

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **SALLY LARCH, (FLEMING),**

5 *Applicant,*

6 vs.

7 **CONTRA COSTA COUNTY,**

8 *Defendant(s).*

Case No. WCK 21372

**OPINION AND DECISION
AFTER RECONSIDERATION**

9
10
11 Introduction

12 Labor Code section 3208.3, subdivision (h) (section 3208.3 (h), bars compensation for
13 psychiatric injuries which are substantially caused by a lawful, nondiscriminatory, good faith
14 personnel action. The issue in this case is what constitutes a “good faith personnel action” in the
15 context of a psychiatric injury claim. The workers' compensation referee (WCR) found that
16 defendant's conduct in this case constituted a good faith personnel action and we agree.

17 Applicant sought reconsideration of the Findings and Order issued by the WCR on
18 September 29, 1997. The WCR found that applicant did not sustain a compensable psychiatric
19 injury while employed as a Deputy Sheriff/Sergeant through June 28, 1994. He issued an order
20 that applicant take nothing by reason of her claim except reimbursement for medical-legal costs.
21 Applicant asserted that the WCR erred in interpreting the term personnel action under section
22 3208.3 (h), to include any criticism by a non-supervisor which is endorsed by management but
23 does not affect the applicant’s employment status. She argued that the WCR’s interpretation
24 improperly broadens the statute and deprives injured workers of benefits under the workers’
25 compensation laws. Applicant asserted that the term personnel action under section 3208.3 (h)
26 must be limited to an employer action which affects the applicant’s employment status.
27

1 We granted reconsideration in order to study the factual and legal issues in this matter.
2 After reviewing the record, we conclude that the WCR correctly found the claim barred by section
3 3208.3 (h).

4 Background

5 Applicant began her career as a deputy sheriff on January 9, 1978, and became a Sergeant
6 in September 1990. On June 28, 1994, Sergeant Knutson confronted applicant about her handling
7 of a conflict between her staff and the staff of another shift under Sergeant Carey. Applicant left
8 work on June 28, 1994, and sought psychiatric treatment. She filed a claim for psychiatric injury
9 related to various occurrences while at the Martinez Detention Facility (Martinez facility) from
10 1992 to March 1993, and the West County Detention Facility (Richmond facility) from March
11 1993 to June 28, 1994, including the June 28, 1994 incident.

12 The elements set forth in section 3208.3 must be satisfied in order to establish that
13 applicant has sustained an industrial psychiatric injury. Section 3208.3 was part of the Margolin-
14 Bill Greene Workers' Compensation Reform Act of 1989 (Stats. 1989, ch. 892, § 25) which
15 enacted extensive revisions to the workers' compensation system. The legislature expressed its
16 intent that section 3208.3 establish a "newer and higher threshold of compensability for psychiatric
17 injury."

18 The pertinent parts of section 3208.3, as amended and as applicable to this case, are as
19 follows:

20 "(a) A psychiatric injury shall be compensable if it is a mental disorder
21 which causes disability or need for medical treatment, and it is diagnosed
22 pursuant to procedures promulgated under paragraph (4) of subdivision (j)
23 of Section 139.2 or, until these procedures are promulgated, it is
24 diagnosed using the terminology and criteria of the American Psychiatric
25 Associations' Diagnostic and Statistical Manual of Mental Disorders,
26 Third Edition-Revised, or the terminology and diagnostic criteria of other
27 psychiatric diagnostic manuals generally approved and accepted nationally
by practitioners in the field of psychiatric medicine.

"(b) (1) In order to establish that a psychiatric injury is compensable, an
employee shall demonstrate by a preponderance of the evidence that
actual events of employment were predominant as to all causes combined

1 of the psychiatric injury.

2 “(2) Notwithstanding paragraph (1), in the case of employees whose
3 injuries resulted from being a victim of a violent act or from direct
4 exposure to a significant violent act, the employee shall be required to
5 demonstrate by a preponderance of the evidence that actual events of
6 employment were a substantial cause of the injury.

