work within the work restrictions set forth by his doctor, did the County determine that [it] could not demand he work when he complained of pain and swelling and fear of aggravation or further injury to his thumb. He was able to return at any time he felt he could work within the work restrictions set forth by his treating physician. Moreover, and importantly, his doctor obviously was of the opinion he could perform the modified position and such opinion was unchanged upon re-evaluation …."
>
> "… Here, the Sheriff's Department never made a decision to [dismiss Stephens], nor did it ever refuse[] to return [him] to service. He was always able to return to the modified light duty position consistent with Dr. Edwards['s] work restrictions of 1997. [Stephens] took himself off work. He threatened to not return and go out on sick leave. Government Code section 31725 cannot imply that an employee's unwillingness to return to light duty specifically arranged to meet medical restrictions is tantamount to a dismissal by an employer."

The County finds support for this position in the last of the section 31725 "dismissal" decisions: *Alvarez-Gasparin v. County of San Bernardino* (2003) 106 Cal.App.4th 183 (*Alvarez-Gasparin*). Alvarez-Gasparin was a station clerk in the sheriff's department who took a medical leave in 1991 on account of carpal tunnel syndrome and degenerative disease. She also filed a workers' compensation claim, and in 1992 was found to be a qualified injured worker eligible for vocational rehabilitation services. Alvarez-Gasparin tried to return to her job for three weeks in 1993, but was unable to work without pain. On this basis, the department concluded no accommodation was possible that would allow her to perform the essential functions of a station clerk. Alvarez-Gasparin applied for disability retirement in 1994; her application was denied, and the decision became final in 1999. She returned to work as a station clerk in the sheriff's department the following year, but was denied back pay and benefits on the ground she had not been dismissed. The trial court denied her writ petition, and she appealed. The appellate court affirmed.

On appeal the county argued, much as the County does in the present case, that Alvarez-Gasparin was not entitled to retroactive reinstatement because "it did not dismiss

[her] for disability, did not refuse [her] a return to service due to disability, and did not refuse to return her to service with an accommodation." (*Alvarez-Gasparin*, *supra*, 106 Cal.App.4th at p. 187.) The appellate court agreed.

> "We first observe it appears questionable whether section 31725 applies in this case because [Alvarez-Gasparin] continues to be employed by the County. She has not been denied both retirement disability and employment, as she persistently complains. Although [Alvarez-Gasparin] may have worked irregularly (or for only three weeks) during the nine years between October 1991 and September 2000, the record shows she began working again as a station clerk in September 2000 and was still employed in June 2001. Because [Alvarez-Gasparin] returned to employment after denial of the retirement disability, section 31725's reinstatement requirement does not apply." (*Alvarez-Gasparin*, *supra*, 106 Cal.App.4th at p. 187, fn. omitted.)

The citation at the end of this passage (which appears as a footnote) refers to the *Hanna* decision. *Hanna* does not support the court's conclusion. As we have explained, *Hanna* did not decide *when* an employee is dismissed for purposes of section 31725, but only that an employee denied disability retirement must be reinstated to the position he or she held when the injury occurred. (*Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1461 [cases are not authority for propositions not considered].) To the extent the court in *Alvarez-Gasparin* meant to adopt the position a "dismissal" can occur only *after* an employee is denied disability retirement, we disagree for the reasons set out in *Tapia*.

Immediately after the passage quoted above, the court in *Alvarez-Gasparin* said:

> "Notwithstanding our foregoing preliminary comment, according to the County, section 31725 does not apply because it did not dismiss plaintiff. After the Retirement Board's finding of no disability was upheld, plaintiff simply returned in 2000 to her position. She was not entitled to reinstatement with backpay because she had never been dismissed." (*Alvarez-Gasparin*, *supra*, 106 Cal.App.4th at p. 187.)

This seems to us to be merely a restatement of the court's "preliminary comment," and we disagree with it as well, again for the reasons stated in *Tapia*.

Finally, the court held Alvarez-Gasparin had failed to meet her burden on appeal, i.e., that the evidence did not support the trial court's "no dismissal" determination. In particular, the trial court declined to accept Alvarez-Gasparin's claim she was effectively dismissed in 1993 when the department determined no accommodation could be made that would permit her to perform the essential functions of a station clerk. The appellate court agreed this was not necessarily sufficient to show Alvarez-Gasparin was being dismissed. "The department's report states that [Alvarez-Gasparin] could not perform her job functions …, even with medical restrictions. But it does not state [she] could not perform any suitable County job or that she was being dismissed for disability. [¶] … There is simply no showing that [Alvarez-Gasparin] was dismissed, expressly or impliedly." (*Alvarez-Gasparin*, *supra*, 106 Cal.App.4th at p. 188.)

We turn then to the comparable question in the present case: Does the evidence support the trial court's conclusion that Stephens "was never dismissed by the County," or, more to the point, that he was not effectively dismissed by Perryman's September 12, 1997 letter? We conclude the evidence does not support the trial court's conclusion.

We begin by reiterating some principles gleaned from the earlier section 31725 "dismissal" cases. First, "dismissed" does not mean the same thing as "terminated" or "fired." An employee may be effectively dismissed if the county simply takes him or her off active duty (*Leili*), or the employee voluntarily places him- or herself on a disability leave (*Hanna*, *Tapia*, *Phillips*). This is so even if the employee eventually returns to work because the disability is temporary (*Raygoza*, *Phillips*), because the employee has been retrained or rehabilitated, or because the employer is able to make the appropriate accommodations. Moreover, an out-of-work employee is no less "dismissed" because the county has no position available compatible with the employee's work restrictions (*Hanna*, *Tapia*, *Raygoza*, *Phillips*), or even because the employee is, or appears to be,

disabled notwithstanding the retirement board's contrary conclusion (*Raygoza*, *Phillips*). In short, the fact Stephens was never formally terminated is immaterial to our analysis.

