**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**ALEJANDRO LLORT, *Applicant***

**vs.**

**PETE FER & SON PLUMBING; TRUCK INSURANCE EXCHANGE, *Defendants***

**Adjudication Number: ADJ10448584**
**Anaheim 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 of Fact issued on June 22, 2021, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that defendant did not violate Labor Code section 132a.[1]

Applicant contends that the evidence establishes that defendant singled him out for disadvantageous treatment by failing to return him to work after his medical restrictions were lifted and otherwise deviating from its normal procedures for returning injured employees to work.

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 Findings of Fact.

## FACTUAL BACKGROUND

On February 25, 2021, the matter proceeded to trial as to the following issue: "Applicant's Petition for Unlawful Discrimination pursuant to Labor Code Section 132(a), dated July 28, 2016." (Minutes of Hearing and Summary of Evidence, February 25, 2021, p. 2:24-25.) The parties

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

stipulated that on December 30, 2014 applicant sustained injury to his low back while employed as an HVAC technician. (*Id*., p. 2:15-17.)

In the Report, the WCJ writes:

> A trial was held in this matter on 02/25/2021, 03/30/2021 and 05/25/2021 regarding applicant's petition for unlawful discrimination pursuant to Labor Code section 132a. Testimony was taken of applicant and defense witness, Jennifer Phillips.
> . . .
> Defendant's Exhibits "D" and "E" consist of a PR-2/Primary Treating Physician's Progress Report dated 10/18/2015 from Dr. Gregory Yoshida and Orthopedic Final Consultation Primary Treating Physician's Permanent and Stationary Report from Dr. Gregory Yoshida dated 12/16/2015, respectively. . . .
>
> The PR-2 from Dr. Yoshida states that applicant can return to full duty on 10/19/2015 with no limitations or restrictions. On page three of the permanent and stationary report, under the section "Work Restrictions", Dr. Yoshida states that applicant currently does not require work restrictions.
>
> Applicant testified that after Dr. Yoshida returned him to return to full duty he contacted his employer to let them know he was ready to go back to work. Applicant testified that he began calling his employer right after he was given the release by the doctor. Applicant testified that this occurred at the end of October or the first week of November. Applicant testified that he called his employer to let them know he was ready to return to work every day from November 1 through November 8th or 9th. . . . Applicant testified that most of the time he spoke with Pete Fer Sr. Applicant testified that his supervisors at Pete Fer & Son Plumbing were Pete Fer, Sr., Pete Fer, Jr and Jennifer. (MOH/SOE 02/25/2021 Trial, at 4:20-24, 5:13-15, 6:9-10, and 8:3-4.)
>
> Applicant testified that each time he called his employer he got the same response which was they had no work for him today and that he was to call tomorrow. . . .
>
> Applicant then testified that each time he called his employer he wrote the date, time and who he spoke to and that he spoke to his employer on three or four occasions and also by radio/Nextel. (MOH/SOE 02/25/2021 Trial, at 6:6:8.)
>
> Applicant's Exhibit "2" consists of an undated and unsigned document entitled "When Back to Work (Pete Fer Plumbing)". This

document lists six dates, November 2 through November 6, 2015 and November 9, 2015; where he called (five times to the shop and once by radio/Nextel); the time each was call made (7:00 a.m. each time); the name of Pete Sr. is listed for dated November 2 through November 6, 2015 and Pete Jr for November 9, 2015; and from November 2 through November 4, 2015 states "No job for you today", November 5, 2015 states "No job., call tomorrow, November 6, 2015 states "No job. Call next week", and November 9, 2015 states "no answer."

. . .

Jennifer Phillips testified that she is the president of Pete Fer & Son Plumbing and has held this position since the year 2000. Ms. Phillips testified that her job duties include overseeing the operations and the business of the company which include accounting and payroll functions and handling inventory of work that is performed and workers' compensation matters. (MOH/SOE 05/25/2021 Trial, at 3:21.)