7 “(3) For the purposes of this section, ‘substantial cause’ means at least
8 35 to 40 percent of the causation from all sources combined.

9 “(c) It is the intent of the Legislature in enacting this section to
10 establish a new and higher threshold of compensability for psychiatric
11 injury under this division.

12 In the revised legislation (Stats. 1991, ch. 115, § 4, effective July 16, 1991), subdivision (d), was
13 added to read in part:

14 “As used in this subdivision, a ‘regular and routine employment event’
15 includes, but is not limited to, a lawful, nondiscriminatory, good faith
16 personnel action, such as discipline, work evaluation, transfer, demotion,
17 layoff, or termination.”

18 In 1993, section 3208.3 underwent significant revision which essentially increased causation
19 requirements for work-related psychiatric injuries (Stats. 1993, ch. 118, § 1, effective July 16,
20 1993; Stats. 1993, ch. 1242, § 22). The language in subdivision (d) defining a “regular and
21 routine employment event” was deleted. Subdivision (h) was added to provide:

22 “(h) No compensation under this division shall be paid by an employer
23 for a psychiatric injury if the injury was substantially caused by a lawful,
24 nondiscriminatory, good faith personnel action. The burden of proof shall
25 rest with the party asserting the issue.”

26 In considering the issues under section 3208.3, there must first be a psychiatric injury as
27 defined in section 3208.3 (a), and the employee must also “demonstrate by a preponderance of the
evidence that actual events of employment were predominant as to all causes combined of the
psychiatric injury.” (Lab. Code, § 3208.3, subd. (b).) The WCR in the present matter determined
that these conditions were met and they are not disputed herein.

1 Defendant claimed, and the WCR concluded, however, that applicant's claim was not
2 compensable under section 3208.3 (h) because defendant had carried its burden of proof in
3 establishing that applicant's injury was substantially caused by a lawful, nondiscriminatory, good
4 faith personnel action. While section 3208.3 does define the substantial cause element (subsection
5 (a)(3)), subsection (h) does not define a "lawful, non-discriminatory, good faith personnel action."
6 In this case, we will address each of these elements, beginning with the personnel action element.

7 Personnel Action

8 What constitutes a "personnel action" depends on the subject matter and factual setting for
9 each case. The term includes but is not necessarily limited to a termination of employment. (*Bray*
10 *v. Workers' Comp. Appeals Bd.* (1994) 26 Cal.App.4th 530 [59 Cal.Comp.Cases 475, 484].) An
11 employer's disciplinary actions short of termination may be considered personnel actions even if
12 they are harsh and if the actions were not so clearly out of proportion to the employee's
13 deficiencies so that no reasonable manager could have imposed such discipline. (Cf. *Clutts v.*
14 *Workers' Comp. Appeals Bd.* [1997] 62 Cal.Comp.Cases 1142, 1143 (writ den.)) In *Clutts*, the
15 applicant had alleged psychiatric injury as a result of letters written to him by his employer warning
16 of disciplinary action for his failure to perform certain job duties.

17 In the instant case, the WCR stated that a personnel action is "conduct attributable to
18 management in managing its business including such things as done by one in authority to review,
19 criticize, demote, transfer or discipline an employee in good faith." The WCR stated that the term
20 personnel action "was not intended to cover all actions by any level of personnel in the
21 employment situation or all happenings in the workplace done in good faith." The WCR
22 explained:

23 "This would be too broad an interpretation that would preclude from
24 consideration practically all events occurring such as work loads imposed
25 in good faith. I am not convinced that new and higher threshold
26 requirements for compensability of psychiatric injuries was intended to be
27 that inclusive."

The WCR reasoned that the term personnel action within the meaning of section 3208.3 (h), meant

1 the acts of management:

2 “I note that deleted from the language in the present section 3208.3(h) is
3 prior language applicable to injuries between January 1, 1990 to January 1,
4 1994. Under the prior section 3208.3, subsection (d), the language
5 included examples of good faith personnel action such as ‘discipline, work
6 evaluation, transfer, demotion, layoff, or termination.’ Although the
7 deleted language could be interpreted to express an intent to broaden
8 ‘good faith personnel action’, I believe it does express the type of action
9 the Legislature envisioned. It appears to be acts of management.
10 Otherwise, any good faith employee conduct by one employee against
11 another, even action by one against a superior could be thrown into this
12 hopper so that even criticism, as in the instant case by Mr. Forrett of
13 applicant (his superior), might be considered good faith personnel action.”

