



WORKERS' COMPENSATION COMMENTARY



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Moorpark! Moorpark!

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It's 4:30 A.M. and I'm suffering from jet lag after my vacation. As is usually the case, I woke up mulling over in my mind the weighty philosophical issues attendant to workers' compensation (just kidding!) but, actually, I did, for some reason, begin thinking about all the hoopla that has arisen out of the California Supreme Court decision in the City of Moorpark case. (*City of Moorpark v Superior Court of Ventura County (1998) 18 Cal. 4th 1143, 63 CCC 944*) There have been seminars and essays, learned dissertations, etc., about the tremendous "sea change" signaled by this decision.

Quite frankly, I believe that on serious reflection by almost anyone who carefully reads the decision, it was really only a matter of time until the rights enunciated in Moorpark were going to be confirmed by the courts. It is really not the California Supreme Court's decision but the earlier decisions of the Court of Appeal, which are really more inexplicable in light of Federal law.

Back in the early 80's, the California Court of Appeal had rendered a decision indicating that the provisions of *Labor Code §132a* were the employee's exclusive remedy for an individual who suffered discrimination in a workers' compensation setting.

With the passage of the ADA in 1990 (signed into law you will recall by a Republican president), it was clear that the remedies provided by the ADA were applicable in all cases where an individual was covered by the act to the extent that any remedy provided therein was not afforded by other legislation. This meant that if an individual sought reinstatement, back wages and penalties under *Labor Code §132a*, they were not precluded from an ancillary filing under the Americans with Disabilities Act to provide for the additional remedies afforded by that act. Thus, it was clear at that point in time that *Labor Code §132a* was not an entirely exclusive remedy.

There was considerable argument thereafter, however, over an individual's right to sue an employer in the civil court for wrongful termination due to an incurred disability resulting from an industrial injury and seek the additional broader sanctions which could

be imposed by those courts.

In discussing issuance of the decision in *Moorpark*, William Herreras, an infamous applicant's counsel in the Santa Barbara area, indicated that the conservative California Supreme Court had issued a liberal decision, which constitutes a "mega trend" (without attributing Alvin Toffler). He intimated that they had finally "seen the light" and further suggested that this decision is inconsistent with the Court's conservative principles. It is my belief that the decision is entirely consistent with the conservative principles of the court (and in general) based upon protection of fundamental constitutional rights.

Let us first discuss the issue of the "exclusive remedy". This concept goes back to the very foundation of the workers' compensation system. When this body of law was created, it was created as a result of a bargain struck between management and labor whereby labor accepted on behalf of employees a limited schedule of indemnity benefits and full medical coverage based upon a "no fault" system in exchange for the surrender of the right of workers to sue their employer for unlimited sums of money, if they could prove negligence or an intentional tort was committed by their employer. The employer was able to assess the potential benefits due and more accurately quantify potential losses on a statistical basis as a cost of doing business without the payment of potentially ruinous insurance premiums. (This, of course, is an idealized version of the cost of benefits theory and, as you know, it has been a struggle to adhere to this original concept over the years.)

The workers' compensation act was challenged from a constitutional standpoint because some felt that it was inappropriate to restrict a worker's rights with regard to a civil law suit for damages, but the system was deemed constitutional and appropriate because there was a reasonable "trade off" between the pre-existing unlimited rights that could be exercised by a few of the limited benefits available to virtually all when tortious conduct need not be proven.

Likewise, in the general field of employment law, the courts upheld the constitutionality of a limitation of the employee's right to bargain freely with their em-

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employer for wages and benefits by providing that an employee may be bound by a contract negotiated between the employer and a labor union representing that employee. In this case, once again, it has been established that the employees of a given employer under those circumstances are, in general, better served by the collective bargaining power provided by the employees' organization than a particular employee's "better chance" of negotiating a sweeter deal.

Once again, the "trade-off" concept reigned supreme. Thus, when one considers that the workers' compensation law is based upon an equitable trade-off (at least in the legislative view), is it really any surprise that the California Supreme Court found that the exclusive remedy rule should not apply to deprive an individual of their civil rights? Where is the trade off?

From the mid 1960's onward, Federal law is replete with the development of the concept of an individual's right (and the government's right, on their behalf) to bring civil law suits based upon the violation of Federal civil rights laws. This has been backed up by legislation at the state level providing for a civil remedy for the violation of an individual's state constitutional rights. In California, the investigatory and occasionally prosecutory body associated with the protection of civil rights affecting the work place is the Department of Fair Employment and Housing (DFEH). This is, if you will, in most employment related respects, a "mirror" of the Federal office charged with such responsibilities, the Equal Employment Opportunity Commission (EEOC). These organizations were founded on the concept that the constitutional rights of an employee may not be abridged in the employment setting. The law provides for civil remedies available to the individual as against the employer if adverse actions are taken such as firing, demotion, harassment, restriction of employee benefits, etc., in violation of applicable law.