Here, as we have said, the trial court effectively adopted the County's position that Stephens was not "dismissed," but that he "took himself off work" from 1997 to 2003. Three factual premises necessarily underlie this conclusion: first, that the control room assignment -- specifically the *central* control room assignment -- was consistent with the work restrictions imposed by Dr. Edwards; second, that Stephens could have returned to a light-duty position at any time between 1997 and 2003 if he had chosen to do so; and third, that Stephens did in fact return to the very same job assignment in 2003 that he had occupied in 1997, even though his condition had not changed in the interim. There is no substantial evidence to support any of these premises.

There is some dispute about whether there is any significant difference between a control room assignment in a housing unit, and one in the central control room. A work site evaluation done in June 1997 found that Stephens's assignment to the control room in housing unit 3 was able to accommodate the requirement he use his right thumb for no more than 15 to 20 minutes at a time without a break. However, Sergeant Lehner observed that Stephens's right thumb was red and swollen after he was reassigned to the central control room. She consulted Lieutenant Hinesly, who instructed her to continue to assign Stephens to the central control room on a rotating basis. Consequently, Lehner testified she wrote her September 10, 1997 memo to Captain Perryman because "it is my opinion he [Stephens] wasn't able to function. We can't always give him a break every 15 minutes in that capacity, so it would, in fact, injure his thumb." And, Lehner added, "I was very concerned, ordering [Stephens] to do a job that he had specifically told me was causing problems to his injury." That is, Lehner herself believed the central control room assignment was *not* compatible with the work restrictions imposed by Dr. Edwards.

Captain Perryman evidently believed this too. She testified that, after receiving Lehner's memo, she (Perryman) wrote her September 12, 1997, letter to Stephens

because she was concerned that continuing him in "the light duty position as Detention Service Officer[] was going to further aggravate his injury to his thumb." And she added, "We had a discussion about other positions that might accommodate his injury to his thumb [and] determined that there were none."

It is important here again to recall that what gave rise to Perryman's letter was not Stephens's complaint about his "light duty position as Detention Service Officer," but his complaint specifically about his assignment to the *central control room*. This is reflected in turn in Perryman's letter to Stephens, in which she wrote in part:

> "This letter is to confirm to you that you are not to return to work until further notice. At [see fn. 7, *ante*] such time as your condition improves and you are able to return to work with no restrictions, or improves to the point that you are able to perform the 'light duty' tasks required *in Central Control* without further complaint or injury, you will be expected to submit time sheets reflecting OFF DUTY/SICK/PERSONAL." (Italics added.)

This brings us to the second factual premise underlying the trial court's decision: that Stephens could have returned to work at any time between 1997 and 2003 if he had chosen to do so. Actually, Stephens could have returned to work, at least according to Perryman's letter, only if he had been willing and able to go back to work in the *central control room* "without further complaint or injury." This offer was illusory. It already had been determined the month *before* Perryman sent her letter that Stephens was a "qualified injured worker," i.e., that his disability was permanent and stable. Indeed, Dr. Edwards found in 2003 that Stephens's work limitations "ha[d] not changed much" since 1997. Thus there was no reasonable possibility that Stephens would be able to go back to work in the central control room. Moreover, as for other positions, Stephens was notified on September 17 and again on November 26, 1997, that the County had no jobs available that were compatible with his work restrictions. In short, the evidence does not support the conclusion it was Stephens's own, self-imposed work restrictions that prevented his return to work between 1997 and 2003.

Finally, we can find no evidence Stephens returned to work in 2003 in the central control room. Perryman testified Stephens returned to work performing the functions of a detention service officer, and the accommodations made for him in 2003 were "one and the same" as those made in 1997. But saying that Stephens returned to work in the same *job classification* is different, of course, from saying he returned to the same *duties* (in the central control room) to which he had been assigned in 1997. Stephens went back to work on July 1, 2003. At the August 28, 2003, show cause hearing, he testified he was working on the "sun deck." And when asked whether he could perform the same modified light-duty work he was doing in 1997, Stephens replied: "In -- not in central, but in one of the other control rooms, yes."

In summary, Stephens was placed on what amounted to an involuntary medical leave in 1997 because the Department determined he was unable to perform the functions of a control room officer *in the central control room*. That he was capable of performing, and did in fact perform, the work required in other assignments within the same general job classification is not substantial evidence Stephens's absence from work from 1997 to 2003 was the result of his own choice rather than the result of the Department's decision to take him off work. Therefore, in the absence of such evidence, we conclude Stephens was "dismissed for disability" for purposes of section 31725 by Perryman's September 12, 1997, letter.[11]

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with instructions to grant Stephens's writ petition to reinstate him to employment "effective as

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[11] We express no opinion as to Stephens's request in the petition for attorney fees under Government Code section 800.

of the day following the effective date of the dismissal." (§ 31725.) Appellant is awarded his costs on appeal.

_____
Levy, Acting P.J.

WE CONCUR:

_____
Cornell, J.

_____
Gomes, J.