

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3  
4 **DONALD STOCKMAN,**

5 *Applicant,*

6 **vs.**

7 **STATE OF CALIFORNIA,**  
8 **DEPARTMENT OF CORRECTIONS,**  
9 **legally uninsured,**

10 *Defendant.*

**Case Nos. BAK 123730**  
**BAK 123079**  
**BAK 123080**

**OPINION AND DECISION**  
**AFTER RECONSIDERATION**

11 These cases involve a question arising under Labor Code section  
12 3208.3, subdivision (h), which bars compensation for a psychiatric  
13 injury that is substantially caused by lawful, nondiscriminatory,  
14 good faith personnel action. We granted reconsideration to further  
15 study the factual and legal issues presented. Having completed our  
16 study, we conclude that the workers' compensation referee ("WCR")  
17 correctly found that no compensation is payable because applicant's  
18 claimed psychiatric injury was substantially caused by a lawful,  
19 nondiscriminatory, good faith personnel action.

20 **BACKGROUND**

21 Applicant was hired by the State of California, Department of  
22 Corrections, in December of 1991. In July of 1995, he was assigned  
23 to Wasco State Prison as an associate warden in charge of business  
24 services. Thereafter, a conflict developed which resulted in two  
25 opposing factions at the prison: Warden Carrillo and his supporters  
26 were on one side, and applicant and Chief Deputy Warden Pena, and  
27 their supporters, were on the other. Applicant assisted Pena in

1 preparing a memorandum which referred to Carrillo's "bazaar (sic)  
2 vindictive management practices" and described Carrillo's behavior  
3 as "irrational, unprofessional and irresponsible." Also, applicant  
4 was concerned because he interpreted a statement by Warden Carrillo  
5 as a death threat after he reported the warden's conduct to his  
6 superiors in the Department of Corrections. Applicant's physical  
7 complaints included upset stomach, diarrhea, disturbed sleep, and  
8 impaired sexual function and interest.

9 On May 19, 1997, applicant was notified that he was being  
10 involuntarily transferred to Corcoran State Prison, approximately 47  
11 miles from the Wasco prison, effective immediately. Chief Deputy  
12 Warden Pena also was transferred to a facility at Corcoran and  
13 Warden Carrillo was forced to retire.

14 Applicant filed three applications for adjudication, alleging  
15 specific injuries to the psyche on March 4, 1996, and May 19, 1997,  
16 and cumulative injury to the psyche from December 1991 through May  
17 19, 1997. The WCR found that the transfer to Corcoran prison was a  
18 lawful, non-discriminatory, good faith personnel action and that it  
19 was a substantial cause of applicant's psychiatric injury. Based on  
20 these findings, the WCR concluded that compensation was barred by  
21 section 3208.3, subdivision (h).

22 In his petition for reconsideration, applicant asserts (1) that  
23 his psychiatric injury was the result of cumulative trauma, (2) that  
24 the transfer to Corcoran State Prison on May 19, 1997, was not a  
25 substantial cause of his psychiatric disability, and (3) that the  
26 transfer from Wasco to Corcoran was not a lawful, nondiscriminatory,  
27 good faith personnel action.

1 **DISCUSSION**

2 Labor Code section 3208.3 was enacted as part of the Margolin-  
3 Bill Greene Workers' Compensation Reform Act of 1989 (Stats. 1989,  
4 ch. 892, § 25) which brought about extensive changes in the workers'  
5 compensation system. The statute specifies that "[i]t is the intent  
6 of the Legislature in enacting this section to establish a new and  
7 higher threshold of compensability for psychiatric injury under this  
8 division." All of the elements set forth in section 3208.3 must be  
9 satisfied in order to establish that applicant has sustained a  
10 compensable psychiatric injury. Those elements in controversy in  
11 the present matter will be individually discussed in the following  
12 sections.

13 Psychiatric Injury

14 Section 3208.3, subdivision (a), states:

15 "A psychiatric injury shall be compensable if  
16 it is a mental disorder which causes disability  
17 or need for medical treatment, and it is  
18 diagnosed pursuant to procedures promulgated  
19 under paragraph (4) of subdivision (j) of  
20 Section 139.2 or, until these procedures are  
21 promulgated, it is diagnosed using the termi-  
22 nology 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 practi-  
tioners in the field of psychiatric medicine."

23 Section 3208.3, subdivision (b)(1), states:

24 "In order to establish that a psychiatric injury  
25 is compensable, an employee shall demonstrate by  
26 a preponderance of the evidence that actual  
27 events of employment were predominant as to all  
causes combined of the psychiatric injury."

