WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

SALLY LARCH, (FLEMING),

Applicant,

vs.

CONTRA COSTA COUNTY,

Defendant(s).

Case No. WCK 21372

OPINION AND DECISION
AFTER RECONSIDERATION

Introduction

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

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

**Background**

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

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

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

“(a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2 or, until these procedures are promulgated, it is diagnosed using the terminology and criteria of the American Psychiatric Associations’ Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised, or the terminology and diagnostic criteria of other 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...
of the psychiatric injury.

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

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

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

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

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

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

“(h) 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.”

In considering the issues under section 3208.3, there must first be a psychiatric injury as 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.

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Defendant claimed, and the WCR concluded, however, that applicant’s claim was not compensable under section 3208.3 (h) because defendant had carried its burden of proof in establishing that applicant’s injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action. While section 3208.3 does define the substantial cause element (subsection (a)(3)), subsection (h) does not define a "lawful, non-discriminatory, good faith personnel action."

In this case, we will address each of these elements, beginning with the personnel action element.

**Personnel Action**

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

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

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

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

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

We adopt the well-reasoned analysis in the WCR’s report of what constitutes a personnel action under section 3208.3 (h). Thus, whether an action constitutes a personnel action under section 3208.3 (h) does not depend simply on whether the action is of a direct supervisor of the applicant or is of one who is in the chain of command. All the participants’ duties, whether management in fact ratified the action in question and/or whether the action in question was 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
the employment status. Criticism or action authorized by management may be the initial step or a preliminary form of discipline intended to correct unacceptable, inappropriate conduct of an employee. The initial action may serve as the basis for subsequent or progressive discipline, and ultimately termination of the employment, if the inappropriate conduct is not corrected.

We conclude that a personnel action is conduct either by or attributable to management including such things as done by one who has 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 necessarily limited to transfers, demotions, layoffs, performance evaluations, and disciplinary actions such as warnings, suspensions, and terminations of employment.

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

Another stressor was applicant’s involvement in the employment termination of a subordinate. The WCR determined that the stressors, while actual, did not constitute personnel actions under section 3208.3 (h) because they were incidental to the actions of a subordinate. The WCR also determined that the other significant stressors were related to the actions of Lieutenant Rodriguez. Actions by Lieutenant Rodriguez at the Martinez facility were not personnel actions.
because they were taken at a time when Lieutenant Rodriguez was not applicant’s supervisor and
was without authority to discipline or criticize applicant on behalf of management. The transfer of
Lieutenant Rodriguez to the Richmond facility was not a personnel action with respect to
applicant. The WCR found, however, that actions of Lieutenant Rodriguez toward applicant at
the Richmond facility were personnel actions under section 3208.3 (h) because applicant at the
time of the actions was under the supervision of Lieutenant Rodriguez. The WCR determined that
certain disagreements between applicant and Lieutenant Rodriguez on the day-to-day operations
did not constitute personnel actions. The WCR determined that Captain Shinn’s action affirming
the position of Lieutenant Rodriguez on applicant’s responsibility to be available for calls at night
as the shift sergeant may constitute a personnel action. Applicant disputes the WCR’s analysis of
the law, but does not appear to dispute his application of the law as interpreted to the facts.

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

Good Faith

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

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

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

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

“Although ‘good faith’ is commonly thought of as subjective in essence, the use of objectified mental states as the legal standard is a familiar feature of Anglo-American law. Juries are routinely asked for example, to place themselves in the position of the ‘reasonable person’ in resolving questions 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
objective]; cf. People v. Machupa (1994) 7 Cal.4th 614, 618, fn. 1 ['good faith’ exception to search warrant requirement focuses on the ‘objective reasonableness’ of the search].) Prosser and Keeton have described the reasonable person - “this excellent but odious character” - as “a personification of a community ideal of reasonable behavior, determined by the jury’s social judgment.” (Prosser & Keeton (5th ed. 1984) Torts, § 32, pp. 174, 175 fn. omitted.) As the case law cited in the main text makes clear, coupling ‘good faith’ with ‘objectivity’ is intended to place the trier of fact in the position of the ‘reasonable employer’ in deciding whether the defendant in a wrongful termination suit acted responsibly and in conformity with prevailing social norms in deciding to terminate an employee for misconduct.” (Cotran, supra, 69 Cal. Rtpr. 2d at p. 909.)

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

The WCR in the present matter found that the personnel actions were in good faith and we agree. He concluded that the actions of Lieutenant Rodriguez at the Richmond facility did not involve dishonesty, a lack of sincere purpose, an intention to mislead, deceive, or defraud, or an unlawful design. He stated that the mannerisms of Lieutenant Rodriguez in “being straight forward, sometimes intimidating, speaking in a loud voice, being forceful and in a no non-sense approach” did not exceed what would constitute good faith conduct. He found that Captain Shinn’s conversation with applicant confirming the position of Lieutenant Rodriguez’s position on applicant’s responsibility to be available for calls at night as shift sergeant was essentially done in a 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
characterized as outrageous nor objectively unreasonable nor conduct objectively engendering undue stress.” While certainly one in authority should strive to maintain calm and reflective communications when dealing with employees, where emotions do rise or an exchange does become heated, that does not alter the fact that the action is being done with an honest and sincere purpose and with an intention based upon valid and good cause. We agree with the WCR’s conclusion that Sergeant Knutson's actions met these standards and were, accordingly, done in good faith.

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

Lawful and Non-Discriminatory

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

Beginning with the lawful element, Black’s Law Dictionary (6th ed. 1990) pp. 885-886 defines lawful as “warranted or authorized by the law; having the qualifications prescribed by law; not contrary to nor forbidden by the law; not illegal." It generally differs from the term “legal.” To say that an act is legal “implies that it is done or performed in accordance with the forms and usages of law, or in a technical manner.” “To say of an act that it is ‘lawful’ implies that it is authorized, sanctioned, or at any rate not forbidden, by law.” The word lawful “more clearly
implies an ethical content” and “usually imports a moral substance or ethical permissibility.” In the instant case, the WCR did not find the acts of Lieutenant Rodriguez at the Richmond facility, or the actions of Sergeant Knutson to be unlawful.

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

Substantial Cause

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

The WCR in the present matter found the pivotal incident that resulted in applicant leaving work and seeking treatment to be the June 28 1994 incident. Absent this incident, the WCR determined that applicant would not have left her employment with defendant or sought treatment. The WCR concluded that his finding of noncompensability rested “primarily, but not entirely, on the event that occurred at work on June 28, 1994.” The WCR therefore concluded that defendant had met the test of proving that the personnel action was a substantial cause of applicant's
psychiatric disability, thus barring compensation under section 3208.3 (h).

**Conclusion**

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

For the foregoing reasons,

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

WORKERS’ COMPENSATION APPEALS BOARD

/s/ Robert N. Ruggles

I CONCUR

/s/ Arlene N. Heath

/s/ Douglas M. Moore, Jr.

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

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

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