COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 035561-09**

Gail Wicklow	Employee
Fresenius Medical Care Holdings, Inc.	Employer
American Casualty of Reading PA	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Koziol and Levine)

The case was heard by Administrative Judge Brendemuehl

APPEARANCES
Bernard Mulholland, Esq., for the employee
Linda Oliveira, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

HARPIN, J. The insurer[1] appeals from a decision awarding the employee § 34 benefits for a causally related exacerbation of her pre-existing Post Traumatic Stress Disorder (PTSD). We affirm.

Beginning in 2000 the employee, a registered nurse since 1981, worked for the employer as a dialysis nurse. (Dec. 7.) The employee "had an extremely chaotic and difficult childhood," which resulted in a diagnosis of PTSD in the late 1990's. (Dec. 8.) A series of acts unrelated to her work occurred in 2002 and 2005 which triggered her PTSD, resulting in her hospitalization three separate times; for ten days in April, 2002, a few days in December, 2002, and for ten to twelve days in May, 2005. (Dec. 9.) Each time the employee was out of work for a period after the hospitalizations, ranging from less than a month to four months. (Dec. 9.) She nevertheless returned to full duty each time. (Dec. 9.)

[1] The employee filed a timely appeal as well, but did not raise any issues in her brief. We thus consider her appeal as waived. Dennen v. Addison Gilbert Hosp., 5 Mass. Workers' Comp. Rep. 289, 292 n. 4 (1991) (failure to raise an issue on appeal waives that issue).

The judge made the following finding regarding the employee's pre-existing PTSD. It was "triggered in situations where the employee felt 'unsafe.' However, prior to the incidents that are alleged herein to have arisen out of the employment, the employee had last had psychiatric treatment and/or medication in 2005. Her PTSD was stable." (Dec. 9.)

The employee alleged that she sustained a work-related emotional injury due to a series of events that occurred from 2006 through May 15, 2009, the day she was suspended for three days. (Dec. 10, 28-29.) She has not returned to work since that date. (Dec. 29.) The judge found the series of work events, while in some cases could be construed as personnel actions, were not *bona fide* actions, and thus the bar to recovery for emotional injuries under § 1(7A)[2] did not apply. (Dec. 38, 39, 41, 42, 43.) She also adopted the medical opinion of Dr. Marc Whaley, the § 11A examiner, that the work events were "the major and predominant" cause of the employee's injury, disability and need for treatment, thus putting to rest the insurer's defense of pre-existing condition under the fourth sentence of § 1(7A). (Dec. 44.) The employee was awarded § 34 benefits from the day after the May 15, 2009 action to date and continuing, as well as medical benefits. (Dec. 44-45.)

The insurer appeals, claiming that all of the actions that formed the basis of the employee's injury were "bona fide personnel actions" under current law, and that "under [the] plain language [of §1(7A) and § 29] 'bona fide personnel action' (sic) are all personnel actions except those which are designed for the intentional infliction of emotional harm." (Ins. br. 22, 45.) It also alleges the judge's finding

[2] General Laws c. 152, §1(7A), sentences three and five, state: "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."

that one of the employer's actions constituted the intentional infliction of emotional distress did not qualify for that designation as a matter of law.

The judge identified ten specific incidents at work that collectively constituted the major and predominant cause of the exacerbation of the employee's PTSD, resulting in her total disability from May 16, 2009, to date and continuing. (Dec. 43-44.)[3] She found that seven of the ten were not personnel actions, and even if they were deemed to be personnel actions, they were not bona fide ones. Id. at 39-41. She found that three of the actions, while undoubtedly personnel actions, were not bona fide. Id. at 39-41-43. She also found that one of the incidents she deemed not to be a bona fide personnel action was the intentional infliction of emotional distress on the employee. Id. at 42.

In making her determination whether the incidents were personnel actions the judge was guided by our decision in Upton v. Suffolk County House of Correction, 25 Mass. Workers' Comp. Rep. 419 (2011). In that case we noted that "not every interaction between an employer and an employee regarding employment-related matters constitutes a 'personnel action' within the meaning of the exclusion set forth in §1(7A)." Id. at 423. We held that "personnel actions," in addition to the four enumerated examples of "transfer, promotion, demotion, or termination," were limited to "only those actions that impact or alter the terms of the employment relationship or the employment status." Id. at 425.

On October 18, 2013, the Appeals Court, in Upton's Case, 84 Mass.App.Ct. 411 (2013), reversed our decision. The court held that "employer conduct need not alter an employee's status or his employment relationship to constitute personnel action under § 1(7A)." Id. at 414. It specifically noted that "personnel

[3] The judge adopted the medical opinion of Dr. Whaley as to causation in general, and to disability on February 6, 2011, the date of the doctor's examination. She allowed gap medical evidence for the period from May 16, 2009, to the date of the examination, and adopted the doctors' reports submitted by the employee that found her disabled during that period. (Dec. 43-44.) The insurer has not raised an issue as to the extent of the employee's disability.

action" in the fifth sentence of § 1(7A) included the "preliminary and less serious processes of supervision, criticism, and investigation," and was not limited to a "status altering action." Id. at 417.