14 The WCR stated that a personnel action does not include an action by one employee against a
15 fellow employee of equal or less status in the employment setting unless management authorized
16 that conduct as an extension of its authority. It is an action attributable to management, or an
17 action of one who has the authority to evaluate, criticize or correct the activity of the employee.
18 Thus, the WCR concluded that the type of personnel action “envisioned by the Legislature in
19 enacting section 3208.3 (h) is conduct attributable to management in managing its business
20 including such things as done by one in authority to review, criticize, demote, or discipline an
21 employee....”

22 We adopt the well-reasoned analysis in the WCR's report of what constitutes a personnel
23 action under section 3208.3 (h). Thus, whether an action constitutes a personnel action under
24 section 3208.3 (h) does not depend simply on whether the action is of a direct supervisor of the
25 applicant or is of one who is in the chain of command. All the participants' duties, whether
26 management in fact ratified the action in question and/or whether the action in question was
27 justified standing alone would be relevant factors. This determination is not solely related to
whether the actions are taken by a superior or supervisor and it does not encompass just “any
criticism” as claimed by applicant.

It is unnecessary, moreover, that a personnel action have a direct or immediate effect on

1 the employment status. Criticism or action authorized by management may be the initial step or a
2 preliminary form of discipline intended to correct unacceptable, inappropriate conduct of an
3 employee. The initial action may serve as the basis for subsequent or progressive discipline, and
4 ultimately termination of the employment, if the inappropriate conduct is not corrected.

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

11 The WCR in the present matter concluded that Sergeant Knutson's confrontation of
12 applicant on the last day of work was a personnel action within the meaning of section 3208.3 (h).
13 Sergeant Knutson did not have the authority to supervise or discipline applicant but, as the
14 Director of Operations, he was responsible for coordinating shifts and resolving problems between
15 shifts. According to Captain Shinn, applicant acted inappropriately in pitting one shift against
16 another, and Sergeant Knutson acted appropriately. Stronger disciplinary action may have ensued
17 if applicant had continued to pit her staff against another staff. The WCR, therefore, concluded
18 Sergeant Knutson acted appropriately within his authority and, therefore, on behalf of
19 management, by confronting applicant for her inappropriate action. Thus, in this situation, where
20 applicant and Sergeant Knutson were of equal status, Sergeant Knutson's action in confronting
21 applicant as part of his duty to resolve conflicts between the staff constitutes a personnel action
22 under section 3208.3 (h).

23 Another stressor was applicant's involvement in the employment termination of a
24 subordinate. The WCR determined that the stressors, while actual, did not constitute personnel
25 actions under section 3208.3 (h) because they were incidental to the actions of a subordinate. The
26 WCR also determined that the other significant stressors were related to the actions of Lieutenant
27 Rodriguez. Actions by Lieutenant Rodriguez at the Martinez facility were not personnel actions

1 because they were taken at a time when Lieutenant Rodriguez was not applicant's supervisor and
2 was without authority to discipline or criticize applicant on behalf of management. The transfer of
3 Lieutenant Rodriguez to the Richmond facility was not a personnel action with respect to
4 applicant. The WCR found, however, that actions of Lieutenant Rodriguez toward applicant at
5 the Richmond facility were personnel actions under section 3208.3 (h) because applicant at the
6 time of the actions was under the supervision of Lieutenant Rodriguez. The WCR determined that
7 certain disagreements between applicant and Lieutenant Rodriguez on the day-to-day operations
8 did not constitute personnel actions. The WCR determined that Captain Shinn's action affirming
9 the position of Lieutenant Rodriguez on applicant's responsibility to be available for calls at night
10 as the shift sergeant may constitute a personnel action. Applicant disputes the WCR's analysis of
11 the law, but does not appear to dispute his application of the law as interpreted to the facts.

