

Significant Decision

It is no longer legally correct to use the criteria identified in *Barns v. Workers' Comp. Appeals Board* to establish a prima facie violation of Labor Code § 132a.

County of San Luis Obispo v. Workers' Comp. Appeals Board [Art Martinez].

Second Appellate District, Division Six

No. B182145

(Filed 09/29/05)

2005 DJDAR 12501

Significance: The proper legal standard for establishing a prima facie case of discrimination under Labor Code § 132a was announced by California's Supreme Court in *Department of Rehabilitation vs. Workers' Comp. Appeals Bd. [Lauher]* (2003) 30 Cal.4th 1298 [68 Cal.Comp.Cases 831].

Facts: Art Martinez ("applicant") was employed as a mental health therapist in the County's homeless outreach program. On February 24, 2000, Martinez was assaulted by a violent patient and sustained industrial injury to his neck, spine, wrist and shoulder. As a result of the injury, Martinez was off work for three years, and during this time had back surgery. Following surgery, Martinez's surgeon reported that the applicant could return to work, and was not precluded from physically restraining patients. Based on this report, applicant was allowed to return to work. Thereafter, applicant's QME reported that Martinez's work should not include the potential for physical altercation. This was followed by a report from applicant's primary treating physician ("PTP") who expressed complete agreement with the QME. Concerned with the QME's and PTP's reports, the County's risk manager obtained an in-house job description, which confirmed applicant's job posed a potential for physical altercation. Shortly after receipt of the in-house job description, a hearing was held and applicant was awarded 39 percent PD with future medical care. Five days later, the County notified applicant not to report to work until further notice pending preparation of a formal job analysis ("JA"). In short order, the JA issued with a finding that applicant's job might require physical restraint of youths weighing 150 pounds. Thereafter, applicant filed a petition for penalty under Labor Code § 132a. A short time later, applicant was informed he would not be allowed to return to work because his duties exceeded his work restrictions. A hearing was held on the penalty issue, and testimony from defense witnesses confirmed the potential for physical altercation was part of applicant's job. Nevertheless, based on the opinion of applicant's PTP that applicant could continue in his modified position,

the WCJ found the County discriminated against applicant in violation of Labor Code § 132a. The Board granted reconsideration, and in a split decision, affirmed the WCJ's decision. The Court of Appeal granted review and annulled the Board's order.

Discussion: The Court of Appeal found the Board erred when it decided the case under the standard announced in *Barns v. Workers' Comp. Appeals Bd.* (1989) 216 Cal.App.3d 524 [54 Cal.Comp.Cases 433]. Under *Barns*, an injured worker could establish a prima facie violation of Labor Code § 132a by showing he or she suffered a detriment as a result of employer action taken because of the industrial injury. This changed, however, when the Supreme Court in *Lauher* increased the injured worker's burden of establishing a prima facie violation. Hence, a prima facie showing of discrimination under *Barns* is no longer sufficient. The court explained:

"[F]or [an employee] merely to show he suffered an industrial injury and that he suffered some detrimental consequences as a result [i.e., the *Barns* standard] is insufficient to establish a prima facie case of discrimination within the meaning of section 132a." (*Lauher*), at p 1300.) *Lauher* requires an employee not only to show detriment but also show that he was singled out for disadvantageous treatment because of his injury. (*Id.*, at p 1301.)

County of San Luis Obispo v. Workers' Comp. Appeals Bd. (2005) 133 Cal. App. 4th 641.

Holding: Since the record did not contain evidence that applicant was single out for disadvantageous treatment, the court could not determine whether Martinez had met his burden of proof. Instead, the court went beyond and found that even if a prima facie violation of Labor Code § 132a was shown, the County met its burden of showing its actions were necessitated by the realities of doing business. Hence, the court annulled the Board's order.

Note: In *Lauher*, the worker failed to establish a prima facie case of discrimination. Hence, Supreme Court concluded *Lauher* failed to demonstrate he was a victim of discrimination within the meaning of Labor Code § 132a. It appears the same conclusion could have been reached here.

A decision by the Court of Appeal is final 30 days after filing unless the court orders otherwise. The decision in this matter became final on October 29, 2005.