STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

DOLORES MOSELEY, *Applicant,* vs. **NOIA RESIDENTIAL SERVICES; INSURANCE CO OF THE WEST PLEASANTON;** *Defendants.*	**Case No. ADJ8183477** **FINDINGS AND ORDER**

The above entitled matter having been heard and regularly submitted, the Honorable William E. Gunn, Workers' Compensation Administrative Law Judge, now decides as follows:

STIPULATED FACTS

Dolores Moseley, born July 25, 1959 while employed on January 7, 2012, and on January 1, 2011 through January 7, 2012, as a caregiver at 1173 W. Sierra, Fresno, California, sustained injury arising out of the cream the course of employment to the neck and back.

At the time of injury the employee's earnings were $330 per week.

Applicant last worked for the employer in January 2012.

ISSUES

1. Petition for Discrimination Benefits Pursuant to Labor Code Section 132a.

2. Statute of Limitations.

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FINDINGS OF FACT

1. The Application for Discrimination Benefits Pursuant to Labor Code Section 132a was not timely filed and is barred by the one year time period to commence proceedings.

2. Applicant was not discriminated against pursuant to Labor Code Section 132a.

ORDER

It is ordered that Applicant take nothing for the claim of Discrimination under Labor Code Section 132a.

DATE: September 7, 2016

William E. Gunn
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

FILED AND SERVED BY MAIL ON PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD.
ON: 9/7/16
BY: L. Casarez

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OPINION ON DECISION

The employer (NOIA) is an intermediate care facility for physically and mentally disabled individuals. (SOE P9 L4) Applicant was employed as a residential care giver and sustained an industrial injury on 1/7/12 which was reported to the employer. At the time of Applicant's hire and at her injury NOIA had a drug policy in effect which precluded drug use and required drug screening. The policy indicates failure to participate in drug screening can result in termination (SOE P9 L10-14, and Ex M). After reporting her injury, Applicant was referred to FIRM Associates for evaluation and drug testing on 1/12/12 (Ex B). Whenever a worker's comp claim is filed, employees are sent for drug testing (SOE 2016 P5 L4). Applicant refused to be tested and was referred again on 1/13/12, and again refused to be tested (SOE, 2015, P9 L16-18, and L21-23).

A meeting was held with Applicant on 1/18/12 at which time she was advised by the employer and given notice that due to her failure to undergo drug testing and her admission of having a cannabis card she could go on unpaid leave and obtain rehabilitation and then return to work, or be terminated (Ex D, Ex 10). Applicant disagreed and refused to sign the letter from the employer (SOE, 2015, P10 L5). Applicant was placed on unpaid leave of absence (Ex 10, Ex F and G). Applicant was provided her final paycheck (Ex I). Applicant returned to the employer sometime later and provided a report from Millennium Laboratories that indicated Applicant had sought drug testing on 1/25/12 and the results were negative (Ex 13). Applicant refused to sign the agreement for the leave of absence and never returned to work (SOE 2016, P4 L15-19, and P5 L5-8). Applicant never gave evidence of completion of

a rehabilitation program to NOIA (SOE 2016, P4 L11). Applicant retained counsel on 1/31/12 and pursued a worker's compensation claim against NOIA (Ex 11). Applicant applied for SSDI benefits on 4/6/12, and was granted SSDI with a disability onset date of 1/25/12 (Ex 30A). Applicant settled the underlying worker's compensation claim against the employer on 9/16/15, leaving the 132a action pending, which has been tried and submitted for decision.

STAUTE OF LIMITATIONS

Applicant filed the "Application for Discrimination Benefits Pursuant to Labor Code Section 132A" on 3/18/15 (Ex A and Ex 29 P3) The Application was not timely filed and is thus barred.

LC 132a provides as follows:

> "Proceedings for increased compensation as provided in paragraph (1), or for reinstatement and reimbursement for lost wages and work benefits, are to be instituted by filing an appropriate petition with the appeals board, but these proceedings may not be commenced more than one year from the discriminatory act or date of termination of the employee."

On its face the Application for Discrimination Benefits appears to not be timely filed, but in order to determine whether this is correct, it must be determined what actions Applicant is claiming are the basis for the LC132a discrimination. Applicant's allegations aren't entirely clear, and it appears from Applicant's Application and testimony that she is alleging several things to be the basis for her claim for discrimination. These are:

1. "Dispute of Labor Code violation. Retaliation of filing wrk comp case"
2. "Employer change in relations form given sign in protest on 1-18-12".

