WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MICA MASON GRIFFIN, *Applicant*

vs.

AAA/AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA, *Defendants*

Adjudication Numbers: ADJ887731 (MON 0343388)
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to further study the factual and legal issues presented in this case. We now issue our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order (F&O) issued on February 27, 2020, wherein the workers' compensation administrative law judge (WCJ) found that applicant failed to prove that defendant discriminated against her in violation of Labor Code section 132a[1] and ordered that she take nothing on her claim.

Applicant contends that the evidence shows that defendant terminated her employment shortly after she filed a workers' compensation claim, and, therefore, that she established her prima facie section 132a claim.

We received an Answer from defendant.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will affirm the F&O.

FACTUAL BACKGROUND

On January 28, 2020, the matter proceeded to trial as to applicant's section 132a petition. (Minutes of Hearing and Summary of Evidence, January 28, 2020, p. 2:11.)

---

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

The parties stipulated that (1) while employed as a claims consultant by defendant during the period of June 2, 2000 through August 15, 2006, applicant claims to have sustained injury arising out of and during the course of employment to unspecified body parts; and (2) applicant's case-in-chief was resolved by way of compromise and release on July 17, 2012. (*Id*., p. 2:2-7.)

The WCJ admitted the defendant's correspondence to applicant dated August 24, 2006, September 18, 2006, and September 29, 2006, and an excerpt from applicant's June 22, 2007 deposition. (*Id.*, pp. 2:17-3:14.)

Defendant's August 24, 2006 letter to applicant states:

> Employee Benefits has been notified of your need for time off. I understand you are off work for your own illness starting 8/15/2006.
>
> In order to be eligible for a job-protected LOA, an employee must have completed one-year service, and worked a minimum of 1,250 hours in the previous 12 months. Since you do not meet the eligibility requirements, you do not qualify for a leave of absence under Family Medical Leave Act. For further information regarding the leave policy, you may want to refer to the employee handbook.
>
> Since there is no job guarantee, you should discuss your options with your manager.
>
> I have enclosed the following forms and instructions you need to follow before your leave can be approved:
> . . .
> Upon receipt of the requested information, you will be notified if your leave and applicable benefits are approved. Failure to provide the requested information may result in your leave being denied and voluntary resignation may be processed.
> (Ex. 5, Letter dated August 24, 2006, pp. 1-2.)

Defendant's September 18, 2006 letter to applicant states:

> On 8/24/06, we mailed Leave of Absence Request forms to you. The letter stated that failure to comply may result in your leave being denied and voluntary resignation may be processed.
>
> To date, we have not received the forms back from you or your physician. We are closing your short-term disability file, no disability benefits are being made, and your leave is not approved. Please contact your manager/supervisor to discuss your current employment status.
> (Ex. 4, Letter dated September 18, 2006.)

Defendant's September 29, 2006 letter to applicant states:

> Our Benefits Department recently sent you a letter stating they had not received medical documentation supporting your leave of absence. As a result, they closed your leave of absence claim file. Failure to submit such documentation on time is considered a voluntary resignation. Therefore, we have processed your assumed voluntary resignation effective **9/29/2006**.
> (Ex. 3, Letter dated September 29, 2006.)

Applicant's June 22, 2007 deposition transcript states:

> Q. Did you have another reason for stopping work on August 15th, 2006 . . . ?
>
> A. I was out on illness.
>
> . . .
>
> Q. What would compel you to stop working on August 15, 2006?
>
> A. August 15th, that day I left due to a sudden incident.
>
> Q. Do you want to explain that incident on that day?
>
> A. I had a friend that was ejected from their car and died.
>
> Q. On that exact date?
>
> A. Three to four days prior.
>
> (Ex. F, Applicant's deposition transcript, June 22, 2007, p. 18:10-25.)

At trial, applicant testified that she signed her claim form on September 15, 2006, and defendant acknowledged receipt of it on September 21, 2006. (Minutes of Hearing and Summary of Evidence, January 28, 2020, p. 4:9-11.) She was "first alerted" to being terminated when she received defendant's September 29, 2006 letter. (*Id*., p. 4:12-13.) Contrary to defendant's assertion in the letter, she did not voluntarily resign from her position. (*Id*., p. 4:18-19.)

Applicant further testified that she had been on FMLA intermittently for two to three years prior to her termination. (*Id.*, p. 5:7-8.) She last requested FMLA in August 2006; and, when asked whether she made the request due to the death of a friend, she stated that this was not correct, that she was already off work on FMLA when her friend died. (*Id*., p. 5:21-23.)

Defendant demanded that she file additional paperwork, but she did not provide it because the demand violated HIPAA laws. (*Id*., pp. 5:26-6:2.)

Applicant further testified that she stopped working on or about August 15, 2006, but did not recall the reason and her friend's death was not the reason. (*Id.*, p. 6:22-25.)