12 Therefore, we agree that the WCR properly concluded that the actions of Sergeant
13 Knutson on June 28, 1994, as well as some actions of applicant's supervisor, Lieutenant
14 Rodriguez, at the Richmond facility, were personnel actions.

15 Good Faith

16 Having concluded that the actions of Sergeant Knutson on June 28, 1994, as well as the
17 actions of applicant's supervisor Lieutenant Rodriguez at the Richmond facility, were personnel
18 actions, we must determine whether those actions were lawful, nondiscriminatory, and in good
19 faith. Each of these three requirements must be met in order for section 3208.3 (h) to bar payment
20 of compensation.

21 Section 3208.3 (h) does not define the term good faith, and there are no cases defining the
22 term as used in that section. The WCR, therefore, considered the definition of good faith in a
23 broader context. The term "good faith" has been defined to mean "honesty in fact in the conduct
24 or transaction concerned" (see, e.g., Civ. Code §§ 2961, 1102.7; Cal. Com. Code, §§ 1201, subd.
25 (19), 2103, subd. (1) (b), 5102); to include "honesty in fact" and the "observance of reasonable
26 commercial standards of fair dealing" (see, e.g., Cal. Com. Code, § 3103, 11105); to include an
27 act without intent to defraud (see, e.g., Ins. Code § 11772); to mean to act with honesty of

1 purpose, without collusion, fraud, or knowledge of fraud, and without intent to assist in fraudulent
2 or otherwise unlawful design (*Appel v. Morford* (1943) 62 Cal.App.2d 36, 40 [57 Cal.Comp.Cases
3 343]; to include a “state of mind denoting honesty of purpose, freedom from intention to defraud,
4 and generally speaking [] being faithful to one’s duty or obligation” (*Efron v. Kalmanovitz* (1967)
5 249 Cal.App.2d 187, 192); to mean “honestly; without fraud, collusion or deceit; really, actually,
6 without pretense,” and “an intention based on a valid or good reason or cause” (*Gibson v. Corbett*
7 (1948) 87 Cal. App. 2d Supp. 926, 929); and to include honesty of intention and an honest
8 intention to abstain from taking any unconscientious advantage of another. (Blacks’ Law Dict. (6th
9 ed. 1990) p. 693.) The good faith element thus encompasses the manner in which the personnel
10 action is taken.

11 The California Supreme Court, moreover, considered the standard for review in
12 determining whether just cause supported the termination of an employee in *Cotran v. Rollins*
13 *Hudig Hall International* (1998) 17 Cal.4th 93 [69 Cal. Rptr. 2d 900] (rehrg. den. 2/25/98). The
14 Court found that the “question critical to defendants’ liability is not whether plaintiff in fact
15 sexually harassed other employees, but whether at the time the decision to terminate his
16 employment was made, defendants, acting in good faith and following an investigation that was
17 appropriate under the circumstances, had reasonable grounds for believing plaintiff had done so.”
18 (*Cotran, supra*, 69 Cal. Rptr. 2d at p. 911.) The Court pointed out that the “good faith” rule is not
19 a standardless rule which would permit a discharge decision to be based on subjective reasons
20 which are pretextual and mask arbitrary and unlawful motives which are unreviewable. (*Cotran,*
21 *supra*, 69 Cal. Rptr. 2d at p. 909.) The Court set forth the “objective good faith standard” in
22 footnote 3:

23 “Although ‘good faith’ is commonly thought of as subjective in essence,
24 the use of objectified mental states as the legal standard is a familiar feature
25 of Anglo-American law. Juries are routinely asked for example, to place
26 themselves in the position of the ‘reasonable person’ in resolving questions
27 of negligence liability. The standard is not confined to tort law. We have
previously applied an objective standard in the wrongful discharge
employment context. (See *Turner v. Anheuser-Busch, Inc.* (1994) 7
Cal.4th 1238, 1248 [standard for determining constructive discharge is

