

Rope v. Auto-Chlor System of Washington, Inc. (2013) 220 Cal. App. 4th 635

Employee that planned to donate kidney to disabled sister stated sufficient facts to support claims for associational discrimination, failure to maintain a discrimination-free environment, and wrongful termination.

FACTS AND PROCEDURAL POSTURE

Plaintiff, Scott Rope, was hired by Auto-Chlor in September, 2010. At that time he informed Auto-Chlor that in February, 2011 he planned to donate a kidney to his sister. He requested that he be given leave to donate the kidney. In November, Rope became aware of the new Donation Protection Act that would go into effect on January 1, 2011. The DPA permits 30 days of paid leave for organ donation. Accordingly, Rope requested that he be given 30 days paid leave under the DPA. Auto-Chlor never responded to Rope's request for leave under the DPA, but did indicate that he would be permitted to take an unspecified amount of unpaid leave. Rope received satisfactory performance reviews from September to December. On December 30, 2010 Auto-Chlor terminated Rope for "poor performance."

Rope's First Amended Complaint alleged (1) violation of the DPA; (2) retaliation for engaging in a protected activity; (3) wrongful termination in violation of public policy; (4) violation of the Labor Code Private Attorneys General Act (PAGA); (5) associational discrimination in violation of FEHA; (6) failure to maintain a discrimination-free environment in violation of FEHA; and (7) retaliation in violation of FEHA. The trial court sustained Auto-Chlor's demurrer without leave to amend as to violation of the DPA, retaliation for engaging in a protected activity, violation of PAGA, and retaliation in violation of FEHA. Rope filed his Second Amended Complaint alleging (1) wrongful termination in violation of public policy; (2) associational discrimination in violation of FEHA; (3) discrimination on the basis of physical disability and perceived disability in violation of FEHA; and (4) failure to maintain an environment free of discrimination in violation of FEHA. Auto-Chlor again demurred. The trial court granted the demurrer without leave to amend. Rope appealed.

DISCUSSION

The court of appeal held that the demurrer was properly sustained as to the first, second, and fourth causes of action in the FAC. Rope could not state a claim for violation of the DPA because at the time he was fired the DPA had not yet gone into effect. Statutes are presumed not to operate retroactively. This presumption is only overcome where the legislature shows a clear and unavoidable intent to impose retroactive liability. There was no evidence that the legislature intended retroactive application of the DPA.

The trial court properly sustained the demurrer as to Rope's PAGA claim because that claim is dependent on a valid labor code violation claim. Rope did not plead any valid claim for a labor code violation. The trial court was also correct in sustaining the demurrer as to Rope's FEHA retaliation claim. Rope did not claim to have opposed any conduct forbidden by FEHA, an essential element of such a claim. The court explained that Rope's complaints to Auto-Chlor about the failure to respond to his request for leave were insufficient to show that he "opposed practices" forbidden by FEHA.

However, the court found that the SAC adequately stated causes of action for associational discrimination, failure to maintain an environment free of discrimination, and wrongful termination in violation of public policy. In analyzing the associational discrimination claim, the court considered the

categories set out in *Larimer v. IBM* (7th Cir. 2004) 370 F.3d 698. The court found that Rope had pleaded facts sufficient to state a claim for “expense” associational discrimination. The expense category is where the alleged discrimination is based on the employer taking some adverse action against the employee because the employer believes the employee’s association with another disabled person will cost the employer money. The allegations in Rope’s complaint, specifically his association with his disabled sister, his plan to donate his kidney, and the expense that Auto-Chlor would incur because of the donation, were sufficient to survive a demurrer. For the same reasons, the court found that Rope had pleaded sufficient facts to state a claim for wrongful termination and failure to maintain a discrimination-free environment.

Held: Reversed and remanded as to Rope’s claims of associational discrimination, failure to maintain a discrimination-free environment, and wrongful termination.