COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 051828-01**

Anthony Presto	Employee
Bishop Connolly High School	Employer
Eastern Casualty Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy and Carroll)

APPEARANCES
George N. Keches, Esq., for the employee
John A. Smillie, Esq., for the insurer

COSTIGAN, J. The employee appeals from an administrative judge's decision denying and dismissing his claim for compensation. The judge found that the employee's emotional disability and need for psychiatric treatment arose principally out of employment events which were bona fide personnel actions and, therefore, the employee did not sustain a compensable personal injury within the meaning of G. L. c. 152, § 1(7A).[1] The employee argues that the judge erred by failing to apply an objective standard in determining whether the employer's actions were bona fide. We disagree, and affirm the decision.

Anthony Presto had worked as a teacher and coach at Bishop Connolly High School for thirteen years when, in December 2001, he was accused of providing drugs and alcohol to a student. The school principal, Anthony Nunes,

[1] General Laws c. 152, § 1(7A), provides, in relevant part:

> Personal injuries shall include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within any employment. . . . No mental or emotional disability arising principally out of a bona fide, personnel action including a transfer, promotion, demotion, or termination except such action which is the intentional infliction of emotional harm shall be deemed to be a personal injury within the meaning of this chapter.

met with the employee on December 11, 2001, informed him of the allegations against him, and placed him on administrative leave with pay. The employee denied the truth of the allegations. Mr. Nunes conducted an investigation, interviewing the student involved and his parents, who had made the accusation. During the investigation, another student came forward with similar allegations. The employee showed up for another meeting with Mr. Nunes on January 2, 2002, but he brought another person with him, and Mr. Nunes refused to hold the meeting with the other person present. At the conclusion of the investigation, Mr. Nunes and the Fall River diocese's director of education, George Milot, made the decision to terminate the employee. At a meeting on January 7, 2002, they gave him his letter of termination. (Dec. 2-3.)

Two days later, on January 9, the employee was admitted to Brockton Hospital in a psychotic state. He was hospitalized a second time in February 2002. From February 7, 2002 into the summer of 2002, he treated with a psychiatrist, Dr. Danuta Fichna. The employee returned to teaching at a high school in Florida in the fall of 2002. (Dec. 4.)

Following a § 10A conference, the employee's claim was denied and he appealed to a de novo hearing at which he, Mr. Nunes, and Mr. Milot testified. Based on the uncontroverted opinion of Dr. Fichna,[2] the judge found that the employee was totally disabled by his symptoms of anxiety, depression and difficulty sleeping, during the time he treated with the doctor. The judge adopted Dr. Fichna's testimony and found the predominant causes of the employee's disabling symptoms and need for treatment were his notification of the accusations against him in December 2001, and his termination from employment in January 2002. However, the judge found both events were bona fide personnel actions

[2] Although not reflected in the judge's decision, the employee states that the parties opted out of the § 11A impartial physician examination. (Employee br. 1.) We infer they did so because liability was at issue, 452 Code Mass. Regs. § 1.10(7), and/or because the employee's claim was for a past, closed period of alleged disability. 452 Code Mass. Regs. § 1.10(5).

within the meaning of G. L. c. 152, §§ 1(7A) and 29,[3] and therefore, the employee was not entitled to compensation. (Dec. 4-6.)

On appeal, the employee contends that the judge erred by not using an objective standard in analyzing whether his termination was a bona fide personnel action. He argues the objective standard against which an employer's actions should be measured is that defined in Gonsalves v. IGS Store Fixtures, Inc., 13 Mass. Workers' Comp. Rep. 21 (1999):

> "[W]ould the facts available to the [actor] at the moment . . . warrant a [person] of reasonable caution in the belief that the action taken was appropriate."

Id. at 24, quoting Coblyn v. Kennedy's, Inc., 359 Mass. 319, 325 (1971), quoting Terry v. Ohio, 392 U.S. 1, 21-22 (1968). Gonsalves, however, is distinguishable because, in that case, we were not construing the phrase "bona fide," but rather the phrase "without reasonable grounds," as used in § 14(1).[4] We held that a judge must utilize an objective, "cautious and prudent [person] standard" in determining whether an insurer defended a claim without reasonable grounds, so as to be liable for a § 14(1) penalty. Gonsalves, supra at 24.

By contrast, the relevant provisions of §§ 1(7A) and 29 do not mention "reasonable grounds." Rather, they exempt from the definition of personal injury emotional disabilities caused by *bona fide* personnel actions, except those which are the intentional infliction of emotional distress. See Caruso v. Hair Club for Men, 18 Mass. Workers' Comp. Rep. 249, 252 (2004), citing Walczak v.

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[3] General Laws c. 152, § 29, provides, in pertinent part:

> No mental or emotional disability, arising principally out of a bona fide, personnel action including a transfer, promotion, demotion, or termination except such action which is the intentional infliction of emotional harm shall be deemed to be a personal injury within the meaning of this chapter.

