# *Digest*: McCarther v. Pacific Telesis Group

*Rebecca J. Kipper*

Opinion by Moreno, J., with George, C.J., Kennard, Baxter, Chin, Corrigan, JJ., and O'Rourke, J.[1]

## Issue

Are sick leave policies that provide for an uncapped number of compensated days off governed by Labor Code section 233?

## Facts

Kimberly McCarther and Juan Huerta each took absences from work to care for sick family members.[2] Although McCarther and Huerta did not work for the same employer,[3] as members of the Communications Workers of America labor union, they were subject to the same sickness absence policy under section 5.01F of the union's collective bargaining agreement (CBA).[4] Under this policy, employees are paid for any day in which they are absent from work due to their own illness or injury for up to five consecutive days in any seven-day long period.[5] There is no limit on the number of days that an employee may be absent from work,[6] but there is an attendance management policy in the CBA which sets forth a progressive scheme of discipline, up to termination, for excessive absences.[7] Although absences for a personal illness or injury are compensated under section 5.01F, they still constitute an absence which is subject to discipline under the attendance management policy.[8] In addition to paid sick leave, the CBA provides for six paid personal days which are not considered absences for the purposes of the attendance

1 Associate Justice of the Court of Appeal, Fourth Appellate District, Division One, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

2 McCarther v. Pac. Telesis Grp., 225 P.3d 538 (Cal. 2010). McCarther was absent for seven consecutive days. *Id.* at 540. Huerta was absent for five consecutive days. *Id.* at 541.

3 McCarther worked for SBC Services, Inc., and Huerta worked for Pacific Bell Telephone Company. *Id.* at 539.

4 *Id.* at 540.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

management policy.[9] Neither McCarther nor Huerta was compensated for the absences to care for sick family members,[10] and neither was disciplined in connection with the absences.[11]

McCarther and Huerta brought a representative action against their respective employers[12] for failure to provide employees with paid leave to care for relatives as required by Labor Code section 233,[13] also called the "kin care" statute.[14] Before class certification was complete, plaintiffs and defendants filed motions for summary judgment and summary adjudication for a determination of whether the defendants' sickness absence policy under section 5.01F of the CBA qualifies as sick leave as defined in section 233.[15] The trial court held that since employees do not earn or accrue any leave under section 5.01F, the defendants' absence policy did not constitute sick leave under section 233, and it granted the defendants' motion for summary judgment.[16] The Court of Appeal reversed the trial court's decision and held that the absence policy did constitute sick leave within the meaning of the kin care statute.[17] The defendants appealed to the California Supreme Court.[18]

Analysis

The court examined the language of the statute in order to determine whether it governs defendants' sick leave policy.[19] First, section 233 requires that if an employer provides sick leave, then it must also provide kin care leave in "an amount not less than the sick leave that would be accrued during six months at the employee's then current rate of entitlement."[20] It is clear

9 *Id.*

10 Huerta requested and was granted one paid personal day in connection with his family care absences per the personal day off policy. *Id.* at 541.

11 *Id.* at 540–41.

12 The employers involved were SBC Services, Inc., Pacific Telesis Group, Advanced Solutions, Inc., Southwestern Bell Video Services, Inc., Pacific Bell Information Services, and SBC Telecom, Inc. *Id.* at 539.

13 *Id.* Labor Code section 233 requires that an

> employer who provides sick leave for employees shall permit an employee to use in any calendar year the employee's accrued and available sick leave entitlement, in the amount not less than the sick leave that would be accrued during six months at the employee's then current rate of entitlement, to attend to an illness of a child, parent, spouse, or domestic.

*Id.* at 541 (quoting CAL. LAB. CODE § 233 (West 2010)).

14 *Id.* at 541.

15 *Id.* Section 233 defines sick leave as "accrued increments of compensated leave." *Id.* (quoting CAL. LAB. CODE § 233).

16 *Id.* at 541.

