Labor Code 132a

By Glen Young & Hayden Beach
Law Offices of Bradford & Barthel, LLP

Certificates
Sent via email w/in 24 hrs

PowerPoint & Video
https://bradfordbarthel.com/training/

Next Webinar – 6/21/22
Settling Cases With A Medicare Component w/ Medivest & Glen Young

TOOLS FOR YOU AT:
www.bradfordbarthel.com

BLOG Articles
bradfordbarthel.blogspot.com/

AMA Rating Department
bradfordbarthel.com/areas-of-practice/bb-ratings/

CE Videos
bradfordbarthel.com/education/

CE Webinars
bradfordbarthel.com/education/

Meet our Team!

Glen Young, Esq.
B&B Woodland Hills
gyoung@bradfordbarthel.com

Hayden Beach, Esq.
B&B Woodland Hills
hbeach@bradfordbarthel.com

Donald Barthel, Esq.
Founding Partner
dbarthel@bradfordbarthel.com
(916) 996-1263 cellular

Nicholas Ward, Esq.
B&B San Diego
nward@bradfordbarthel.com

Donald (Scott) Dodd
B&B Fresno
sdodd@bradfordbarthel.com

Tahmeena Ahmed, Esq.
Executive Managing Partner,
Client Relations
tahmed@bradfordbarthel.com
(818) 257-2682 cellular

Labor Code

132a. It 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. (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. (2) Any insurer that advises, directs, or threatens an insured under penalty of cancellation or a raise in premium or for any other reason, to discharge an 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 subject to the increased compensation and costs provided in paragraph (1).

Labor Code

(3) Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because the employee testified or made known his or her intentions to testify in another employee's case before the appeals board, is guilty of a misdemeanor, and the employee shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer. (4) Any insurer that advises, directs, or threatens an insured employer under penalty of cancellation or a raise in premium or for any other reason, to discharge or in any manner discriminate against an employee because the employee testified or made known his or her intention to testify in another employee's case before the appeals board, is guilty of a misdemeanor. 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. The appeals board is vested with full power, authority, and jurisdiction to try and determine finally all matters specified in this section subject only to judicial review, except that the appeals board shall have no jurisdiction to try and determine a misdemeanor charge. The appeals board may refer and any worker may complain of suspected violations of the criminal misdemeanor provisions of this section to the Division of **Labor** Standards Enforcement, or directly to the office of the public prosecutor.

Let's break this down…

The ACT

An ER who:
Discharges OR
Threatens to discharge, OR
In "any manner discriminates" against an EE

"[B]ecause" EE has:

Filed a claim, or
Made **known** his/her intention to file a claim…OR
Received a rating, award, or settlement.

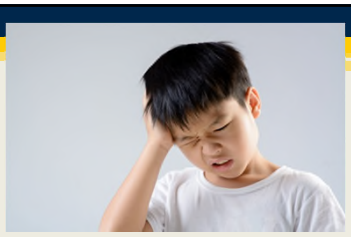
THE ACT

What ACTS can constitute discrimination against the employee?

TERMINATION! OR:

- Reduction in Pay or Status
- Loss of Seniority
- Loss of Benefits
- Loss of Promotion or Pay Increase
- Transfer of workplace or refusal of transfer
- Refusal of original job position (or refuse to modify?-Civil?)

EE WITNESSES



Any employer who:

Discharges, threatens to discharge, or in any manner discriminates against any EE -

Where EE:

Testified in another EE's w.c. case, or made known his/her intention to testify

SAME REMEDIES!

The CONSEQUENCES:

a) "misdemeanor"

WCAB "may refer" suspected violations to:

Div. of **Labor** Standards Enforcement, or

http://www.ca.gov/

Welcome to the California
DEPARTMENT OF INDUSTRIAL RELATIONS

To the public prosecutor

The CONSEQUENCES:

b) EE's compensation:

i. "increased by one-half"
ii. $10,000 cap + $250 (costs/expenses) AND
iii. "reinstatement" "reimbursement for lost of wages and…benefits"

LOST WAGES: "THE WHOLE ENCHILADA"

REINSTATEMENT: Lost Wages – LC §132a
Labor Code §132a states in pertinent part: "(1) …**Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer. WOW! How Many years?????**

TTD is now a partial payment for actual amount of wage loss. REIMBURSE EDD AND STILL OWE?
All of the prior medical Care Costs her insurance would have covered had it not been cancelled? Would it have mattered if it was non-industrial? Would UR/EOBs apply?