3. "Return with proof of drug free test-return to work, complied to demand to return to work submit all demands on 1-21-12 to adm. Jill Tipton-denied return to work"

4. "Ongoing harassment and discrimination at employment"

In describing the retaliation Applicant experienced for filing a worker's compensation claim Applicant testified that "The applicant feels that she was retaliated against for making her workers compensation claim because she was called into a meeting on January 12, 2012, when she was asked about her medical marijuana card." (SOE 2015 P7 L20-22) and "The applicant believes the drug rehabilitation letter of January 18, 2012, was retaliation for her workers' compensation claim. That was the change of relationship letter."(SOE 2015 P8 L10-12) Both of the described incidents occurred on either 1/12/12 or 1/18/12, so the filing of the 132a Petition on 3/18/15 regarding a claim of discrimination for these events was not timely.

The denial of a return to work occurred after the events of 1/12/12, as that was Applicant's last date of work. Applicant provided NOIA with a report from Millennium Laboratories on either 2/7/12, (SOE 2015 PL21-22) or on 2/17/12 based on the handwritten notation on Exhibit 13. Even assuming the 2/17/12 date is the date Applicant was denied a return to work and is the date of the retaliation for filing a worker's compensation claim, the Petition filed on 3/18/15 was not timely.

Applicant also alleges "ongoing discrimination at employment". Applicant's last date of work was 1/12/12 (SOE 2015 P7 L18). Any ongoing discrimination at employment had to have occurred on that date or prior, but even assuming the 2/17/12 date mentioned above, the Petition filed on 3/18/15 was not timely.

Assuming Applicant is alleging termination as the discriminatory conduct, at first a termination doesn't appear to have occurred as she was placed on unpaid leave and not terminated, but the evidence indicates Applicant believed the action on 1/18/12 was a terminating event. Even so a claim for an increase in benefits due to an alleged violation of LC 132a would still have to be timely filed with the WCAB. Here Applicant alleged a 1/12/12 termination date with the Division of Labor Standards and Enforcement (Ex 25 P 2 and P19). Applicant also alleged in a complaint filed with the DFEH she was terminated on 1/18/12 and was denied a return to work on 2/17/12 (Ex 26 P 11). Clearly in Applicant's mind the events on 1/18/12 and 2/17/12 were terminating events. Applicant retained an attorney on 1/31/12, and was represented by counsel until 3/15/15 (Ex 23 p 13). She considered filing a 132a claim but thought her attorney would do it (SOE 2015, P8 L13-14). Applicant has testified she didn't file a claim for a 132a violation until after a hearing on 10/19/14 (SOE 2015 P L18-19). The Application itself is date stamped indicating it was received at the WCAB on 3/18/15 (Ex 29 P3). Applicant alleges in her DOR filed on 3/18/15 that she had requested her attorney "resolve dispute of employment" and "I plea with my former attorney to resolve issue of dispute". No date was alleged for when this request was made, the "dispute of employment" is not further described, and no other evidence of a timely filing of a claim for 132a benefits is alleged. The evidence shows Applicant believed she was terminated in January or February 2012. She considered that she had a 132a claim and was represented by counsel from 1/31/12 to 3/15/15; during this time she discussed disputed employment issues with her attorney, but an Application for 132a benefits was not filed until 3/18/15.

Applicant's "Application for Discrimination Benefits Pursuant to Labor Code Section 132a" was filed on 3/18/15, and is barred by the one year period to commence proceedings for increased compensation.

THE MERITS OF THE 132a CLAIM

Assuming Applicant timely filed a Petition for Benefits pursuant to LC 132a, she has not met her burden of proof to show LC 132a discrimination has occurred.

Applicant claims in her Application for LC 132a benefits:

1. "Dispute of Labor Code violation. Retaliation of filing wrk comp case"
2. "Employer change in relations form given sign in protest on 1-18-12".
3. "Return with proof of drug free test-return to work, complied to demand to return to work submit all demands on 1-21-12 to adm. Jill Tipton-denied return to work"
4. "Ongoing harassment and discrimination at employment"

LC 132a prohibits discrimination against workers who are injured in the course and scope of their employment. LC 132a states:

> **(1)** 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 for compensation with his or her employer or an application for adjudication, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor and the employee's compensation shall be increased by one-half, but in no event more than ten thousand dollars ($10,000), together with costs and expenses not in excess of two hundred fifty dollars ($250). Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer.

Sullivan on Comp, Sec. 11.8, discusses the Supreme Court's decision in *Department of Rehabilitation/State of California v. WCAB (Lauher)* (2003) 68 CCC 831, and states:

> *"Lauher* stated that it was insufficient for the purposes of establishing a prima-facie case of discrimination under LC 132a to simply show that the injured worker suffered some detrimental consequences. That is, an employer does not necessarily engage in discrimination merely because it requires an employee to shoulder some of the disadvantages of the industrial injury. Instead, the court stated that LC 132a "prohibit[s] treating injured workers differently, making them suffer disadvantages not visited on other employees because the employee was injured or had made a claim." The court added that

> an employee is discriminated against for the purposes of LC 132a if he or she was "*singled [] out for disadvantageous treatment because of the industrial nature of his injury*." So, following *Lauher,* an employee is required to show (1) detriment as a result of a work-related injury and (2) that he or she was singled out for disadvantageous treatment because of the injury."