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* at 542 (quoting CAL. LAB. CODE § 233).

from this language that in order to apply the statute to an employer's sick leave policy, it is first necessary to calculate the amount of sick leave that an employee would accrue in a six-month period.[21] Under the defendants' policy, there is no cap to the number of days that employees can be absent for sick leave as long as they operate within the attendance management policy.[22] Therefore, it is not possible to determine how many days of sick leave that an employee would accrue in six months in order to apply section 233.[23]

Plaintiffs proposed, and the court dismissed, two ways in which kin care leave could be calculated under defendants' absence policy in order to make section 233 applicable.[24] First, as to plaintiffs' suggestion that the rate of entitlement during any six-month period is the five-day increment of leave that an employee earns,[25] the court explained that under the defendants' plan, the only period for which the entitlement can really be calculated is for a seven-day period because the amount of compensated time is not "banked."[26] Therefore, since the rate of entitlement cannot be calculated for a six-month period, the legislature did not intend section 233 to apply to sick leave policies like the defendants'.[27] Further, the Legislature's adoption of section 234, which prohibits employers from counting, for disciplinary purposes, any sick leave taken under section 233, supports this conclusion.[28] Presently, due to the lack of a limit on the number of absences, the defendants' absence control policy is the only limit on its sick leave policy.[29] Thus, if section 233 applied to the defendants' absence control policy, then section 234 would also apply and would prohibit the defendants' only limit to the number of sick days taken for kin care.[30] Since, an employee would be limited in the amount of personal sick leave he could take (by the attendance management policy), but not in the amount of kin care sick leave he could take, this would have the effect of allowing the employee to take more kin care sick leave than personal sick leave.[31] This result would be

21 *Id.* at 542.
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.* at 542–43.
27 *Id.* at 543.
28 *Id.*
29 *Id.*
30 *Id.* For example, if defendants cannot utilize their attendance management policy, then an employee would be allowed to take unlimited, compensated five day absences for kin care as long as he returned to work for a partial day each week. *Id.*
31 *Id.*

directly contrary to the plain language of the statute, which contemplates that employees will only be permitted to use half of their annually accrued sick leave for kin care.[32]

The court found the plaintiffs' alternative proposal for calculating the kin care entitlement—that it should be based on the amount of sick leave actually used—equally unpersuasive because it presumed, wrongly, that section 233 is not concerned with certainty and precision.[33] The court noted the flaw in this method, which is that it would be impossible for an employer to determine the exact amount of kin care leave to which its employees are entitled.[34] The statute's clear intent is to provide employers with precise guidelines as to an employee's kin care entitlement.[35] The plaintiffs' interpretation of the statute ignores this intention and therefore was rejected.[36]

Finally, plaintiffs' argument as to calculating kin care entitlement failed because it was "self-defeating."[37] The clear intent of the legislature, illustrated by the plain language of the statute, is to give employers notice of how many kin care days they were required to provide.[38] Plaintiffs' argument, which proposed two different ways of calculating kin care entitlement, resulted in two different calculations under the same policy, which clearly violates the intent of the statute.[39] Thus, the court rejected the plaintiffs' arguments and concluded that an employer must have clear guidelines as to an employee's kin care requirements and, therefore, that the amount of kin care leave to which an employee is entitled must be ascertainable from the employer's absence policy in order for section 233 to apply.[40]

In addition to being limited to absence policies in which the amount of kin care leave is ascertainable, the court noted that the reach of section 233 is also limited by the definition of sick leave in the statute.[41] The statute defines sick leave as "accrued increments of compensated leave," and further states that employees may only utilize "accrued and available" sick leave for

32 *Id.* Section 233 plainly states that an employee may take, in a one-year period, kin care leave equal to the amount of regular leave days accrued in a six-month period. *Id.* at 541 (quoting CAL. LAB. CODE § 233).

33 *Id.* at 543.

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.* at 543–44.

kin care.[42] In order to determine if the defendants' sickness absence policy is sick leave as defined in the statute, the court analyzed the meaning of the word "accrued."[43] The most usual definition of accrued is to accumulate over a period of time.[44] Yet, even under the plaintiffs' proposed, non-temporal definition of accrual as leave that is earned but not yet paid,[45] it is still clear that section 233 does not apply because the parties had previously stipulated that employees under the defendants' sick leave policy do not accumulate or bank any specific number of paid sick days in a year.[46]

