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WHAT ARE LAWFUL NONDISCRIMINATORY GOOD FAITH PERSONNEL ACTIONS?

Labor Code Section 3208.2(h) states: "No compensation under this division shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action. The burden of proof shall rest with the party asserting the issue." Just what is a "lawful, nondiscriminatory, good faith personnel action?" The Labor Code is silent in its definition thus leaving the courts to decide.

The good faith personnel action was discussed in detail in the recent panel decision *Ferrell v. County of Riverside*, 2016 Cal.Wrk.Comp. P.D. -- (ADJ8180265). In *Ferrell*, the applicant claimed psyche injury due to the elimination of her department resulting from budgetary cuts causing her to be transferred to a new department. The transfer included the applicant becoming a probationary employee again as well as inadequate access to pooled resources. The WCJ found at trial that these changes were considered "general working conditions," not personnel actions within the meaning of LC §3208.3(h). In agreeing with the WCJ in denying reconsideration, the panel went on to define what the difference is between "general working conditions" and "personnel actions" and how they differ in relation to §3208.3(h).

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Quoting the significant panel decision in *Larch v. Contra Costa County* (1998) 63 Cal.Comp. Cases 831, the Board stated:

"A personnel action is conduct either attributable to management including things as done by one who had the authority to review, criticize, demote, or discipline an employee. It is not necessary for the personnel action to have a direct or immediate effect on the employment status. Personnel actions may include but are not limited to transfers, demotions, layoffs, performance evaluations, and a disciplinary action such as warnings, suspensions and terminations of employment."

Using the above to frame its analysis, the panel went on to recognize the distinction between a psychiatric injury caused by stressful working conditions, and an injury caused by a good faith nondiscriminatory "personnel action" directed specifically towards an individual's employment status. Not recognizing such a distinction broadens the interpretation of a "personnel action" that would in essence preclude from consideration practically all events occurring such as workloads.

Here, the elimination of one department due to budgetary concerns and the transfer of several employees to a different department with all the consequences of a new probationary period and the need to share limited resources were general working conditions, not "personnel actions" within the meaning of §3208.3(h).

In essence, the Board affirmed the distinction between psych injuries caused by general working conditions and psych injuries caused by actions directed specifically at the individual injured worker involving their employment. This is a fact-driven analysis and many of the other decisions that the panel in *Ferrell* cited concerned changes in the job that were applicable to the general working environment, thus denying the personnel action defense.

This panel does recognize that other panels have reached different conclusions as to what constitutes a personnel action. In *Schultz v. WCAB* (1998) 63 Cal.Comp.Cases 222, the panel held that changes in the employment environment resulting from change in company ownership, frequent change of managers, alteration of sales territory, change in

the pay structure, increased workload caused by reduction of sales staff, and requirement to maintain a neat desk were considered personnel actions and the defense applied.

Remember that the party asserting the defense carries the burden to prove that the actions taken were indeed personnel actions. Under the *Ferrell* analysis - which is much more recent than the above-cited *Schultz* decision - the defense must show that the actions taken were by someone in a management position and they were directed specifically at the injured employee regarding their employment status. Aggressive discovery from the outset will likely lead to information to either prove or disprove of this defense early in the case. Depose the injured worker as soon as possible while simultaneously working with the employer to determine exactly what actions were taken and by whom. Get statements from any senior employee that had contact with the injured worker. Only then can the defense be properly evaluated and asserted.

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