Ms. Phillip's testified that she did receive a text from applicant on 10/15/2015 stating the doctor had released him to return to work. Ms. Phillips testified she responded to the text by telling applicant to contact the plumbing office where the workload and scheduling is known and to reach out to his supervisor, Pete Fer, Jr to provide him with a medical release. Ms. Phillips testified that applicant did not provide his supervisor at that time with any written documentation from the doctor releasing him to return to work. (MOH/SOE 05/25/2021 Trial, at 4:24-25 and 5:2-7.)

Ms. Phillips testified applicant called a few days later, on or about October 19th or 20th, 2015 and spoke with Pete Fer, Jr., who told applicant that there was no HVAC work available and to bring in his medical release to return to work. (MOH/SOE 05/25/2021 Trial, at 5:8-10.)

Ms. Phillips testified that after she received the text from applicant she wrote the information about his text and her response on her desk calendar. Ms. Phillips testified that she did the same with the follow up calls applicant had with Pete Fer, Jr. Ms. Phillips testified that she recorded that applicant called in twice to work. Ms. Philips testified that Pete Fer, Jr. also recorded the contents of his conversation with applicant on his desk calendar. Ms. Phillips testified that both she and Pete Fer, Jr. recorded this information on their desk calendars as a normal part of their business. Ms. Phillips testified that she reviewed these desk calendars in preparation for her testimony at trial. (MOH/SOE 05/25/2021 Trial, at 5:13-19.)

Ms. Phillips testified that after those two conversations the applicant had with Pete Fer, Jr., both she and Pete Fer, Jr. noted on their weekly calendars if applicant attempted to call again. . . . Ms. Phillips testified that their desk calendars reflect that applicant did not make any further telephone calls or submit a medical release. Ms. Phillips testified her business notes after October 20, 2015 indicate there was no contact by the applicant with the company or that applicant provided the company with a medical release. (MOH/SOE 05/25/2021 Trial, at 5:17-25.)

. . .

The evidence indicates that when the applicant contacted the employer to return to work he was told to contact the plumbing office where the workload and scheduling is known and to reach out to his supervisor, Pete Fer, Jr to provide him with a medical release. The evidence indicates that the employer was not provided with a medical release.

. . .

Ms. Phillips testified that Pete Fer & Son Plumbing is a small family owned business. Ms. Phillips testified that applicant's job duties were HVAC duties and that the company did not have any HVAC work for applicant when he was released to return to work. Ms. Phillips testified that currently the company has two employee. Ms. Phillips testified that in 2015 the company had about five employees. (MOH/SOE 05/25/2021, at 4:14-16 and 10:4-7.)

Ms. Phillips testified that applicant was the only person on the payroll who is certified to do repairs and maintenance for heating and air conditioning units for business, residential and commercial. . . . Ms. Phillips testified that after applicant went off work for his work injury the company had to turn away a lot of HVAC work and refer them other companies. (MOH/SOE 05/25/2021 Trial, at 4:16-18 and 4:21-24.)

Ms. Phillips testified that on October 15, 2015 there was no one on staff certified to perform HVAC work and the company did not have any HVAC work at that time. . . . Ms. Phillips testified that the company did not receive any orders for HVAC work since January 2015. Ms. Phillips testified that in the fall of 2015 business was very slow. Ms. Phillips testified that between October 2015 and March 2020 the company's business revenue declined. Ms. Phillips testified that subsequent to the pandemic the company's revenue continued to decline. (MOH/SOE 05/25/2021 Trial, at 4:21-24, 9:23-24, 13-6-7 and 10:14-17.)

. . .

> It should be noted that the Court believed that applicant's testimony was vague, inconsistent and contradictory. . . .The Court determined that based on the applicant's manner and demeanor in which he gave testimony, and considering that testimony in light of the other evidence of record, including the credible testimony of Jennifer Phillips, the Court could not give applicant's testimony full credence (Report, pp. 2-11.)

**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]

---

[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. (*Anderson*, *supra* at pp. 1377-1378.)

