

LEGAL BRIEFS

CASES & COMMENTS ON WORKERS' COMPENSATION
From the Law Offices of McDermott & McNamara, LLP

WHAT IS A "GOOD FAITH" PERSONNEL ACTION?

Labor Code 3208.3(h) provides that "No compensation...shall be paid by an employer for a psychiatric injury if the injury was substantially caused by lawful, non-discriminatory good faith personnel action." Although the term "personnel action" has not been defined in the Labor Code, case law suggests that what constitutes a good faith personnel action must be tested against the facts of each case.

There is a three part test to determine whether this defense to psychiatric claims will be successful in any given case. First, the action complained of must be classified as a "personnel action." Second, the action must have been undertaken in "good faith." Third, the action complained of must be medically and legally deemed the cause of the psychiatric disability.

In what has been officially designated a "significant panel decision" by the WCAB, guidelines for determining the existence of a "personnel action" were set forth in *Larch v. Contra Costa County*, (1998) 63 CCC 831. This case holds that a personnel action is conduct by management or attributable to management including such things as done by one who has authority to review, criticize, demote or discipline an employee. Personnel actions may include transfers, demotions, layoffs, or performance evaluations and can include warnings, suspensions and terminations.

The current state of the case law appears to clearly demonstrate that not every action by management will be construed as a "personnel action." In *County of Butte v. WCAB (Purcell)* (2000), 65 CCC 1064 (*writ denied*), the WCAB held that memoranda from a

supervisor to an employee did not constitute personnel actions because they did not suggest that the applicant was being disciplined, nor did they carry a threat of discipline. The memoranda noted that Applicant had used unauthorized facilities in conducting a firearms class and also reflected disagreements between the Applicant and the police chief over firearms policy, and whether or not there was adequate communication up and down the chain of command. The Applicant was reassigned to a new position. Testimonial evidence suggested that the Chief was on a campaign to eliminate the Applicant. Additionally, the Applicant testified he was under instructions to build cases against other employees whom the Chief wished to eliminate, the goal being to allow a basis for termination of these employees and a "streamlining" of the department. The WCAB concluded that the Applicant was a victim of a "culture clash" between himself and the new chief, and therefore LC 3208.3(h) did not bar his recovery for psychiatric injury.

At first blush, the question of whether or not an action was undertaken in "good faith" should be fairly easy to determine from the facts of the case: was the action undertaken without ill-motive toward the employee, and was it within the range of activities foreseen by the *Larch* decision? Unfortunately, as with most "technical" defenses that bar an otherwise disabled employee from obtaining benefits, the analysis in *Larch* is often very narrowly construed. In fact, as a legal matter, *Larch* is not even persuasive authority on the Board because it is a panel decision and therefore not binding on subsequent cases, despite its prior designation as a "significant panel decision."

Some cases have gone so far as to attempt to analyze *how well* the employer carried out its own policies and rules, apparently substituting a standard of correctness in place of good faith. In *City of Fresno v. WCAB* (Romero)(2000), 65 CCC 1052, the Board apparently completely abdicated any reliance on *Larch*. In this case, the employee was chronically absent from work and the employer attempted to take action to correct the problem. The employer's actions included counseling, written reprimands, letters of understanding, fines, and finally, termination. The WCAB found that the employer's actions were "froth with problems of unclarity of rules and errors of management personnel not following proper procedures."

Despite the holdings in the above cases, however, the defense of LC 3208.3(h) is not entirely dead. If the employer can truly demonstrate that it followed its own rules, that there was bona fide business necessity behind the rules, and that it did not single out or discriminate against the employee in any way, then the employer's actions may yet be found to be good faith personnel actions. There is a similarity in this type of analysis with the requirements for defending an LC 132a action, which also requires the employer to demonstrate valid business necessity in order to establish the *bona fides* of its actions.

In *Beckman v. WCAB* (2000) 5 CCC 1046, an investigator for the County District Attorney claimed psychiatric disability as a result of actions taken against him after he had given "whistle blower" testimony in an investigation against his Chief Investigator in a sexual harassment matter. Subsequent to giving the testimony, the Applicant had made four requests to his supervising lieutenant, all of which were denied. These included requests to be excused from further staff briefings, to switch his office to another floor, to be transferred to another detail, and to be provided with a copy of the Policy and Procedure manual. After taking testimony in the case the WCJ found that there were legitimate reasons for denying each of the four requests, and that the Applicant was not being treated differently from anyone else. Thus, the defense was successful.

When considering raising the defense of the good faith personnel action, remember that under the terms of LC 3208.3(h) the defendant has the burden of proof on the issue. According to this line of cases, it will be necessary to work closely with the employer to establish that 1) the events giving rise to the psychiatric claim can be construed as "personnel actions" and 2) that the

actions were undertaken in "good faith," with legitimate business necessity behind them and 3) that the employer followed its own rules, correctly carrying out its pre-established procedures, without discriminating against the Applicant.

In order to establish and preserve the evidence you will need for this defense, we recommend an early deposition of the Applicant so that the charges and allegations against the employer can be defined early in the process. Obviously, any memoranda or written communications relating to the events need to be obtained and preserved. Finally, since employees are often known to leave their jobs prior to a case coming to trial, and memory for important events fades over time, you may need to consider preserving key testimony of witnesses from the employer via their deposition prior to trial as well.

Finally, do not forget that establishing the existence of a good faith personnel action is not the end of the effort: It is still necessary to establish that the psychiatric condition was caused by the actions complained of, rather than by some other industrial cause (such as pain from a compensable physical injury). This requires medical opinion. "As the fundamental decisions under the section regarding diagnosis and percentage of causation by actual events of employment are within the province of psychiatric experts, it seems more reasonable to require a medical opinion regarding whether the requisite percentage of causation from all sources combined can be attributed to any lawful, non-discriminatory, good faith personnel action, just as the expert witness is to be asked whether more than 50 percent of all causes combined of the psychiatric injury can be attributed to actual events of employment." *Bass Tickets v. WCAB* (Fay) (1999), 65 Cal. Comp. Cases 53 (Writ Denied).

Legal Briefs is a publication of McDermott & McNamara, LLP

Legal Briefs is provided free of charge as a service to our valued clients to provide general assistance in the day to day review of claims and cases. Comments and recommendations provided are not necessarily meant to apply to any specific case currently under review, as many cases present unique facts and circumstances which should be reviewed by legal counsel when litigation is involved. Please feel free to call with questions or comments, 714-288-1700.