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In the Matter of the Compensation of  
**SANDRA BUCKSEN, Claimant**  
WCB Case No. 07-06489  
ORDER ON RECONSIDERATION  
Stebbins & Coffey, Claimant Attorneys  
Dennis L Ulsted, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

On February 19, 2010, we abated our January 22, 2010 order that reversed an Administrative Law Judge's (ALJ's) order that set aside the SAIF Corporation's denial of an occupational disease claim for a mental disorder. We took this action to consider claimant's assertion that, in reaching our decision, we did not consider the employer's disciplinary action as a whole. Having received the parties' arguments, we proceed with our reconsideration.

First, we agree with claimant that *Reginald Cuffee*, 53 Van Natta 747 (2001), is instructive. In *Cuffee*, we upheld a carrier's mental disorder denial, finding that the employer's disciplinary action was reasonable.<sup>1</sup> In so finding, we treated the employer's disciplinary action as one causative factor, with consideration of its many parts--the accusation, the investigation, and the resultant action. *Id.* at 751. Regarding the first stage, we found that the employer's *accusation* of sexual harassment was reasonable because it was supported by a complaint from a customer, the customer's request that the claimant not be allowed to return, and several other complaints it had received, both from customers and from the claimant's coworkers. *Id.*

Next, we reviewed the *investigation* stage of the disciplinary action, which we determined was less reasonable. We acknowledged that the employer's "sexual harassment" policy required an investigation to determine whether harassment had occurred. We noted that the employer's investigation did not involve the claimant until the very end stage. However, we further noted that, thereafter, the claimant was given an opportunity to "speak his piece," and the procedure was consistent with the employer's policy that mandated "the privacy of the charging party" be kept strictly confidential. *Id.* at 751-52.

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<sup>1</sup> Because we found that the employer's disciplinary action was reasonable, it was considered a statutorily "excluded" work-related factor. *Cuffee*, 53 Van Natta at 752.

Finally, we reviewed the employer's *action* of placing the claimant on a 90-day "performance review" period. In light of the multiple customer and coworker complaints and the seriousness of those complaints, we determined that such action was reasonable. *Id.* at 752.

In sum, despite some misgivings regarding the employer's investigation, we still found that the employer's disciplinary action as a whole was reasonable. In doing so, we did not necessarily accord equivalent weight to each stage of the disciplinary process (*i.e.*, the accusation, the investigation, and the resultant action), but rather viewed the reasonableness of the action as a whole. *Id.* at 752; *see Janice E. Ingersoll*, 48 Van Natta 100, 101 (1996) (the employer's accusations of sexual harassment against the claimant, its investigation, and resulting discipline, were each reviewed when determining the reasonableness of the employer's "disciplinary action" as one causal factor).

Similarly, in *Katherine S. Tatum*, 58 Van Natta 1774 (2006), we followed *Cuffee* to find that the employer's disciplinary action as a whole was not reasonable. *Id.* at 1777. To begin, we determined that the employer acted reasonably by *initiating* an investigation of a complaint filed by educational assistants, who alleged that a special-needs child had been "force fed" by the claimant, an occupational therapist. *Id.* at 1774, 1777. However, we found that the *investigation* was not reasonable because: (1) the employer did not interview the child's primary teacher about the incident; and (2) the claimant's supervisor contacted the child's parent without sufficient information regarding the alleged incident. *Id.* at 1778. We also found that the employer's *resultant action*--a letter of reprimand--was not reasonable given that its findings regarding the incident were not supported by the record. *Id.*

Thus, in *Cuffee* and *Tatum*, we separately analyzed each of the different stages of the disciplinary action, but did not necessarily accord equivalent weight to each of those components. Instead, considering all of the components analyzed, we ultimately determined the reasonableness (or unreasonableness) of the action as a whole (*i.e.*, as one causative factor).