MITIGATION:

Dyer v. Workers' Comp. Appeals Board (1994) Cal. Comp Cas. 96) and cited in a more recent case *Victoria Lacheta v. Olympic Security Services (2014 Cal. Wrk. Comp. P.D. LEXIS 324)*
An employee may not recover lost wages and benefits for any period in which he or she was not ready, willing and able to perform the duties of his or her position.
An employee cannot recover for a willful loss of earnings and thus such things as:

Failure to Remain in the labor market
or refusal to accept employment or
quitting other employment and a failure to diligently search for work

An employee is required to mitigate damages and a failure to mitigate may preclude an award. An award of lost wages must be reduced by such sums as the employee earned or might reasonably have earned during the relevant period.

STRATEGY: 132 a Counsel

1) LAY LOW! (UNLESS ENCHILADA CASE)
   - Most will remain unlitigated, and will resolve as part of a C&R with no additional compensation
2) KEEP EXPENSES DOWN!! (UNLESS ENCHILADA CASE)
   - Employers do not like litigation bills!: 10k Max Exposure?
   - Quick teleconference with main witnesses and HR.
   - Get personnel file.
3) COORDINATE AND SHARE EVERYTHING WITH CASE IN CHIEF ATTORNEY
4) DEPOSITION ATTENDANCE: (Remember rule (1) AND (2) above. Be prepared to attend main case deposition but only if main case attorney can not get an agreement to BIFURCATE OR STIPULATE TO A 132 A DEPOSITION IF NEEDED.

If there is no agreement prior to the deposition starting, YOU MUST APPEAR. Still try to bifurcate at deposition. Most AAs will allow this. Then get copy of the transcript.

STRATEGY: 132 a counsel

(5) Avoid Conflicts of Interest:

Insurance Co. versus ER $$$

- Are you the handling attorney on the case in chief?
  If so, waiver of conflict of interest may not be enough.
  New B&B attorney at different location? Maybe.

GET A CONFLICT WAIVER!!

(6) Be the Hero: Always Get a Dismissal of the 132 a claim with prejudice to the extent possible, and put the date of the Pleadings in the C&R.

132 a Depositions

TAKE ONLY IF NECESSARY
i.e. No Bifurcation and/or no dismissal of 132 a in C&R

***STRATEGY: ALWAYS know more than your opponent.
Review the main case deposition, Speak to Witnesses, supervisors, review statements, and review and notate the personnel file for impeachment at the deposition.

FOCUS ON BUSINESS NECESSITY. CONFIRM # OF EE's AT WORK SITE UNLESS IT IS A BIG ER.

132 a Depositions

BUSINESS NECESSITY: (BE CAREFUL)

FOCUS ON:

- Show in the deposition, that employer needed more help. Applicant's will ALWAYS comply.
- COVID LAYOFFS/ILLNESS (HUGE DEFENSE)
- STATUTE OF LIMITATIONS: (⅓ or more of cases)
  - ONLY 1 year from the discriminatory ACT.
  - Quash SDT, Notices of Depositions of ER and witnesses
    ***Jurisdictional

132 a Depositions

MITIGATION: The Enchilada Defenses (DYER)

- DID THEY REQUEST UNEMPLOYMENT BENEFITS?
- ANY WORK RESTRICTIONS? NOT PTD!
- LOOK FOR WORK WITH WR'S?
- How Diligent? Look once a week, month? (GET NAMES AND BE SPECIFIC)
- How many Offers of work? (GET NAMES AND BE SPECIFIC)
- How many Jobs did the Applicant Reject and Why?
- Ulterior Motives/Intent: Was the applicant getting State Enhanced benefits of an additional $400 per week?
- Find high paying alternative jobs with WR's and ask on the record why they haven't looked into anything similar

All of these Questions will "CLUE IN" any Judge that applicant probably failed to mitigate.

STRATEGY FOR MAIN CASE ATTORNEY

- COORDINATE FULLY AND COOPERATE WITH 132 a COUNSEL
- PSYCHE CLAIM?- 132 a Attorney has you covered. GFPD
- NEVER proceed with a trial setting or deposition unless and until there is a stipulation or bifurcation of 132 a issues.
- NEVER ask if you can have your Insurance Co. or TPA pick up an additional amount to resolve the 132 a claim.
- Always get a dismissal of the 132 a with prejudice.