Applicant must show she suffered a detriment as a result of a work related injury, and that she was singled out for disadvantageous treatment because of the injury.

As described above Applicant testified "The applicant feels that she was retaliated against for making her workers compensation claim because she was called into a meeting on January 12, 2012, when she was asked about her medical marijuana card. She had a medical marijuana card for three to four years, but had not told her employer about it. She had not used medical marijuana on the job; however, she had an active card, and "The applicant believes the drug rehabilitation letter of January 18, 2012, was retaliation for her workers' compensation claim. That was the change of relationship letter."(SOE 2015 P7 L20-23 and P8 L10-12) The crux of Applicant's complaint that she was discriminated against is that in response to her filing a worker's compensation claim the employer called her into a meeting to ask about her medical marihuana card, and in response she was given the drug rehabilitation letter and terminated.

The change in relationship letter was reasonably interpreted as a termination by the Applicant, but Applicant must also establish the termination was as a result of the work related injury. Applicant filed a worker's compensation claim, and was promptly sent to a medical facility, where she was asked to submit to drug testing on two occasions (SOE 2015 P.9 L.23-24). In a broad sense the request for drug testing may be said to be in response to the filing of Applicant's workers compensation claim, but

in reality the drug testing was in compliance with the NOIA company policy. Jill Tipton Weinstein provided credible testimony that Applicant had been provided a copy of the company policy on drug use, and Exhibit M confirms this. NOIA company policy indicates that employees may be required to undergo drug testing after filing a worker's compensation claim. This is what happened here. Weinstein also testified that the protocol with the FIRM was that whenever a worker's compensation claim has been filed the employees are sent to the FIRM for drug testing (SOE 2016 P5 L2-4). In *Ashbrook* v *The Vons Cos., Inc.,* 29 CWCR 284, a WCAB Panel found discrimination did not occur when an employee was required to undergo drug testing after an industrial injury. Applicant was not discriminated against in retaliation for her filing a worker's compensation claim by requiring her to undergo drug testing or by placing her on inactive status for her refusal to do so in violation of company policy.

Applicant claims she "return with proof of drug free test-return to work, complied to demand to return to work submit all demands on 1-21-12 to adm. Jill Tipton-denied return to work". Weinstein provided credible testimony that Applicant was not taken back to work because she had not complied with any of the requirements, and that she did not sign the proposed agreement or participate in a drug rehabilitation program (SOE 2016 P4 L17-22). Applicant's testimony confirms she refused to sign the agreement or participate in rehabilitation (SOE 2015 P 8 L7-8). NOIA company policy indicates that reasonable accommodation would be made for employees that seek treatment or rehabilitation for chemical dependency. This accommodation would include a treatment or rehabilitation leave (Ex M). Applicant's refusal to sign the agreement for a leave of absence to participate in drug rehabilitation is a rejection of

the reasonable accommodation offer by NOIA. Applicant testified she returned on 2/7/12 with letters showing compliance (SOE 2015 P8 L20-22). Exhibit 13 is a medical report from Millennium Laboratories purporting to indicate Applicant tested negative for drugs. This document has a notation indicating it was received by Jill on 2/17/12, but there was no testimony explaining this notation. Even assuming 2/7/12 as the date this report was provided to NOIA, Applicant testified she refused to agree to the offer made on 1/18/12 to take a leave of absence to undergo rehabilitation. Her refusal to agree when the offer was made is in contrast with her allegation that she complied with all requirements and was then was refused a return to work. The failure of NOIA to return Applicant to work appears to have been made in response to Applicant's refusal on 1/18/12 to agree to participate in the offer of a leave for rehabilitation and not in response to her filing a worker's compensation claim. As such the conduct by NOIA in refusing to return Applicant to work is not in response to her filing a worker's compensation claim, and is thus not discriminatory.

Even assuming Applicant sustained a detriment in response to a work related injury Applicant must still establish she was singled out for disadvantageous treatment because of the injury. No evidence was presented that Applicant was treated any differently than any other employee. Weinstein testified the protocol with the FIRM was whenever a worker's compensation claim has been filed the employees are sent to the FIRM for drug testing (SOE 2016 P5 L3-4). Based on this it appears all employees were treated the same. Applicant has failed to establish that she was singled out for disadvantageous treatment because of the injury.

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION

09-07-2016

OFFICIAL ADDRESS RECORD

FINDINGS AND ORDER served by mail on parties as listed on the OAR (excluding employers) by LC.

Case Number: ADJ8183477

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