The judge thus may have erred in finding that seven of the listed incidents were not personnel actions. The incidents were: (1) a disagreement over overtime pay in December, 2007, during which the employee's supervisor "proceeded to scream at the employee and speak in a disrespectful manner," (Dec. 14, 38); (2) a disagreement in July, 2008, over the employee's request for time off to attend to a medical matter, which the supervisor made difficult for the employee to attend, and during which "she became upset and angry with the employee," (Dec. 15, 39); (3) the supervisor's yelling and screaming at the employee due to the employee's "allegedly not answering her page," (Dec. 16, 39); (4) a dispute over the supervisor's use of per diem employees instead of regular staff such as the employee, resulting in the employee having to use her paid time off to reach the required 37 hours per week, (Dec. 21, 40); (5) a requirement by the supervisor that the employee perform her usual duties on January 9, 2009, despite the employee's reasonable request that she be allowed to take time off to have a medical follow-up for what she thought was a positive TB test, (Dec. 21, 41); (6) a disagreement between the employee and the supervisor over scheduling the employee for work at a time when the employee had to attend a class to obtain a certification, despite an earlier agreement to accommodate the employee, (Dec. 24-25, 41); and (7) the supervisor getting "very angry [with a] tone [that] was loud and forceful" when discussing the employee's request for bereavement leave, and the supervisor's deliberate failure to inform the employee that the leave would be granted until the dates of the wake and funeral. (Dec. 25-26, 41).

However, it is not necessary to determine, as a matter of law, whether the listed incidents were personnel actions, as the judge made the additional finding for each incident that "even if" the incident was a personnel action, it was not done

in good faith.[4] It is this last set of findings that the insurer has ignored in crafting its argument. The insurer alleges that "under [the] plain language [of §1(7A) and § 29] 'bona fide personnel action' are [sic] all personnel actions except those which are designed for the intentional infliction of emotional harm." (Ins. br. 22, 45.) This, however, is a misconstruction of the applicable law, for it equates "personnel action" with "bona fide, personnel action."

Determining whether an incident is a personnel action, Upton's Case, supra, is not the end of the analysis, for the separate finding must be made whether the personnel action is "bona fide." Anderson v. General Elec. Co., 10 Mass. Workers' Comp. Rep. 801, 803-804 (1996).[5] A "bona fide" action is one that is done in "good faith," which implies "an honest belief, an absence of malice, an absence of design to defraud or to seek an unconscionable advantage," Baker v. Commonwealth of Mass., 25 Mass. Workers' Comp. Rep. 239, 242, quoting Carey v. New England Organ Bank, 446 Mass. 270, 282 (2006). The insurer's argument that any personnel action is, by definition "bona fide" would thus eliminate the statute's second and separate requirement for the defense of a "pure" emotional disability.[6], [7] The analysis must therefore turn to whether the judge correctly

[4] The judge also found that the supervisor's actions over the bereavement leave request constituted the intentional infliction of emotional distress. (Dec. 42.) Given that we have affirmed the finding of a lack of a bona fide action in this event, we need not examine this other finding.

[5] The independent nature of the requirement that the personnel action be "bona fide" is confirmed by the insertion of a comma after "bona fide" in the statute. The comma sets "bona fide" apart from "personnel action," thereby making it an additional requirement of the action and not equivalent to it. Costa's Case, 52 Mass.App.Ct. 105, 108 (2001) ("punctuation . . . may be resorted to when it tends to throw light upon the meaning of the language.")

[6] A "pure" emotional disability is one directly caused by an event or series of events at work which are not the sequelae of a physical injury. Litchfield v. Town of Westford, 27 Mass. Workers' Comp. Rep. 71, 80-81, and n. 13 (2013).

[7] A third requirement for the defense is that where the personnel action is bona fide, it must not constitute the intentional infliction of emotional harm. G. L. c. 152, § 1(7A).

found that the incidents were not bona fide. In doing so she was required to make a subjective analysis whether the employer acted in good faith. Baker, supra, quoting Presto v. Bishop Connolly High School, 20 Mass. Workers' Comp. Rep. 157, 160-161 (2006). After reviewing the record we find there was adequate support to sustain the judge's factual findings as to the nature of the incidents. We therefore affirm her determination that, as to the seven listed incidents, the actions were not bona fide.

