

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

ERIC SPRY, *Applicant*

vs.

INFRACORE, LLC; ZENITH INSURANCE COMPANY, *Defendants*

**Adjudication Number: ADJ11132673
San Diego District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Findings, Award and Order (F&O) issued on March 11, 2021,¹ wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that (1) on March 23, 2018, defendant terminated applicant in violation of Labor Code section 132a;² (2) defendant failed to prove that it terminated applicant for a legitimate business reason; (3) applicant is entitled to reinstatement to his position with defendant; (4) applicant's claim exceeds the \$20,000 value of the prior settlement, warranting a maximum section 132a penalty of \$10,000.00; (5) applicant is entitled to recover the value of the benefits he lost while unemployed and the record requires further development of this issue; and (6) applicant is entitled to recover the value of the wages he lost during the period of March 23, 2018 until his reinstatement, defendant is entitled to an offset for any wages applicant earned during this period, and the record requires further development of these issues.

The WCJ awarded applicant \$10,000.00, less attorney's fees. The WCJ also ordered that applicant be reinstated, that the parties adjust the monies due applicant, and that defendant withhold twenty-five percent of the award as attorney's fees.

¹ Apparently relying upon the Appeals Board's March 18, 2020 In Re: COVID-19 State of Emergency En Banc (Misc. No. 260), the WCJ emailed the F&O to defendant's attorney and designated him to effect service on the other parties. In that decision, the Appeals Board suspended WCAB Rule 10628, which requires the WCAB to effect service by mail unless a party has designated email for service. (Cal. Code Regs., tit. 8, former § 10500, now § 10628 (eff. Jan. 1, 2020).) Although that decision stated that service by the WCAB may be made electronically with or without the parties' consent, it did not state that the WCAB may designate a party to serve a final decision, order or award. Therefore, district offices should still serve all parties of record with a final decision, order or award (whether electronically or otherwise), and not designate a party to do so.

² Unless otherwise stated, all further statutory references are to the Labor Code.

Defendant contends that the evidence is insufficient to establish applicant's prima facie section 132a claim or resultant damages. Defendant further contends that the evidence is sufficient to establish its business necessities defense.

We received an Answer from applicant.

The WCJ issued 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 upon our review of the record, and for the reasons expressed in the Report and the Opinion On Decision, both of which we adopt and incorporate herein, we will deny the Petition.

The record reveals that the WCJ found applicant's testimony that he was qualified for several of the positions for which defendant was hiring when he was terminated to be credible. (Opinion On Decision, p. 3.) We accord this determination great weight because the WCJ had the opportunity to hear applicant's testimony and observe his demeanor at trial. (See *Garza v. Worker's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].) Because the record demonstrates that defendant was hiring new employees for positions for which applicant was qualified without providing him an opportunity to apply for them, defendant's argument that it terminated applicant because it was downsizing and did not have positions available is not credible and fails to support its business necessities defense. (Opinion On Decision, p. 4; see *Westendorf v. W. Coast Contrs. of Nev., Inc.* (9th Cir. 2013) 712 F.3d 417, 423. (Citation omitted).)

Accordingly, we will deny the Petition.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings, Award and Order issued on March 11, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 28, 2021

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

**ERIC SPRY
LAW OFFICES OF PIERRE VAUGHN, APC
SCHWARTZ SEMERDJIAN CAULEY & MOOT
CHERNOW LIEB
SMALL SCHENA
TEKSYSTEMS
GLENN SILVERII
INFRACORE LLC
ZENITH**

SRO/ara

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