1 objective]; *cf. People v. Machupa* (1994) 7 Cal.4th 614, 618, fn. 1 [‘good
2 faith’ exception to search warrant requirement focuses on the ‘objective
3 reasonableness’ of the search].) Prosser and Keeton have described the
4 reasonable person - “this excellent but odious character” - as “a
5 personification of a community ideal of reasonable behavior, determined by
6 the jury’s social judgment.” (Prosser & Keeton (5th ed. 1984) Torts, § 32,
7 pp. 174, 175 fn. omitted.) As the case law cited in the main text makes
8 clear, coupling ‘good faith’ with ‘objectivity’ is intended to place the trier
9 of fact in the position of the ‘reasonable employer’ in deciding whether the
10 defendant in a wrongful termination suit acted responsibly and in
11 conformity with prevailing social norms in deciding to terminate an
12 employee for misconduct.” (*Cotran, supra*, 69 Cal. Rptr. 2d at p. 909.)

13 Any analysis of the good faith issue, therefore, must look at the totality of the circumstances, not a
14 rigid standard, in determining whether the action was taken in good faith. To be in good faith, the
15 personnel action must be done in a manner that is lacking outrageous conduct, is honest and with a
16 sincere purpose, is without an intent to mislead, deceive, or defraud, and is without collusion or
17 unlawful design. This analysis would be based upon the objective good faith standard as discussed
18 by the Supreme Court in *Cotran, supra*, 69 Cal. Rptr. 2d at p. 909.

19 The WCR in the present matter found that the personnel actions were in good faith and we
20 agree. He concluded that the actions of Lieutenant Rodriguez at the Richmond facility did not
21 involve dishonesty, a lack of sincere purpose, an intention to mislead, deceive, or defraud, or an
22 unlawful design. He stated that the mannerisms of Lieutenant Rodriguez in “being straight
23 forward, sometimes intimidating, speaking in a loud voice, being forceful and in a no non-sense
24 approach” did not exceed what would constitute good faith conduct. He found that Captain
25 Shinn’s conversation with applicant confirming the position of Lieutenant Rodriguez’s position on
26 applicant’s responsibility to be available for calls at night as shift sergeant was essentially done in a
27 manner lacking outrageous conduct and was honest and with a sincere purpose.

The WCR, moreover, characterized the manner in which Sergeant Knutson confronted
applicant on June 28, 1994, as a good faith action. The WCR considered the testimony and
accepted “applicant’s version of what transpired with raised voices but no yelling.” The WCR
concluded that “there was a heated exchange but that Sergeant Knutson’s conduct may not be

1 characterized as outrageous nor objectively unreasonable nor conduct objectively engendering
2 undue stress.” While certainly one in authority should strive to maintain calm and reflective
3 communications when dealing with employees, where emotions do rise or an exchange does
4 become heated, that does not alter the fact that the action is being done with an honest and sincere
5 purpose and with an intention based upon valid and good cause. We agree with the WCR's
6 conclusion that Sergeant Knutson's actions met these standards and were, accordingly, done in
7 good faith.

8 Applicant claimed that good faith was lacking because Sergeant Knutson did not
9 investigate whether the dispute between the shifts had been resolved before confronting applicant.
10 The WCR, however, determined that Sergeant Knutson's action was appropriate because
11 applicant's conduct in pitting the staff of her shift against the staff of another shift was
12 inappropriate. The inappropriateness of applicant's action did not depend on whether the conflict
13 between the shifts had been resolved. Applicant's action was unacceptable. Thus, Sergeant
14 Knutson's refusal to listen to applicant's explanation as to whether the problem was resolved or
15 what Sergeant Carey did that was similar did not render his action as bad faith, or remove his
16 action from a good faith effort to correct applicant's unacceptable conduct. Again, applicant has
17 not challenged the factual determination under the WCR's analysis of the good faith standard.