1 Dr. Donlon, Dr. Perelli-Minetti and Dr. Enelow each diagnosed  
2 applicant pursuant to standard psychiatric terminology and criteria  
3 as having a mental disorder which caused disability and the need for  
4 treatment. The primary medical dispute concerned the cause of this  
5 psychiatric injury. The WCR relied primarily on the opinion of Dr.  
6 Donlon. In his report dated June 30, 1997, Dr. Donlon concluded  
7 that "with reasonable medical probability, there is no evidence for  
8 disability until 05-19-97 when he was reassigned to Corcoran," and  
9 that "[f]rom information available, personnel action of 05-19-97 is  
10 the predominant causation for his mental disorder/disability." In  
11 his report dated August 15, 1997, Dr. Donlon opined that applicant  
12 "did not develop a cumulative mental injury to his psyche for the  
13 period of 12/91 through 05-19-97," but "05-19-97 may be considered a  
14 specific mental injury."

15 In his petition for reconsideration, applicant contends that  
16 "Dr Donlon's report should not be considered substantial evidence as  
17 he does not accurately analyze the history," and that "Dr. Enelow's  
18 report is a much better evaluation of the history." However, in her  
19 report on the petition, the WCR, who had the opportunity to hear all  
20 of the lay testimony and consider the complete documentary record,  
21 reaffirmed her reliance on Dr. Donlon and observed that "without  
22 question, the personnel action of May 19, 1997 constituted the cause  
23 for applicant's leaving work, refusing to report as instructed to  
24 Corcoran, and for first seeking medical treatment." After review of  
25 the entire record and affording the WCR's findings the great weight  
26 to which they are entitled, we find no valid reason to reject the  
27 WCR's determination.

1           Personnel action

2           Section 3208.3, subdivision (h), was added in 1993 and provides  
3 as follows:

4                   "No compensation under this division shall be  
5                   paid by an employer for a psychiatric injury if  
6                   the injury was substantially caused by a  
7                   lawful, nondiscriminatory, good faith personnel  
8                   action. The burden of proof shall rest with the  
9                   party asserting the issue."

10           The term "personnel action" is not defined in the Labor Code.<sup>1</sup>  
11           What constitutes a personnel action depends on the subject matter  
12           and factual setting for each case. The term includes but is not  
13           necessarily limited to termination of employment. (Bray v. Workers'  
14           Comp. Appeals Bd. (1994) 26 Cal.App.4th 530 [59 Cal.Comp.Cases 475,  
15           484].) An employer's disciplinary actions short of termination may  
16           be considered personnel actions even if they are harsh and if the  
17           actions were not so clearly out of proportion to the employee's  
18           deficiencies so that no reasonable manager could have imposed such  
19           discipline. (Cf. Clutts v. Workers' Comp. Appeals Bd. (1997) 62  
20           Cal.Comp.Cases 1142, 1143 (writ den.)) In Clutts, the applicant  
21           had alleged psychiatric injury as a result of letters written to him  
22           by his employer warning of disciplinary action for his failure to  
23           perform certain job duties.

24           We conclude that a personnel action is conduct either by or  
25           attributable to management and includes such things as done by one  
26           who has the authority to review, criticize, demote or discipline an

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27           <sup>1</sup> When Labor Code section 3208.3, subdivision (d), was added in 1991, it stated  
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." This language was deleted from subdivision (d) and  
replaced by subdivision (h) when the latter subdivision was added in 1993.

1 employee. Personnel actions may include but are not necessarily  
2 limited to transfers, demotions, layoffs, performance evaluations,  
3 and disciplinary actions such as warnings, suspensions, and termina-  
4 tions of employment.

5 Based on this analysis, we conclude that the transfer of  
6 applicant to Corcoran State Prison on May 19, 1997, was a personnel  
7 action within the meaning of Labor Code section 3208.3, subdivision  
8 (h).

9 Lawful

10 Having concluded that applicant's transfer was a personnel  
11 action, we must determine whether that action was lawful, nondis-  
12 criminatory, and in good faith. Each of these requirements must be  
13 met in order for section 3208.3, subdivision (h), to bar payment of  
14 compensation.

15 Black's Law Dictionary (6th ed. 1990) pp. 885-886, defines the  
16 term "lawful" as "warranted or authorized by the law; having the  
17 qualifications prescribed by law; not contrary to nor forbidden by  
18 the law; not illegal." It generally differs from the term "legal."  
19 To say that an act is legal "implies that it is done or performed in  
20 accordance with the forms and usages of law, or in a technical  
21 manner." "To say of an act that it is 'lawful' implies that it is  
22 authorized, sanctioned, or at any rate not forbidden, by law." The  
23 word "more clearly implies an ethical content" and "usually imports  
24 a moral substance or ethical permissibility."