In the present case, applicant contends that defendant singled him out for disadvantageous treatment by failing to return him to work after his medical restrictions were lifted. Here, we observe that an employer who discharges an employee because the employee made a claim for workers' compensation benefits is in violation of section 132a and that evidence demonstrating a close temporal proximity between the employee's medical release to return to work after filing a claim and the employee's discharge may serve to establish the employee's prima facie claim. (§ 132a; see, e.g., *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 353, (finding that temporal proximity between a worker's filing of a workers' compensation claim and an employer's adverse action against the worker is sufficient to establish a prima facie section 132a claim).)

Here, the October 18, 2015 report of applicant's treating physician, Gregory Yoshida, M.D., released applicant to return to work on October 19, 2015 without any restrictions. (Report, p. 4.) Applicant contacted defendant's president, Jennifer Phillips, to inform her of his medical release to return to work. (Report, pp. 4, 6.) Ms. Phillips advised applicant to contact the plumbing office regarding workload and scheduling and to provide his supervisor with his medical release. (Report, pp. 6-7.) When applicant spoke with his supervisor on or about October 20, 2015, however, he was informed that no HVAC work was available and that he should call back the following day to learn whether work would then be available. (Report, pp. 4, 6.) Since the parties' testimony shows that applicant contacted defendant advising of his medical release to return to work and that defendant failed to return him, it is clear that defendant effectively discharged applicant on a date no later than November 9, 2015, or approximately twenty-five days after receiving notice of his forthcoming release. (Report, pp. 5-7.) It follows that defendant effectively discharged applicant on a date in close temporal proximity to the date of his medical release, thereby establishing applicant's prima facie section 132a claim.

When an employee establishes a prima facie case, the defendant still retains the right to present evidence to rebut that case. (See § 5705; *Judson, supra*, 22 Cal.3d at p. 667.) In rebuttal, the employer must show that its actions were "…necessitated by 'the realities of doing business.'" (*Judson, supra*, 22 Cal.3d at p. 667; *Smith, supra*, 152 Cal.App.3d at p. 110.) The employer's stated business reasons must be reasonable under the facts of the case. (*Barns, supra*, 216 Cal.App.3d at pp. 534-535.) Thus, evidence produced by an employee in the prima facie case, and the related inferences raised by such evidence, may support a finding of retaliation or

discrimination if the reason offered by the employer is unreasonable or not credible under the totality of the circumstances of an individual case. (See *Westendorf v. W. Coast Contrs. of Nev., Inc.* (9th Cir. 2013) 712 F.3d 417, 423. (Citation omitted.).) We note also that while an employer's motivation might be discriminatory in its effect, section 132a does not require proof of *discriminatory intent*. (*Lauher, supra,* at p. 1301, fn. 8, italics added.)

In this case, defendant's stated business reason for not returning applicant to work after receiving notice of his medical release was that applicant's job duties required performing HVAC work and it no longer had such work. (Report, p. 6.) According to the testimony of defendant's president, Ms. Phillips, applicant was defendant's only employee certified to perform HVAC work, defendant was unable to accept new HVAC work after applicant was placed on leave, and defendant had no HVAC work at all after January 2015. (Report, p. 8.) The WCJ determined that Ms. Phillips's testimony was credible, a determination which we accord great weight and the record fails to controvert with evidence of considerable substantiality. (Report, p. 11; *Garza v. Workmen's Comp. App. Bd*. (1970) 3 Cal.3d 312, 317–319 [35 Cal.Comp.Cases 500].)

Based upon this record, we conclude that defendant's stated business reason for failing to return applicant to work following his medical release was reasonable. Accordingly, defendant's conduct was based upon the realities of doing business and, therefore, did not violate section 132a.

Accordingly, we will affirm the Findings of Fact.

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration, that the Findings of Fact issued on June 22, 2021 is **AFFIRMED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**November 23, 2021**

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

**ALEJANDRO LLORT**
**LAW OFFICE OF THOMAS NGUYEN, APC**
**ARTIANO & ASSOCIATES**

**SRO/ara**

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