

WORKERS' COMP

## State law doesn't support public policy wrongful termination claim

by Michael Futterman and Jaime Touchstone

*A hospital terminated one of its employees who recently had been injured on the job. The employee sued for wrongful termination in violation of public policy under California Labor Code Section 132(a), which prohibits discrimination against employees who file workers' compensation claims. The trial court dismissed the lawsuit and directed the employee to petition the California Workers' Compensation Appeals Board (WCAB). The California Court of Appeal upheld the dismissal because Section 132(a) can't form the basis of an action for wrongful termination.*

### ***Injured employee sues for wrongful termination***

Michelle Dutra worked for Mercy Medical Center as a housekeeper. She injured her back while pulling one of Mercy's linen barrels across a snow-covered alley. She filed a workers' comp claim the next day. Less than two months after she filed her claim, Mercy terminated her for (1) gossiping, (2) check fraud, (3) time card falsification, and (4) leaving work without clocking out.

Dutra sued Mercy, claiming the hospital had wrongfully terminated her in retaliation for filing a workers' comp claim. The trial court dismissed her lawsuit, finding that the WCAB—not the superior court—was

the proper venue for her retaliation claim. Dutra appealed, and the California Court of Appeal affirmed the decision.

### ***California law protects employees injured on the job***

Labor Code Section 132(a) prohibits employers from discriminating against employees who file workers' comp claims. Specifically, an employer that discharges, threatens to discharge, or discriminates against such an employee is guilty of a misdemeanor. Further, Section 132(a) also authorizes an award of damages to the employee, including reinstatement, reimbursement of lost wages, and an increase in compensation and/or payment of expenses. To seek compensation, the aggrieved employee must file a petition with the WCAB, which has "full power, authority, and jurisdiction" to award damages under Section 132(a). Notably, a trial court lacks jurisdiction to hear a civil claim for an employer's violation of the statute.

As an alternative to filing a petition with the WCAB under Section 132(a), an injured employee may sue her employer in civil court for disability discrimination, violation of California's Fair Employment and Housing Act (FEHA), and/or common-law wrongful termination.

### ***WCAB was proper venue for Dutra's claims***

Dutra sought to evade the limitation on the jurisdiction of the civil courts by characterizing her Section 132(a) claim as a claim for "wrongful termination in violation of public policy." She asserted that Section 132(a) was the public policy that was violated.

For a public policy to support a common-law wrongful termination claim, it must be:

- (1) Delineated in the constitution or a statute;
- (2) “Public” in the sense that it benefits the public rather than serving only individual interests;
- (3) Well established at the time of the termination; and
- (4) Substantial and fundamental.

Dutra alleged she was wrongfully terminated in violation of California’s public policy—codified in Section 132(a)—discouraging discrimination against workers who are injured in the course and scope of their employment. She further argued that California law permitted her to seek recovery from the civil courts despite Section 132(a)’s vesting of authority in the WCAB.

The court of appeal disagreed. When a statute articulates a public policy but includes substantive limitations on the statute’s scope or the remedies available, those limitations also will apply to a wrongful termination claim based on a violation of that statute. A civil claim for wrongful termination can’t be broader than the statute on which it’s based.

Section 132(a) establishes a specific procedure, forum, and remedies for an employee who has suffered discrimination based on the filing of a workers’ comp claim. Thus, it contains substantive limitations. Allowing Dutra to pursue a wrongful termination lawsuit based on a violation of Section 132(a) would impermissibly give her broader remedies and procedures than those provided by the statute itself. Therefore, the court of appeal determined that Section 132(a) couldn’t support her claim for wrongful termination in violation of public policy.

Dutra finally argued that her termination fell outside of the “compensation bargain” of a normal employment relationship. Thus, she should be able to file her claims in court, not solely before the WCAB. The court of appeal reminded her that she could have pursued other remedies for the alleged discrimination—including filing a lawsuit in civil court for disability discrimination or for violations of the FEHA—but she chose not to pursue those alternatives. Petitioning the WCAB remained her only available option. *Dutra v. Mercy Medical Center Mt. Shasta* (California Court of Appeal, Third Appellate District, 9/26/12).

### **Bottom line**

On its face, this decision appears to provide relief to employers because it limits the extent to which an industrially injured employee can sue in civil court and emphasizes that certain claims arising out of a workplace injury always must be addressed before the WCAB. However, terminating an employee who has suffered a workplace injury remains a minefield of potential liability and can result in charges of disability discrimination, retaliation, and violation of the FEHA. You are encouraged to obtain advice from legal counsel before terminating any employee who has suffered a workplace injury.

*The authors can be reached at Futterman Dupree Dodd Croley Maier LLP in San Francisco, [mfutterman@fdm.com](mailto:mfutterman@fdm.com) and [jtouchstone@fdm.com](mailto:jtouchstone@fdm.com). ❖*