25 Applicant contends that his transfer was unlawful, arguing that  
26 the Department of Corrections violated state civil service rules  
27 covering transfers. Specifically, he asserts that the Department

1 | violated Government Code section 19994.1 because he was not given 60  
2 | days' notice of his transfer. However, that section only requires  
3 | 60 days notice of a transfer which ". . . reasonably requires an  
4 | employee to change his or her place of residence . . ." In this  
5 | case, applicant was transferred to a facility approximately 47 miles  
6 | from his prior work site and the record indicates that he did not  
7 | move his residence after his transfer. Therefore, the record does  
8 | not establish that the Department was required to give him 60 days'  
9 | notice before transferring him. Likewise, applicant's transfer did  
10 | not violate section 599.714 of Title 2 of the California Code of  
11 | Regulations. That section deals with the circumstances under which  
12 | a transferred employee is entitled to reimbursement of moving  
13 | expenses, not the legality of or procedures for transferring an  
14 | employee. Thus, we conclude that applicant's transfer was lawful.

15 | Nondiscriminatory

16 | Black's Law Dictionary (6th ed. 1990) p. 467, defines the term  
17 | "discrimination" as a "failure to treat all persons equally where no  
18 | reasonable distinction can be found between those favored and those  
19 | not favored." Thus, the issue in this matter is whether the employer  
20 | treated applicant differently than others similarly situated without  
21 | justification.

22 | Applicant contends that in order for his transfer to be nondis-  
23 | criminatory, there must be a "business necessity" for the employer's  
24 | conduct. The cases he cites in support of this contention primarily  
25 | concern issues arising under Labor Code section 132a which prohibits  
26 | discrimination against an employee for filing, or making known his  
27 | or her intention to file, a workers' compensation claim. However,

1 section 132a involves a public policy intended to protect against  
2 discrimination proscribed by that section, while personnel actions  
3 under section 3208.3, subdivision (h), include a variety of possible  
4 actions by employers before an injury has even occurred. We decline  
5 to incorporate the same requirement of business necessity as applied  
6 in the context of section 132a.

7 As stated, the issue is whether the employer treated applicant  
8 differently than others similarly situated, without justification.  
9 In this case, the record reflects that there was a split among the  
10 upper management at the prison with Warden Carrillo on one side, and  
11 applicant and Chief Deputy Warden Pena on the other. All three were  
12 removed from the prison either by transfer or forced retirement.  
13 Therefore, applicant was not treated differently than the other  
14 similarly-situated employees, so his transfer was nondiscriminatory.

15 Good faith

16 Section 3208.3, subdivision (h), does not define the term "good  
17 faith" as used therein. Therefore, it is necessary to consider the  
18 definitions of the term in broader contexts. "Good faith" has been  
19 defined to mean "honesty in fact in the conduct or transaction  
20 concerned" (see, e.g., Civ. Code §§ 2961, 1102.7; Cal. Com. Code, §§  
21 1201, subd. (19), 2103, subd. (1) (b), 5102); to include "honesty in  
22 fact" and the "observance of reasonable commercial standards of fair  
23 dealing" (see, e.g., Cal. Com. Code, § 3103, 11105); to include an  
24 act without intent to defraud (see, e.g., Ins. Code § 11772); to mean  
25 to act with honesty of purpose, without collusion, fraud, or  
26 knowledge of fraud, and without intent to assist in fraudulent or  
27 otherwise unlawful design (Appel v. Morford (1943) 62 Cal.App.2d 36,



1 40; to include a "state of mind denoting honesty of purpose, freedom  
2 from intention to defraud, and, generally speaking, [] being faithful  
3 to one's duty or obligation" (People v. Nunn (1956) 46 Cal.2d 460,  
4 468); to mean "honestly; without fraud, collusion or deceit; really,  
5 actually, without pretense," and "an intention based on a valid or  
6 good reason or cause" (Gibson v. Corbett (1948) 87 Cal. App. 2d Supp.  
7 926, 929); and to include honesty of intention and an honest  
8 intention to abstain from taking any unconscientious advantage of  
9 another. (Blacks' Law Dictionary (6th ed. 1990) p. 693.) The good  
10 faith element therefore encompasses the manner in which the personnel  
11 action is taken.

