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Reporter

Employment Law

by Jennifer Newman, Esq.

Positive News for Employers Being Charged With §132a Discrimination Claims

Section 132a of the California Labor Code prohibits discrimination against an employee for filing a workers' compensation claim or for related protected activity. In a victory for all California employers, the Court of Appeals recently clarified the standard for a successful §132a claim in *Gelson's Markets, Inc. v. Workers' Compensation Appeals Board* by holding that in order for an employee to prevail on a §132a claim, the employee must establish that the employer treated the industrially injured employee differently than an employer would treat a non-industrially injured employee under the same or similar circumstances.

In *Gelson's Markets*, the employee at issue sustained

an industrial neck injury which resulted in surgery and caused the employee to be off work for over a year. Following the surgery, the employee provided a doctor's note purporting to release the employee to return to work. Due to the ambiguous language of the release, the employer followed up with the doctor for clarification. In the process of seeking clarification from the doctor, the doctor admitted that he did not believe the employee should return to work, but should instead remain temporarily totally disabled. However, because the employee wanted a release so he could return to work, the doctor provided a release based on the employee's personal opinion that he could do his job.

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As a result of the doctor's admissions, the employer did not allow the employee to return to work. Litigation over the underlying workers' compensation claim then ensued, eventually resulting in a medical evaluator opining that the employee could return to work. At this point, the employer permitted the employee to return to work, but 18 months had passed since the employee's original "release" from his treating doctor.

The employee filed a petition for discrimination under §132a seeking to recover his lost wages for the time period his employer did not allow him to return to work. The Workers' Compensation Appeals Board ("WCAB") granted the petition and awarded the employee lost wages in addition to a \$10,000 statutory penalty. The WCAB specifically found that the employer's failure to return the employee to work following an unambiguous full-duty release constituted discrimination against an industrially injured worker in violation of §132a.

Following an appeal by the employer, the court overturned the WCAB's award, holding that the WCAB applied the wrong legal standard and erroneously concluded that the employee had been discriminated against under §132a. The court then

applied the standard articulated by the California Supreme Court in *Dep't of Rehabilitation v. WCAB (Lauher)*, 30 Cal. 4th 1281 (2003). In *Lauher*, the Supreme Court ruled that to prevail on a claim for discrimination under §132a, it is not sufficient for the employee to show he or she suffered a negative consequence as a result of an industrial injury; rather, the employee must show "discrimination." The court explained that discrimination is differential treatment based on the industrial nature of the injury.

Applying the *Lauher* standard to the facts before it, the *Gelson's Market* court found the employee not only made no such showing that the employer treated him disadvantageously because of the industrial nature of his injury, but also saw no facts to suggest the employer would have treated an employee with a non-industrial injury any differently under the circumstances. As such, the court concluded that the employee could not prevail on his claim for discrimination under §132a.

This case is good news for employers who are frequently provided the choice between bringing an employee back to work where the risk of re-injury or injury to others is high or seeking clarification from medical experts as to the employee's ability to return to work.

Did you know...

That incentive compensation that mandates employees to forfeit shares of stock upon termination may not violate California laws? In a year-end decision, the California Supreme Court held that shares of restricted stock granted to an employee—but not yet vested at the time of termination—did not constitute "earned but unpaid" wages. Therefore, the employer was permitted to have the employee forfeit them. *Schachter v. Citigroup, Inc.*, 2009 Cal. LEXIS 11056 (Cal. Nov. 2, 2009)

That the American Recovery and Reinvestment Act of 2009 (ARRA), as amended on [December 19, 2009](#) by the Department of Defense Appropriations Act, 2010 (2010 DOD Act) provides for premium reductions for health benefits under the Consolidated Omnibus Budget Reconciliation Act of 1985, commonly called COBRA? Eligible individuals pay only 35 percent of their COBRA premiums and the remaining 65 percent is reimbursed to the coverage provider through a tax credit. To qualify, individuals must experience a COBRA qualifying event that is the involuntary termination of a covered employee's employment. The involuntary termination must occur during the period that began September 1, 2008 and [ends on February 28, 2010](#). The premium reduction applies to periods of health coverage that began on or after February 17, 2009 and lasts for up to 15 months.

Well, now you know!

If you have any questions regarding this bulletin, please contact Kelly O. Scott, Esq., Editor of this publication and Head of ECJ's Employment Law Department, at (310) 281-6348. If one of your colleagues would like to be a part of the Employment Law Reporter mailing list, or if you would like to receive copies electronically, please contact Brandi Franzman at (310) 281-6328 or bfranzman@ecjlaw.com.