Similarly, here, we have viewed the reasonableness of the employer's disciplinary action *as a whole*, considering its various components (*i.e.*, the employer's initial actions, work plans, and disciplinary hearing). In our prior order, we acknowledged that the employer had issued a letter of reprimand to

claimant that included a HIPAA violation, when none occurred.<sup>2</sup> Additionally, the employer acknowledged that claimant's supervisor had made "inappropriate" comments regarding retirement, "regardless of the reason."<sup>3</sup> (Ex. 2Ea). However, even assuming that such actions were unreasonable, such an assessment does not preclude us from finding that the employer's disciplinary process as a whole was reasonable, considering all the various components of the process.<sup>4</sup> See *Cuffee*, 53 Van Natta at 752; cf. *Tatum*, 58 Van Natta at 1777.

As discussed in our prior order, the employer instituted work plans to address claimant's undisputed "documentation" problems. (Exs. 2A, 2D, 4A). The initial work plan developed in October 2005 was subsequently withdrawn by the employer in 2007, and a revised plan was instituted to "address the measurable objectives" and create a more objective performance evaluation. (Ex. 2Ea). Even if the October 2005 work plan was unreasonable, in that it would have been impossible for claimant to have succeeded under the plan given a discrepancy between her work load and the number of working hours available, this does not mean that the 2007 modified work plan was similarly defective. As our prior order discussed, in evaluating claimant's ability to meet the work plan goals, we considered her lateness and absenteeism, which would have reduced the amount of time she had to complete her tasks, as well as her acknowledged documentation issues. (Exs. 2G, 2H, 2I, 5-9, -19). Claimant also acknowledged that she "let attitude interfere" in her documentation problem. (Exs. 2F, 2Ka). Moreover, the record indicates that, for a time, claimant was progressing in getting caught up with her paperwork under the work plan. (Exs. 2F-2G). Consequently, we remain persuaded that the work plan, as established in 2007, was reasonable.

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<sup>2</sup> However, the allegation was promptly withdrawn and replaced with claimant's concession that she had violated an agency policy and accepted a verbal warning. (Ex. 2Cb).

<sup>3</sup> In discussing claimant's paperwork delinquency, when claimant became upset, Ms. Bell inquired if she had contemplated retirement and working as a counselor part time. (Tr. 189). Claimant alleged in her grievance that she was subject to age discrimination and requested that comments regarding age and/or retirement not be made. (Ex. 2Cb). Apparently, the supervisor agreed to refrain from making such comments in the future. (*Id.*)

<sup>4</sup> Claimant raises, for the first time on reconsideration, that the time frame to be considered "as a whole" is restricted to "the end of 2006" through June 2007. Yet, on review, claimant expressed no dissatisfaction with the ALJ's order, which considered claimant's job performance from 2004 through 2006. (Opinion and Order, p. 6). Further, Dr. O'Gara, in opining that the "disciplinary processes" were the major contributing cause, did not restrict his opinion to the discipline from October 2006, onward. (Ex. 7-2). Moreover, in her argument on reconsideration, claimant also discusses the work performance plan from September 2005. (Claimant's reconsideration motion, p. 4). Consequently, we continue to evaluate the circumstances of claimant's condition from 2004 through June 2007.

Finally, we continue to find the employer's disciplinary hearing process reasonable given that, when confronted with the deficiencies preceding the disciplinary hearing, claimant offered no response to the acknowledged contractual violations.

Considering all the above components, we adhere to our conclusion that the employer's disciplinary action as a whole was reasonable. Consequently, such disciplinary action is an "excluded" work-related factor. ORS 656.802(3)(b); *Liberty Northwest Ins. Corp. v. Shothafer*, 169 Or App 556, 565-66 (2000). Because Dr. O'Gara considered excluded work-related factors, we continue to find that claimant has not proven the compensability of her mental disorder claim.

Accordingly, on reconsideration, we republish our January 22, 2010 order, as supplemented herein. The parties' rights of appeal shall begin to run from the date of this order.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on April 21, 2010