Once one is acquainted with this concept, the application of the "exclusive remedy" rule relative to workers' compensation really doesn't make that much sense since workers are not given broader access to the enforcement of the law as a result of *Labor Code §132a* and are given more restrictive remedies. Once again, where is the trade off? Relative to remedies, there is none. Unless there is a massive overhaul of that specific remedial section to provide the same remedy that an employee would be entitled to under the FEHA (the Fair Employment and Housing Act under which the DFEH acts) or the civil rights acts enforced by the EEOC, then an employee is actually being deprived of their rights without the "trade off" that is present in the workers' compensation scheme with respect to normal benefits or in the collective bargaining legislation.

I do not understand why Mr. Herreras would be-

lieve that a conservative court would be any less willing to ensure the civil rights of an individual employee than would his liberal cronies. I believe it to be entirely consistent with a conservative philosophy.

If we were, just for arguments sake, to accept Mr. Herreras' assessment of Ron George and his court as a die-hard bunch of pro employer advocates, nevertheless, this decision by the California Supreme Court would be prompted by the very strong probability, nay, inevitability, of a directive from the Federal judiciary to extend these benefits to California employees. It is clear that the Congressional intent codified in the Americans with Disabilities Act is that an employee shall not be relegated to only the remedy made available by state law but that the remedies available under Federal law shall also be made available in addition thereto. Clearly, this should and must apply to rights not only under that specific legislation but with respect to general civil litigation brought before the court for violation of an individual's civil liberties.

From an employer or claims perspective, what does this all mean? In the first place, it means that employers must be prepared to defend claims of discrimination both before the Workers' Compensation Appeals Board and in civil forums. It means that employers may be subjected to a substantially higher measure of damages available in the civil court as well. The principles related to employment discrimination remain the same but a higher level of awareness must be developed with regard to the potential implications of employment actions that are taken.

It becomes more important than ever that employers, having any question whatsoever with regard to actions to be taken affecting an individual's employment rights, seek legal counsel before proceeding rather than after they have received a letter from the DFEH or the EEOC. The cost of consultation is miniscule by comparison with the cost of litigation!

REMINDERS AND SUGGESTIONS REGARDING RU-94 MODIFIED WORK PROPOSALS

As you'll recall in our May, 1995 issue of this newsletter, we discussed the newly added provisions in Labor Code sections 4644: (a)(5)(6) and (7) and the use of the RU-94 form to offer modified or alternative work to applicants so that the need for the provision of a vocational rehabilitation plan could be avoided. While this is being utilized on many occasions now, it is our perception that it is being under-utilized and that, when utilized, employers are not making proposals in the manner required, encountering (or causing) delay in the making of an offer, using obsolete forms and failing to provide the necessary information in order to make the offer effective.

In most of the cases where the applicants have accepted

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the work and returned, this has turned out to be a moot point but, in those cases where the applicant refused to return and thus theoretically permitting the employer to establish that they have fulfilled their responsibilities with respect to vocational rehabilitation, such mistakes and omissions have proven costly.

Because of the problems that we have seen, we wanted to provide a few suggestions, recommendations and reminders to allow our clients to effectively use this alternative to a vocational rehabilitation plan.

1) *The form to be used to offer the alternative or modified work to the applicant has been revised. please ensure that the new RU-94 form is being utilized in connection with such offers. If you would like a copy of the form, feel free to contact our office and we will FAX you a copy.*

2) *While an employer is engaged in identifying an appropriate job to offer and during the 30 days the applicant has to make up their mind as to acceptance, VRMA benefits are payable. Thus, time is of the essence in getting the decision made, preparing the job description and the RU-94 and getting these to the applicant.*

3) *A rehabilitation plan is not needed, nor is approval to be sought from the Rehabilitation Unit.*

4) *Be certain that an adequate job description is attached to the RU-94 when sent. Note that the Code talks in terms of the job being one in which the employee can perform the essential functions so it is not necessary (and potentially harmful) to outline physical demands as in a Job Analysis.*

5) *While the code does not provide that approval is required from the treating physician, as a practical matter, such should be sought. Obtaining approval of the job description from applicant's choice of treating physicians (or your own physician for that matter) is frequently problematic. We suggest that the enquiry directed to the doctor specify that the position was developed with the restrictions outlined in the medical reports in mind and if no response is received within 10 days of submission, it will be presumed that the doctor believes the applicant may return to the indicated position.*

6) *Remember that the ADA mandates that an employer provide an accommodation to a qualified worker with a disability. Failure to give due consideration to a modified or alternative position may constitute a discriminatory act.*

This newsletter contains only personal opinions and suggestions by the writer which may be of general application in the subject area being discussed. This letter is not intended as specific legal advice as applied to any factual situation and it is recommended that if legal advice is desired concerning the application of any of the information contained herein to a particular factual situation that