In the Report, the WCJ states:

> There is no evidence in the record which demonstrates that the applicant ever contacted AAA, either verbally or in writing, in order to respond to AAA regarding her 2006 medical leave request.
>
> The Trial Court observes that the applicant testified that she herself never voluntarily resigned from her employment with AAA. [See 1/28/2019 MOH, Applicant's testimony, page 4, lines 12-23.] The Trial Court accepted this testimony as being true, to the extent that the applicant herself never notified AAA that she was voluntarily resigning her employment with AAA. However, AAA's Employee Handbook, which the applicant acknowledged receiving, as well as AAA's September 18, 2006 letter to her, clearly placed the applicant on notice that, in the event that she made a request for a medical leave of absence, she would have to follow up and provide documentary evidence and a physician's certification to AAA, so that AAA could determine whether she qualified for any of the other available medical leave benefits.
>
> . . .
>
> AAA's September 29, 2006 termination of the applicant's employment, was clearly based on the applicant's absence from work since August 15, 2006, in the absence of any supporting documentation and a physician's certificate, which provided a medical basis for the applicant's absence from work.
> (Report, pp. 17-19.)

DISCUSSION

We observe that under section 132a, "[i]t is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment." Section 132a protects an employee from retaliation or discrimination by an employer because of an exercise of workers' compensation rights. (*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143 [63 Cal.Comp.Cases 944] (*Moorpark*); *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658 [43 Cal.Comp.Cases 1205]; *Department of Rehabilitation v. Workers' Comp. Appeals Bd.* (*Lauher*) (2003) 30 Cal.4th 1281, 1298-1299 [68 Cal.Comp.Cases 831]; *Smith v. Workers' Comp Appeals Bd.* (1984) 152 Cal.App.3d 1104, 1109 [49 Cal.Comp.Cases 212] (*Smith*); see *Usher v. American Airlines, Inc.* (1993) 20 Cal.App.4th 1520, 1526 [58 Cal.Comp.Cases 813].)

Section 132a provides in pertinent part:

> Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file a claim…or an application for adjudication, or because the employee has received a rating, award, or

> settlement…testified or made known his or her intention to testify in another employee's case… is guilty of a misdemeanor and the employee shall be entitled to reinstatement and reimbursement for lost wages and work benefits . . .

This section has been "interpreted liberally to achieve the goal of preventing discrimination against workers injured on the job," while not compelling an employer to "ignore the realities of doing business by 'reemploying' unqualified employees or employees for whom positions are no longer available." (*Lauher*, *supra*, 30 Cal.4th at pp. 1298-1299 [citations omitted].)

In *Lauher*, the Supreme Court clarified its definition for "discrimination," noting that in its previous decisions in *Smith*, *supra* and *Barns v. Workers' Comp. Appeals Bd.* (1989) 216 Cal.App.3d 524, the Court held that an employer's action which caused detriment to the employee because of an industrial injury was sufficient to show a violation of the statute. (*Lauher, supra,* 30 Cal.4th at p. 1299 quoting [1 Hanna, Cal. Law of Employee Injuries and Workers' Compensation (rev. 2d ed., Peterson et al. edits, 2002)], § 10.11[1], p. 10-20 ["[t]he critical question is whether the employer's action caused detriment to an industrially injured employee"]; see *Barns, supra*, 216 Cal.App.3d at p. 531.)

The *Lauher* court noted with approval the Court of Appeal's finding that the formulation enunciated in *Smith v. Workers' Comp. Appeals Bd.* (1984) 152 Cal.App.3d 1104, and adopted by *Barns* to establish a prima facie case was "analytically incomplete:"

> The court explained that, although Lauher had clearly suffered a detriment by having to use his accumulated sick leave and vacation time for his visits to see Dr. Houts, he never established he 'had a legal right to receive TDI [temporary disability indemnity] and retain his accrued sick leave and vacation time, and that [his employer] had a corresponding legal duty to pay TDI and refrain from docking the sick leave and vacation time.' Thus, said the court, '[t]o meet the burden of presenting a prima facie claim of unlawful discrimination in violation of section 132a, it is insufficient that the industrially injured worker show only that . . . he or she suffered some adverse result as a consequence of some action or inaction by the employer that was triggered by the industrial injury. *The claimant must also show that he or she had a legal right to receive or retain the deprived benefit or status, and the employer had a corresponding legal duty to provide or refrain from taking away that benefit or status.*' (*Lauher*, *supra*, 30 Cal.4th at pp. 1299-1300, italics added.)

The Court further agreed with the Court of Appeal that "[an] employer thus does not necessarily engage in 'discrimination' prohibited by section 132a merely because it requires an employee to shoulder some of the disadvantages of his industrial injury. By prohibiting 'discrimination' in section 132a, we assume that the Legislature meant to prohibit treating injured employees differently, making them subject to disadvantages not visited on other employees because the employee was injured or had made a claim." (*Lauher, supra* at p. 1300.)

