LEGAL BRIEFS NEWSLETTER

CASES & COMMENTS ON WORKERS' COMPENSATION

OCTOBER 2010 www.McDermott-Clawson.com **OCTOBER 2010**

GOOD FAITH PERSONNEL ACTION DEFENSE

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 a significant panel decision, guidelines for determining the existence of a "personnel action" were set forth in Sally 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 as 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 termination.

Not every action by management will be construed as a "personnel action." In County of Butte v WCAB (Purcell) (2001) 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

Los Angeles
16530 Ventura Boulevard, Suite 209
Encino, CA 91436
(818) 997-2100

Orange County / Inland Empire
1700 West Katella Avenue
Orange, CA 92867
(714) 288-1700

Copyright 2010 by McDermott & Clawson, LLP

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(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 in Larch? Unfortunately, as with most technical defenses that bar an otherwise disabled employee from obtaining benefits, the analysis in Larch is often very narrowly construed.

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 1051, 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 WCJ and WCAB found that the employer's actions were "froth with problems of unclarity (sic) 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) 65 CCC 1045, 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 case. After giving the testimony, the applicant had made four requests to his supervising lieutenant, all of which were denied. These included a request to be excused from further staff briefings, a request to switch his office to another location, a request for transfer, and a request to be provided with a copy of the Policy and Procedure Manual. A WCAB judge found that there were legitimate reasons for the denials and that the applicant was not being treated differently than anybody else. In another case, it was held that employers have a duty to investigate claims of misconduct such as claims of sexual harassment or racial discrimination. Glenda Stafford v WCAB (2010) (official cite not yet available); Northrop Grumman Corp. v. WCAB (2002), 103 Cal. App. 4th 1021

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. To maintain the defense it is necessary to work closely with the employer to establish each of the elements of the defense: 1) the events are truly personnel actions and 2) the actions were undertaken in good faith with a legitimate business necessity behind them, and 3) the employer followed its

Los Angeles
16530 Ventura Boulevard, Suite 209
Encino, CA 91436
(818) 997-2100

Orange County / Inland Empire
1700 West Katella Avenue
Orange, CA 92867
(714) 288-1700

Copyright 2010 by McDermott & Clawson, LLP

own rules, correctly carrying out its pre-established procedures without discriminating against the applicant.

We recommend an early deposition of the applicant in such cases to that the charges and allegations against the employer can be defined early in the process. All written communications, as will as electronic communications, are subject to discovery and should be preserved and reviewed. To preserve testimony, consider deposing key witnesses who may move on to greener pastures before the present case ever goes to trial.

Finally, do not forget that establishing the existence of a good faith personnel action is not the end of the effort. It may still be necessary to show that the psychiatric condition (if one exists) was caused by the good faith personnel action and not by other work-related events complained of by the injured worker, such as pain from a physical injury sustained at work. In a recent case, the WCAB held that the defendant failed to meet its burden of proving that the applicant's (a deputy sheriff) psychiatric injury "was substantially caused by a lawful, nondiscriminatory, good faith personnel action" so as to bar his claim for compensation under Labor Code § 3208.3(h), when the applicant alleged that his injury was caused by his distress over failing to prevent a prisoner from escaping while in his custody. Sedgwick Claims Management et. al. v. WCAB, (Munguiat) (official cite not yet available).

Showing causal relationships will require medical opinion. In the Munguiat case noted above, the WCAB also found that qualified medical evaluator's report relied on by defendant was insufficient to establish that injury was "substantially caused" by applicant's impending job transfer.

"As the fundamental decisions under this 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) (199) 65 CCC 53 (writ denied)

Article by Howard Stevens, reprinted and updated from 2001 Legal Briefs article

Need Assistance with Training?

McDermott & Clawson, LLP is happy to assist with the training needs of your organization. Our education committee has extensive experience in providing seminars and discussions on Workers' Compensation topics of concern to adjusters and employers. We have worked with numerous carriers, third party administrators, and brokers to provide educational assistance, and would be happy to discuss your needs. Call or email Howard Stevens at (714) 288- 1700 or feel free to speak with any of our attorneys for further information.

Legal Briefs is a publication of McDermott & Clawson, LLP
Howard Stevens (Orange office), Editor

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 our Education Committee with questions or comments. Contact Howard Stevens in the Orange office, 714 288-1700, or any of our managing attorneys for more information.

Los Angeles
16530 Ventura Boulevard, Suite 209
Encino, CA 91436
(818) 997-2100

Orange County / Inland Empire
1700 West Katella Avenue
Orange, CA 92867
(714) 288-1700

Copyright 2010 by McDermott & Clawson, LLP