COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 023278-08**

Michael Gannon	Employee
Suffolk County House of Corrections	Employer
City of Boston	Self-Insurer

REVIEWING BOARD DECISION
(Judges Levine, Costigan and Horan)

The case was heard by Administrative Judge Novick.

APPEARANCES
Louis deBenedictis, Esq., for the employee at hearing
Martin J. Long, Esq., for the employee on appeal
Marion C. Grimes, Esq., for the self-insurer

LEVINE, J. The employee appeals from the administrative judge's decision denying and dismissing his claim for an emotional injury allegedly caused by work-related events. The employee was the subject of a sexual harassment allegation and investigation. The judge determined that the employee's claim principally arose from a series of exempted bona fide personnel actions,[1] and she denied the claim. We vacate the decision and recommit the case for further findings.

On August 18, 2008, while on vacation, the employee, a corrections officer, received a telephone call from his non supervisory co-worker informing him that someone at work had made allegations against the employee. The employee then

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

called his union vice-president, who informed him that a female teacher had alleged harassment on the employee's part. The employee testified that this ruined his vacation and he was not feeling good. The employee returned from vacation a week later to find that, due to the harassment complaint, he had been reassigned to the segregation unit. The employee did not feel well. He reported to the infirmary, where the nurse told him that his blood pressure was high and that he should go to an emergency room. The emergency room physician advised him to stay out of work for one week. (Dec. 6-7.) The employee's primary care physician agreed, and diagnosed him with " 'adjustment reaction, hypertension (mild) and headache.' " (Dec. 7.)

In the meantime, the Sheriff's Investigation Division (SID) began an investigation of the sexual harassment complaint. The employee responded to a sixteen item questionnaire regarding his conduct involving a teacher at the facility. The employee understood that up to seventeen questionnaires had been sent to other individuals in connection with the investigation. The employee was upset and embarrassed. In the fall of 2008, he was diagnosed by two mental health clinicians as suffering from major depression and post-traumatic stress disorder related to the sexual harassment complaint and investigation. He was advised to stay out of work. (Dec. 7-8.)

As the investigation proceeded, another teacher made similar allegations against the employee. These allegations also needed to be investigated, contributing to the prolongation of the process. (Dec. 8.) On November 3, 2008, the SID dismissed the teachers' allegations as unsubstantiated and lifted the restriction on the employee's assignment. The employee returned to work on November 18, 2008, amidst a dispute with the employer regarding his use of sick and vacation leave during the time he was out of work. That matter was resolved by the union grievance process. (Dec. 9.)

The employee claimed workers' compensation benefits for his emotional disability related to the series of events beginning with the August 18 notification and

followed by the investigation of the sexual harassment allegations against him and related actions. The § 10A conference order awarded benefits to the employee. The self-insurer appealed to an evidentiary hearing. (Dec. 3-4.)

The judge found that the series of events related to the allegations and investigation occurring at work were subject to § 1(7A)'s bona fide personnel action disqualification:

> [W]hile the employee has produced uncontroverted medical evidence that the events at work relating to the sexual harassment complaint are the only cause of his claimed disability [and therefore the predominant cause as a matter of law], I do not make, nor do I need to make a finding as to whether the employee's complaints are credible, whether he was disabled from work for the period of time claimed, whether he suffered from the diagnosis made by his medical experts, or whether his claimed disability was the result of the events at work cited by him, as I am persuaded by the evidence produced by the self-insurer, and find that the actions it took pursuant to the sexual harassment complaints constitute a bona fide personnel action. I also find that the employer's actions were not a pretext, as the employee produced no such evidence.

(Dec. 11; footnote omitted.) The judge therefore denied and dismissed the employee's claim. (Dec. 13.)

The case is governed by our decisions in Creamer v. Suffolk County HOC, 26 Mass. Workers' Comp. Rep. ___ (2012), and Payton v. Saint Gobain Norton Co., 21 Mass. Workers' Comp. Rep. 297 (2007). In Creamer, we concluded that the notification by a co-worker of workplace sexual harassment accusations by another co-worker, which communication occurred when the employee was on vacation, could not be considered a bona fide personnel action as a matter of law. We concluded that such an event, although work-related, was not within the scope of the bona fide personnel action exemption in a § 1(7A) emotional injury claim:

> [T]he employee's initial symptoms were experienced while on vacation, when he was first informed by a co-worker that his conduct was the subject of a sexual harassment investigation. (Tr. 19.) See Bisazza'a Case, 452 Mass. 593 (2008). That event was not a "personnel action" as contemplated by § 1(7A). A co-worker, not the employer, accused the employee of sexual harassment;

> another co-worker communicated this fact to the employee. See Avola v. American Airlines Co., 20 Mass. Workers' Comp. Rep. 293, 298-299 (2006)(personnel actions taken by employers, not co-workers); Dunleavy v. Tewksbury Hosp., 17 Mass. Workers' Comp. Rep. 70, 74 (2003)(same).

Creamer, supra. Because this first event in the series of events cannot be considered a bona fide personnel action as a matter of law, the case must be recommitted for further findings.[2]

The "uncontroverted medical evidence," (Dec. 11), that the series of events surrounding the sexual harassment accusation and investigation was the only cause of the employee's emotional injury constitutes proof that these events were, under § 1(7A), the "predominant contributing cause" of that injury. See Cappello v. DTR Advertising, Inc., 25 Mass. Workers' Comp. Rep. 45, 49 (2011)("only cause" satisfies "predominant contributing cause" standard). It is not relevant that at least one of the later events -- the reassignment -- clearly is a bona fide personnel action.[3] Because one incident -- the initial notification by a co-worker -- is not a bona fide personnel action, the employee has made a prima facie showing of an emotional disability predominantly caused by a work-related event. Payton, supra, at 310. And, "[o]nce the employee has introduced prima facie medical evidence that his emotional disability was predominately caused by events at work, . . . 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.' " Id. See also Agosto v. M.B.T.A., 21 Mass. Workers' Comp. Rep. 281, 285-286 (2007)(Horan, concurring). In the present case, the self-insurer produced no medical evidence that the employee's

[2] The judge did not have the benefit of our decision in Creamer, which issued after the judge filed her hearing decision.

[3] Whether some or all of the conduct of the investigation was a bona fide personnel action is a question we need not answer.

emotional injury arose principally out of any bona fide personnel action.[4] Therefore, the judge's conclusion, (Dec. 11-12), that the self-insurer had met its burden of producing evidence that the employee's emotional injury arose principally out of bona fide personnel actions was contrary to law.

Accordingly, we vacate the decision, and recommit the case for further findings. "Findings of fact, assessments of credibility, and determinations of the weight to be given the evidence are the exclusive function of the administrative judge." Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007). As noted above, the judge did not make the credibility findings necessary to determine whether the employee is entitled to compensation benefits. (Dec. 11.) On recommittal, the judge must first address that matter. See Brommage's Case, 75 Mass. App. Ct. 825, 828 (2009)(judge did not adopt conclusions of a doctor because those conclusions were based on the employee's testimony, which the judge found lacked credibility). Depending on the outcome of that determination, the judge may then address the extent of incapacity during the closed period claimed by the employee.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **August 8, 2012**

[4] Just as with "predominant" or "major" cause evidence under § 1(7A), the evidence which supports a causal relationship finding of "principally arising out of a bona fide personnel action" must be provided by expert medical opinion. See Dube's Case, 70 Mass. App. Ct. 121, 122-123 & nn. 1, 2 (2007)(medical evidence explicitly addressed the degree of effect of termination on the employee's mental condition in § 26A suicide case).