18 Lawful and Non-Discriminatory

19 Petitioner has not raised issues regarding the elements that the personnel actions were
20 lawful and non-discriminatory and therefore the WCR's findings in this regard are not being
21 challenged. We, however, do wish to make the following general comments on these elements.

22 Beginning with the lawful element, Black's Law Dictionary (6th ed. 1990) pp. 885-886)
23 defines lawful as “warranted or authorized by the law; having the qualifications prescribed by law;
24 not contrary to nor forbidden by the law; not illegal.” It generally differs from the term “legal.”
25 To say that an act is legal “implies that it is done or performed in accordance with the forms and
26 usages of law, or in a technical manner.” “To say of an act that it is ‘lawful’ implies that it is
27 authorized, sanctioned, or at any rate not forbidden, by law.” The word lawful “more clearly

1 implies an ethical content” and “usually imports a moral substance or ethical permissibility.” In the
2 instant case, the WCR did not find the acts of Lieutenant Rodriguez at the Richmond facility, or
3 the actions of Sergeant Knutson to be unlawful.

4 The lawful, good faith personnel actions must also be nondiscriminatory. (Lab. Code, §
5 3208.3 (h).) Black’s Law Dictionary (6th ed. 1990) p. 467) defines discrimination as “[a] failure
6 to treat all persons equally where no reasonable distinction can be found between those favored
7 and those not favored.” Thus, the real issue is whether the employer treated applicant differently
8 than others similarly situated without justification. There is no showing in the present matter that
9 applicant was treated differently than other similarly situated employees.

10 Substantial Cause

11 Having concluded that the actions complained of by applicant were lawful,
12 nondiscriminatory, good faith personnel actions, we must then determine whether the actions were
13 a substantial cause of her psychiatric condition. Section 3208.3 (a) (3), provides that the term
14 “‘substantial cause’ means at least 35 to 40 percent of the causation from all sources combined.”
15 More than one factor may be a substantial cause. The question, therefore, is whether the lawful,
16 nondiscriminatory, good faith personnel actions were a substantial cause. We emphasize that the
17 determination is a legal one. It is the trier-of-fact who makes the determination on the legal issue
18 of whether “the injury was substantially caused by a lawful, nondiscriminatory, good faith
19 personnel action.” The medical expert’s primary focus and province is the causation issue
20 including the required percentage of causation as defined in the statute, and not upon the other
21 elements discussed above; i.e., lawful, non-discriminatory, good faith, and personnel action.

22 The WCR in the present matter found the pivotal incident that resulted in applicant leaving
23 work and seeking treatment to be the June 28 1994 incident. Absent this incident, the WCR
24 determined that applicant would not have left her employment with defendant or sought treatment.
25 The WCR concluded that his finding of noncompensability rested “primarily, but not entirely, on
26 the event that occurred at work on June 28, 1994.” The WCR therefore concluded that defendant
27 had met the test of proving that the personnel action was a substantial cause of applicant’s

1 psychiatric disability, thus barring compensation under section 3208.3 (h).

2 Conclusion

3 In sum, although it had been established that applicant had a psychiatric condition (Lab.
4 Code § 3208.3, subd. (a)) and that the actual events of employment were predominant as to all
5 causes combined of the psychiatric injury (Lab. Code § 3208.3, subd. (b) (1)), applicant's claim is
6 barred under section 3208.3 (h) because her psychiatric complaints were substantially caused by
7 lawful, nondiscriminatory, good faith personnel actions. Accordingly, we will affirm the WCR's
8 decision.

9 For the foregoing reasons,

10 IT IS ORDERED as the Appeals Board's Decision After Reconsideration that the Findings
11 and Order issued September 29, 1997, be, and hereby is, AFFIRMED.

12 WORKERS' COMPENSATION APPEALS BOARD

13 /s/ Robert N. Ruggles

14 I CONCUR

15
16 Arlene N. Heath

17
18 Douglas M. Moore, Jr.

19 DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

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21 SERVICE BY MAIL ON SAID DATE TO ALL PARTIES SHOWN
22 ON THE OFFICIAL ADDRESS RECORD.

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27 LARCH, SALLY