Lack of Jurisdiction: PREEMPTION

Navarro v. A&A Farming; Western Growers

(02/13/2002, *En Banc*)

Navarro v. A&A Farming; Western Growers

(02/13/2002, *En Banc*)

EE/ER participate Western Growers Assurance Trust (the Trust)

Provides…

a) medical
b) dental
c) vision
d) etc.

Funded via employer contributions covered by ERISA.

ERISA?

Employer's Retirement Income Security Act

Navarro (con't)

FACTS:

EE TD

3 months: ER & EE make contributions to Trust

After 3 months, ER discontinues medical coverage after 90 days of disability

Files 132a

Was Navarro…

…"singl[ed]…out specifically as a result of the work injury"?

"…treated differently than other similarly situated employees"?

DEPENDS…

But doesn't matter

PREEMPTION!

Lack of Jurisdiction: PREEMPTION

UNION AND COLLECTIVE BARGAINING AGREEMENTS:

SCHOOL DISTRICTS: WAGES MAY CONTINUE FOR ONE YEAR HOWEVER:

- HEALTH CARE AND BENEFITS AND ACTUAL EMPLOYMENT AFTER MISSING AN EXTENDED PERIOD OF TIME OR BENEFITS BASED ON UNION CONTRACTS AND MAY HAVE BEEN TERMINATED.
- DOES NOT NEED ADDITIONAL DEFENSES, YET ADDITIONALLY, THESE RULES ARE APPLIED FOR ANYONE MISSING EXTENDED TIME, WHETHER WORK RELATED OR NOT.

CAN YOU TERMINATE AN EMPLOYEE WITH A COMP CLAIM?

Do you feel lucky?

APPLICANTS BURDEN OF PROOF: PRIMA FACIE CASE

The employee has the burden of proof for a 132a discrimination claim.

- Employee must show the employer knew or should have known of the claim or injury at the time of the discriminatory conduct.
- Recent case law expanded on the discriminatory conduct and the burden of proof : "singled out for disadvantageous treatment." to now to "disadvantages not visited on other employees".

ER KNOWLEDGE

Discriminatory action must have occurred **with knowledge** of the worker's compensation claim of injury, or **should have known**-

- Long term 20 year machinist
- Dr. sends work status Report:
  - no lifting more than 25 pounds.
  - Supervisor terminates the applicant for inability to do normal work.
  - Supervisor credibly testifies that he never knew that the applicant had a work related injury nor knew he was going to allege a work related injury.
- Long term 20 year employee for the ER doing heavy work
  - Never claims or reports injury or pain until he is terminated.
  - Arguments for Both sides?
  - "Should have Known" = WC Laws by WC Judges

DISCRIMINATION: County of San Luis Obispo v. WCAB (Martinez)

(09/29/05, 133 Cal. App. 4th 641)

FACTS:

EEs doctors agreed he should not have a position that may involve physically restraining combative patients. Employer gets a job description and terminates the applicant.

HOLDING:

To establish discrimination, employee must show he/[she] was

"**singled out** for disadvantageous treatment" because of his/[her] claim

PRIMA FACIE CASE NOT MADE. NO DEFENSES NEEDED: GAME OVER RIGHT?

Job Description

JD included potential involvement in unanticipated physical confrontations

Law Offices of Bradford & Barthel, LLP – www.bradfordbarthel.com
New File Referrals: edocs@bradfordbarthel.com

EE removed from job
Claims "retaliation" (132a)
TRIAL TIME

Trial Time

EE testifies and disputes risk of physical confrontation

ER testimony :
- W's:
- Risk manager
- Direct supervisors
- Co-employee with similar job duties

ALL INDICATE, YES, YOU MUST RESTRAIN AT TIMES

ER WINS?

NOT AT TRIAL! (HUH?)

REASON: EE was capable of continuing in his "modified job"

HUH? WE DO NOT GET BUSINESS NECESSITY YET. NO PRIMA FACIE CASE YET.

WRONG ANALYSIS

RECON TIME

ER Recons

WCAB grants recon, upheld award

ER files Writ

ER WINS ONE!