The three remaining actions were found by the judge to be personnel actions, even under our pre-Upton interpretation of § 1(7A). However, none were found to be bona fide. An August 7, 2008, disciplinary action, in which the employee received a Corrective Action Form requiring her to obtain doctor's orders prior to beginning dialysis and to arrive each day by 7:00 a.m., was found by the judge to be based on efforts by the supervisor to "scapegoat" the employee for the supervisor's failure to properly inform the employee of an order not to perform dialysis on a patient. (Dec. 18-19, 39-40.) In addition, "[t]he issue of the employee's tardiness was added as grounds for the disciplinary action in an attempt to substantiate a disciplinary action which was based on an allegation which [the supervisor] knew to be false." (Dec. 40.) A second disciplinary action, on February 4, 2009, in which the employee was given a Corrective Action Form for leaving a dialysis machine undisinfected at the end of the day and for being late a number of times, was found by the judge to be "an act of retaliation" by the supervisor for the employee's prior actions in going over the head of the supervisor. (Dec. 22-23, 41.)[8]

The final personnel action identified by the judge occurred during the employee's annual review on May 15, 2009. During the course of that review the

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[8] An amendment to the Form set out an Accommodation for the employee's PTSD, in which the employee would not have to work consecutive days, and would not have to arrive for work at 7:00 a.m. if she had had an exceptionally long day the day before. (Dec. 23.)

employee was informed she would be suspended for the three following days, for being argumentative with her supervisor on May 4, 2009; questioning her assignments or monthly schedule; and for being "unprofessional and disrespectful." (Dec. 28.) The judge found that the employee had not been argumentative, and did not change her tone nor raise her voice in the May 4, 2009 conversation, thus "the allegations on which the disciplinary action is based are false." (Dec. 43.) The employee did not return to work after the May 15, 2009 meeting. The judge found that the employee's PTSD had been exacerbated by the meeting and the suspension, and the exacerbation "has continued unabated since that time." Id. She concluded that the disciplinary action "can not be construed as a bona fide personnel action." Id.[9]

There was thus more than ample support in the record for the judge's findings that the identified events, even if all were considered as personnel actions, were not bona fide actions. The insurer's other arguments as to the judge's findings on the nature of the actions constitute requests that we reconsider the weight the judge assigned to the various pieces of evidence, which we may not do. Pilon's Case, 69 Mass.App.Ct. 167, 169 (2007).

The insurer makes one other argument of note. It asserts, as to most of the identified events, that the employee failed to present medical evidence on causation for each separate event. (Ins. br. 19.) "The employee's proof is limited to either all of the events in the series was [sic] the predominant contributing cause of the employee's disability, or the May 2009 disciplinary action was the

[9] The insurer argues the employee failed to meet her burden to provide evidence of a lack of good faith in the employer's May 15, 2009 discipline, because she failed to show "an intent to inflict emotional harm . . . The employee may not simply offer up general attacks upon the supervisor's credibility, but rather must identify affirmative evidence of intent to inflict emotional harm." (Ins. br. 45-46.) This assertion again mistakenly assumes that finding an event to be a personnel action automatically makes it "bona fide," unless the employee proves it to be the intentional infliction of emotional distress. As we have noted, an action that is not the intentional infliction of emotional harm may still not be bona fide, which is the case here.

predominant contributing cause of disability." (Ins. br. 30, n. 6.) The insurer cites to Smith v. Charming Shoppers. Inc., 21 Mass. Workers' Comp. Rep. 67, 70-71 (2007) to support its assertion. (Ins. br. 19.) However, this argument is based on a misreading of Smith, see Agosto v. M.B.T.A., 21 Mass. Workers' Comp. Rep. 281, 286 and n. 6 (2007)(Horan, J., concurring), and is an incorrect allocation of the burden of proof in "pure" emotional disability cases. We have set out that allocation succinctly, as follows:

> Once the employee has introduced prima facie medical evidence that his emotional disability was predominantly caused by events at work, we think it is the insurer's burden to produce evidence, including medical evidence, that the emotional disability arose "principally out of a bona fide personnel action." Production of evidence that a bona fide personnel action is the principal cause of the employee's emotional disability is in the nature of an affirmative defense. See Presto v. Bishop Connolly High School, 20 Mass. Workers' Comp. Rep. 157, 161 n.6 (2006). Once the insurer produces evidence, including medical evidence, that the employee's emotional disability arose "principally out of a bona fide personnel action," the employee's burden to produce further evidence to substantiate his claim is increased.

Payton v. Saint Gobain Norton Co., 21 Mass. Workers' Comp. Rep. 297, 310 (2007).

The employee presented medical evidence, through the impartial physician, Dr. Whaley, that the series of events at work (later found by the judge not to be bona fide personnel actions) were the major and predominant cause of the exacerbation of the employee's PTSD. (Stat. Ex. A, at 3; Deposition of Dr. Whaley, 75.) This opinion was the only medical evidence on causation adopted by the judge. (Dec. 43-44.) The employee thus met her burden of proof in this "pure" emotional disability case. The insurer then proceeded to present evidence, through cross-examination and testimony from two supervisors, that the series of events were bona fide personnel actions. However, the judge did not accept this defense, as noted above. Instead, she made findings of fact that "substantiated" the claim of

the employee that the series of events did not fall within that rubric. The insurer's defense thus failed.

We therefore affirm the judge's decision. Pursuant to General Laws c. 152, § 13A(6), the insurer is directed to pay the employee's counsel a fee of $1,574.83.

So ordered.

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William C. Harpin
Administrative Law Judge

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Catherine W. Koziol
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **April 9, 2014**