12 This year, in Cotran v. Rollins Hudig Hall International (1998)  
13 17 Cal.4th 93, the state Supreme Court considered the standard for  
14 determining whether just cause supported termination of an employee.  
15 In that case, the court ruled that an objective good faith standard  
16 should be applied. At 17 Cal.4th 106, fn. 3, the court stated that  
17 "[a]lthough 'good faith' is commonly thought of as subjective in  
18 essence, the use of objectified mental states as a legal standard is  
19 a familiar feature of Anglo-American law." The court concluded that  
20 "coupling 'good faith' with 'objectivity' is intended to place the  
21 trier of fact in the position of the 'reasonable employer' in  
22 deciding whether the defendant ... acted responsibly and in  
23 conformity with prevailing social norms in deciding to terminate an  
24 employee for misconduct."

25 We conclude that "good faith" under section 3208.3, subdivision  
26 (h), should be determined under a similar objective standard. In  
27 this case, the evidence indicates that that standard has been met.

1 Deputy Director Tristan testified that applicant and Chief Deputy  
2 Warden Pena were both transferred in order to give the new warden a  
3 fresh start. He also testified that applicant was a good employee.  
4 Regional administrator Jones testified that applicant was caught in  
5 a bad management situation. Both Tristan and Jones testified that  
6 applicant's transfer was not a punitive action. The WCR found the  
7 testimony of Tristan and Jones to be credible and, because she had  
8 the opportunity to observe the witnesses, her credibility determi-  
9 nations are entitled to great weight. (Garza v. Workmens' Comp.  
10 Appeals Bd. (1970) 3 Cal.3d 312, [35 Cal.Comp.Cases 500].) We also  
11 find the testimony of Tristan and Jones to be credible, and that  
12 testimony establishes an honesty of intention on the part of the  
13 Department of Corrections in its transfer of applicant.

14 Substantial causation

15 Having concluded that applicant's transfer to Corcoran was a  
16 lawful, nondiscriminatory, good faith personnel action, we finally  
17 must determine whether the transfer was a "substantial cause" of his  
18 psychiatric condition. Section 3208.3, subdivision (a)(3), provides  
19 that the term "'substantial cause' means at least 35 to 40 percent  
20 of the causation from all sources combined." We note that more than  
21 one factor may be a substantial cause and that the question here is  
22 whether applicant's transfer was a substantial cause, and not the  
23 substantial cause. There is conflicting medical evidence on this  
24 question. Dr. Donlon opined that in the absence of his transfer,  
25 applicant would have continued to work without any psychiatric  
26 injury, while Dr. Enelow attributed applicant's psychiatric  
27 complaints to events prior to his transfer. As noted, the WCR found

1 | the opinion of Dr. Donlon to be the more persuasive. Applicant  
 2 | asserts that Dr. Donlon did not accurately analyze the history, but  
 3 | points to no particular errors in Dr. Donlon's report. In addition,  
 4 | Dr. Enelow incorrectly concluded that applicant's transfer was a  
 5 | punitive action by the Department of Corrections. Moreover, we note  
 6 | that there was no evidence that applicant missed work or sought  
 7 | psychiatric treatment prior to being notified of his transfer on May  
 8 | 19, 1997.

9 |         Considering the entire record, we agree with the WCR that the  
 10 | opinion of Dr. Donlon is the more persuasive and find that the  
 11 | preponderance of the evidence establishes that applicant's transfer  
 12 | to Corcoran State Prison was a substantial cause of his psychiatric  
 13 | complaints. Because these psychiatric complaints were substantially  
 14 | caused by a lawful, nondiscriminatory, good faith personnel action,  
 15 | compensation for applicant's claimed psychiatric injuries is barred  
 16 | by Labor Code section 3208.3, subdivision (h). Therefore, we will  
 17 | affirm the decision of the WCR.

18 |         For the foregoing reasons, as decision after reconsideration of  
 19 | the Workers' Compensation Appeals Board,

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1 IT IS ORDERED that the Findings and Order dated March 4, 1998,  
2 be, and the same is hereby, AFFIRMED.

3 WORKERS' COMPENSATION APPEALS BOARD

4  
5 /s/ J. Wiegand  
6 J. WIEGAND

7 I CONCUR,

8  
9 /s/ Douglas M. Moore, Jr.  
10 D. MOORE

11 /s/ Arlene N. Heath  
12 A. HEATH

13 DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

14 7/24/98

15 SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED  
16 ON THE OFFICIAL ADDRESS RECORD