[4] General Laws c. 152, § 14(1), provides that penalties shall be assessed if an "administrative judge . . . determines that any proceedings have been . . . defended by an insurer *without reasonable grounds. . . .*" (Emphasis added.)

Massachusetts Rehab. Comm'n, 10 Mass. Workers' Comp. Rep. 539, 542 (1996). "Bona fide" translates as "good faith." Black's Law Dictionary 693 (6th ed., 1990). "Good faith" implies "an honest belief, an absence of malice, an absence of design to defraud or to seek an unconscionable advantage." Carey v. New England Organ Bank, 446 Mass. 270, 282 (2006), citing Hahn v. Planning Bd. of Stoughton, 403 Mass. 332, 337 (1988). A determination of good faith "involves a determination of a state of mind." Carey, supra. Therefore, of necessity, the determination of whether someone has acted in good faith requires a subjective analysis.

Here, the judge found:

> In concluding that the upsetting incidents were bona fide actions, I find the testimony of Mr. Nunes to have been credible and sincere as to both his feeling that the allegations were serious enough to warrant the suspension of Mr. Presto while they were investigated and also that, at the conclusion of his investigation, he believed the allegations to be true.

(Dec. 5.) The judge continued:

> I am satisfied that Mr. Nunes honestly made a determination as to whether the allegations were true or not, *in good faith believed that they were true*, and only then decided to terminate the employee.

(Dec. 6; emphasis added.) [5]

The judge correctly rejected the employee's argument that he was obliged to determine whether the allegations against the employee were actually true: "I make no finding and do not believe I must reach the issue of whether or not Mr. Presto actually provided drugs and alcohol to his student accusers. This was not a hearing on his termination." (Dec. 5.) The judge properly recognized that his duty was not to determine whether the allegations against the employee were in fact true, but rather whether the employer held a subjective, good faith belief that

[5] On the other hand, although not required, the judge also seemed to apply a more objective standard, finding that "Mr. Nunes and Mr. Milot acted *reasonably* and in good faith." (Dec. 6; emphasis added.)

the charges against the employee were true, and terminated the employee without intent to inflict emotional harm. Indeed, the employee does not argue that his termination was the "intentional infliction of emotional harm" by his employer, in the guise of a bona fide personnel action, nor do we see any evidence which would support such a contention, had it been made.[6]

Finally, the employee's reliance on Bengtson's Case, 34 Mass. App. Ct. 239 (1993), is misplaced. In Bengtson, the Appeals Court held that whether an employee's participation in a recreational activity was purely voluntary -- so as to render an injury resulting from that activity noncompensable -- must be analyzed under an objective standard, such as the employee urges here.

> [C]onstruing 'voluntariness' under a subjective standard would substantially make the question of participation a matter of individual idiosyncracy and inevitably broaden recreational activity coverage, in derogation of the conceded legislative intent to restrict it.

Id. at 245. However, unlike the personnel action provisions of § 1(7A) at issue in this case, the recreational activity component of the statute[7] neither expressly nor implicitly invokes a "good faith" standard. Even if held in good faith, Mr.

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[6] When the defense of bona fide personnel action is raised, the necessary analysis a judge must make under §§ 1(7A) and 29 is "whether the conduct of the employer . . . was the intentional infliction of emotional harm in the circumstance of *an otherwise bona fide* personnel action." Caruso, supra at 253. (Emphasis added.) Given that the standard for determining whether a personnel action is bona fide is a subjective one, it is difficult to see how a personnel action, properly found by a judge to be bona fide, that is, undertaken in good faith, meaning an absence of malice, see Carey, supra, could ever constitute the intentional infliction of emotional harm, the elements of proof for which would be that the personnel actions were extreme or outrageous or beyond all possible bounds of decency, or were utterly intolerable in a civilized community. See Foley v. Polaroid Corp., 400 Mass. 82, 99-100 (1987); Agis v. Howard Johnson Co., 371 Mass. 140, 144-145 (1976).

[7] General Laws c. 152, § 1(7A), provides, in relevant part:

> "Personal injury" shall not include any injury resulting from an employee's purely voluntary participation in any recreational activity, including but not limited to athletic events, parties and picnics, even though the employer pays some or all of the cost thereof.

Bengtson's *subjective* belief that his participation on the company softball team was expected or required by his employer, was not the standard the legislature intended be applied. " '[I]n construing a statute its words must be given their plain and ordinary meaning according to the approved usage of language.' " Gonsalves, supra at 24, quoting Johnson's Case, 318 Mass. 741, 747 (1945). Just as there is a "fundamental difference between the concepts of 'reasonable grounds' . . . and of 'good faith'," Gonsalves, supra at 24, the concepts of "purely voluntary" and "good faith" are different and distinguishable. The judge here properly drew the distinction, and we affirm his decision.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

Filed: **May 25, 2006**