As the *Lauher* court determined in the first part of its decision, the employee was no longer entitled to temporary disability indemnity (TDI) because his condition was permanent and stationary. (*Lauher*, *supra* at p. 1297.) Therefore, even though the employee's use of sick and vacation leave was for medical treatment and time off due to his industrial disability, because he was not entitled to TDI, the employee was treated in the same way as non-industrially disabled workers who were also required to use sick and vacation leave for medical treatment and time off due to a disability. Because the employee in *Lauher* was on the same legal footing as non-industrially injured employees with respect to this issue, he could not show a legal right to TDI, and therefore could have only established a prima facie case for discrimination if he had been "singled out for disadvantageous treatment." (*Id.* at p. 1301; *Accord*, *Gelson's Markets, Inc. v. Workers' Comp. Appeals Bd.* (2009), 74 Cal.Comp.Cases 1313, *County of San Luis Obispo v. Workers' Comp. Appeals Bd.* (2005) 133 Cal.App.4th 641 (*Martinez*); Compare with *San Diego Transit, PSI, Hazelrigg Risk Management Services, Administrator, Petitioners v. Workers' Compensation Appeals Board* (2006) 71 Cal.Comp.Cases 445 (*Calloway*) [writ den.; defendant violated section 132a by refusing to return applicant to her bus driver position after she was released to work by her PTP, another treating physician and an AME.].)

Based on its specific application to the facts of *Lauher*, we view the Court's phrase "singled out for disadvantageous treatment" to be an *application* of the broader standard adopted by *Lauher*—that, in addition to showing that he or she suffered an industrial injury and that he or she suffered some adverse consequences as a result of some action or inaction by the employer that was triggered by the industrial injury, an applicant "must also show that he or she had a legal right to receive or retain the deprived benefit or status, and the employer had a corresponding legal duty to provide or refrain from taking away that benefit or status." (*Lauher*, *supra* at p. 1300.) Stated another way, an employee must show they were subject to "disadvantages not visited on other

employees because they were injured. . . ." (*Id.*)[2] Because the employee in *Lauher* was not deprived of a legal right to TDI, and therefore could not show he was treated differently than other employees with respect to his alleged detriment, he could not establish a prima facie case of discrimination.[3]

In the present case, applicant contends that the record shows that defendant terminated her employment shortly after she filed a workers' compensation claim and thus establishes her prima facie section 132a claim. We observe in this regard that applicant may establish her prima facie claim by way of evidence demonstrating that defendant took action adverse to her on a date in close temporal proximity to the date it was on notice of her workers' compensation claim. (See *Arteaga v. Brink's, Inc*. (2008) 163 Cal.App.4th 327, 353.)

Here, there is no dispute that applicant apprised defendant of her claim on September 21, 2006, and, eight days later, on September 29, 2006, defendant terminated her employment. (Minutes of Hearing and Summary of Evidence, January 28, 2020, p. 4:9-11; Report, p. 19.)

However, the record reveals that defendant initiated the action that culminated in applicant's termination on August 24, 2006, twenty-eight days before it received notice of her claim. On that date defendant advised applicant that she had been off work without leave since August 15, 2006, that she was ineligible for FMLA, and that she would be subject to termination through the "voluntary resignation" process unless she were to provide documentation required for a leave of absence. (Ex. 5, Letter dated August 24, 2006, pp. 1-2.) Then, on September 18, 2006, three days before it learned of applicant's workers' compensation claim, defendant again advised applicant that she would be subject to termination through the "voluntary resignation" process unless she provided the requested documentation. (Ex. 4, Letter dated September 18, 2006.) Although she knew of defendant's requests, applicant did not provide the documentation. (Minutes of Hearing and Summary of Evidence, January 28, 2020, pp. 5:26-6:2.) Thereafter, on

---

[2] *Accord, St. John Knits v. Workers' Comp. Appeals Bd.,* 2019 Cal. Wrk. Comp. LEXIS 75 [writ den.; the Court of Appeals found no reasonable grounds to review a WCAB finding of section 132a discrimination based upon substantial evidence of defendant employer's subjection of industrially-injured employee to disadvantages not visited on other employees.]

[3] We also note that the particular standard denoted by the phrase "singled out" does not literally apply where the detriment affects injured workers as a class, although the broader standard would apply. (*Andersen v. Workers' Comp. Appeals Bd*., (2007) 149 Cal.App.4th 1369, 1377-1378 [72 Cal.Comp.Cases 1369].)

September 29, 2006, defendant processed applicant's termination as a voluntary resignation. (Ex. 3, Letter dated September 29, 2006.)

Based upon this record, it is clear that applicant's termination resulted from proceedings initiated before defendant could have known of her workers' compensation claim and thus unrelated to her claim. It follows that the evidence fails to demonstrate applicant's prima facie section 132a claim.

Accordingly, we will affirm the F&O.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration, that the Findings and Order issued on February 27, 2020 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 13, 2022

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

KEGEL, TOBIN & TRUCE
LAW OFFICE OF CHRISTOPHER L. CONGLETON
MICA MASON GRIFFIN

SRO/*pc*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
CS