HOLDING: no discrimination; no 132a

APPLICANT WAS NOT "singled out" or given disparate treatment AS THE RESULT OF A WR CLAIM OR INJURY.

Anyone with those WR's, WHETHER INDUSTRIAL OR NOT, should not be doing that work.

NEW TEST (*Lauher*, CA Sup Ct.)

EE must demonstrate the "adverse consequence involved *singling him out specifically as a result of the work injury and showing that he was treated differently than other similarly situated employees.*"

The "County has met its burden of showing it terminated Martinez because of a good faith belief that he could not perform the duties of his employment without risk of reinjuring himself."

OSCAR FRANCO V. MV TRANSPORTATION
04/12/2019 84 Cal. Comp. Cases 666

HOLDING:

The injured worker is not required, in every case, to prove that he or she was "singled out for disadvantageous treatment" to establish prima facie case for discrimination, that more broadly interpreted, Lauher requires employee to show that, based on specific factual scenario underlying his or her discrimination claim,

he or she was subject to "disadvantages not visited on other employees" because of injury

FACTS:

Applicant was returned to work at full duties by PTP for four months. After four months, AME provided new confusing work restrictions and ER sought clarification. While waiting for AME clarification, the applicant was removed from work.

OSCAR FRANCO V. MV TRANSPORTATION
04/12/2019 84 Cal. Comp. Cases 666

Conclusion:

That although applicant here was ostensibly treated same as non-industrially injured workers with respect to his work release, employer's apparent lack of policy with regard to handling medical-legal reports that conflict with opinion of treating physician that releases employee to work could be found to adversely affect industrially-injured workers in way that does not equally affect non-industrially-injured workers, thereby subjecting applicant to disadvantages not visited upon other employees because of his injury

IF PRIMA FACIE CASE: Rebut! BUSINESS NECESSITY

OLD TEST: 132a ***if*** **:**

EE proves "an adverse action taken by ER as a result of an injury"

Prior to 2003, EE est'd "prima facie case" of discrim. merely "by showing that, as the result of an industrial injury, the employer engaged in conduct detrimental to him."

Burden shifts to ER "to show that its conduct was necessitated by the realities of doing business"

Jones v AC Transit
2021 Cal.Wrk.Comp P.D. LEXIS 66

HOLDING:
ER liable for 132a claim for termination of applicant on two separate grounds. Defendant singled out the applicant for disadvantageous treatment by terminating her due to her workers compensation claim and ER deviated from usual practice and procedure for employee injury claims.

FACTS:
The applicant was on excused medical leave for her workers compensation claim. The ER initiated disciplinary proceedings on the grounds of the applicant not reporting her medical status every 30 days.

Charletta v. Barrett Business Services, Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 8

HOLDING:

ER NOT liable for 132a claim for termination of applicant. While applicant established a prima facie case in the termination taking place within two months of the injury, ER was able to establish the necessity of termination for the realities of doing business.

FACTS:

The applicant sustained injury to left finger on April 1, 2019. Prior to industrial injury, applicant received two written performance review warnings. The applicant was returned to work at modified duties for two months at which time he received another written warning for violation of company policy.

Sarwary v. Walgreens Family of Companies, 2021 Cal. Wrk. Comp. P.D. LEXIS 178

HOLDING:

ER LIABLE for 132a claim for termination of applicant. ER discriminated against the applicant due to his settlement of a workers compensation claim and there was no business necessity for termination.

FACTS:

The applicant sustained an industrial injury which was settled in November 2015. One condition of the settlement was his not having to resign from employment. The applicant requested his return to work in May 2016. The ER informed the applicant that his job was terminated on receipt of the settlement.

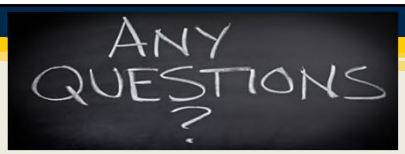
Lack of Jurisdiction: Statute of Limitations

Proceedings for increased compensation… or for reinstatement and reimbursement for lost wages and work benefits…may not be commenced more than ***one year*** from the discriminatory ***act or date of termination…"***

What does your employee's Personnel File look like?

DOCUMENT DOCUMENT DOCUMENT

…and document some more!



Glen Young, Esq.
B&B Woodland Hills
gyoung@bradfordbarthel.com

Hayden Beach, Esq.
B&B Woodland Hills
hbeach@bradfordbarthel.com