The court dismissed plaintiffs' contention that the definition of the word accrued changes depending on how it is used in the statute.[47] The plaintiffs claimed that the word accrued, when used in the statute to explain that employees must be allowed to use "accrued and available sick leave" for kin care, means to "come into existence,"[48] and thus, since the defendants' policy provides employees with an enforceable right to use sick leave, the employees have accrued leave. Therefore, according to the plaintiffs' argument, the policy is controlled by section 233.[49] This reasoning is flawed for two reasons. First, although Black's Law Dictionary does define the word accrue as a right coming into existence, it only does so in the framework of a cause of action.[50] Since section 233 does not concern causes of action, a more usual and ordinary definition, such as to accumulate, applies here.[51] Second, if plaintiffs' definition is accepted, then the word accrued would have the same definition as the word available.[52] The rules of statutory interpretation mandate that a construction which makes a word a surplusage must be avoided.[53] Therefore, since accepting plaintiffs' definition would make the word available unnecessary, it is clear that the Legislature intended the two words to have different meanings, and plaintiffs' proposed definition was rejected.[54]

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42 *Id.* at 544 (quoting CAL. LAB. CODE § 233(a), (b)(4)).

43 *Id.* at 544.

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.* (citing BLACK'S LAW DICTIONARY 22 (8th ed. 2005)).

51 *Id.* at 544.

52 Available is defined as "present and ready for use." *Id.* at 545 (quoting AMERICAN HERITAGE DICTIONARY 123 (4th ed. 2000)).

53 *Id.* (citing Dyna-Med, Inc. v. Fair Emp't & Hous. Comm'n., 43 Cal.3d 1379, 1387 (1987)).

54 *Id.* at 545.

The second, and final, use of the word accrued appears in the statute's definition of the term sick leave as "accrued increments of compensated leave."[55] The court rejected the Court of Appeal's contention that the words "accrued" and "increments" mean the same thing in this definition because it would cause the word increments to be surplusage, which is clearly not what the legislature intended.[56] In addition, the court stated again that the usual and commonsense definition of the word accrued means to accumulate,[57] and once again concluded that section 233 applies only to sick leave policies that provide for an accumulated number of days off; not to policies like the defendants' that provide for an uncapped and unbanked number of days off.[58]

Finally, the court turned to an analysis of the legislative intent of the statute.[59] Legislative intent must be ascertained by examining both the language of the statute and its legislative history.[60] The fact that section 233 includes a definition of the term sick leave shows that the legislature was aware that the term could have more than one meaning.[61] If the legislature had meant for every type of sick leave policy to be covered by the statute, they would have stated that expressly; since they did not, it is clear that they meant to exclude some types of sick leave plans.[62] Even though the plain language of the statute clearly shows a legislative intent to limit the types of policies to which it applies, the court went a step further by examining the statute's legislative history.[63] The statutory history is filled with examples of intent to limit the reach of the statute.[64] The court noted that the phrase "sick leave, as defined" is found throughout the historical documents, which illustrates that the legislature understood the definition in the statute to be limiting.[65] In addition, the court found it conclusive that, before the statute could pass the legislature, the definition of the term sick leave was changed by amendment from a very inclusive definition that would have likely included defendants' policy to the current definition, which is much more restrictive.[66] The court concluded

55 *Id.* (quoting CAL. LAB. CODE § 233(b)(4)).
56 *Id.* at 545.
57 *Id.*
58 *Id.*
59 *Id.*
60 *Id.* at 542 (citing Dyna-Med, Inc. v. Emp't & Hous. Comm'n., 43 Cal. 3d 1379, 1387 (1987)).
61 *Id.* at 545.
62 *Id.*
63 *Id.*
64 *Id.*
65 *Id.* at 546.
66 *Id.*

that the legislative intent was to limit the types of absence policies to which section 233 applied to only those defined in the statute, i.e., those which provide for an accumulated or banked system of sick leave.[67]

Holding

The court reversed the Court of Appeal.[68] The court held that the kin care statute does not apply to sick leave policies which provide for an uncapped number of compensated days off because it is impossible to determine the amount of sick leave that an employee may take under such a policy.[69] Therefore, since there is no limit to the number of days that employees may be absent from work under the defendants' sick leave policy, the kin care statute does not apply, and the defendants are not required to provide employees with paid absences to care for sick family members.[70]

Legal Significance

The court's holding prevents an employee who is subject to a paid sick leave policy that provides for an uncapped number of days off from demanding paid kin care leave under section 233. However, the court's decision does not preclude such an employer from complying with section 233. On the other hand, an employer that provides sick leave in the form of an accrual-based system is required to comply with the requirements of the kin care statute by providing its employees with paid kin care leave.

67 *Id.*
68 *Id.*
69 *Id.* at 543.
70 *Id.* at 546.