U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENIS M. DUPOR and U.S. POSTAL SERVICE,
POST OFFICE, Milwaukee, WI

Docket No. 98-2295; Submitted on the Record;
Issued April 18, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant sustained an emotional condition causally related to his federal employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On March 25, 1997 appellant, then a 30-year-old custodian, filed a claim alleging emotional distress due to ill treatment by his supervisor, Bryan L. Walsch. Appellant stopped work on March 18, 1997 and was subsequently placed in an absent without leave (AWOL) status. In support of his claim, appellant submitted an April 28, 1997 note from Dr. Kenneth M. Saydel, an osteopath specializing in family practice, who stated appellant was off work from March 19 through April 26, 1997 due to an anxiety reaction resulting from being verbally abused and sworn at by his boss while working.

In response to a request by the Office for additional information pertaining to his claim, appellant alleged two incidents, occurring on March 14 and 18, 1997, in which Mr. Walsch became verbally abusive. He stated that "[o]n March 14, 1997 at 9:50 a.m. He said 'get the f—k outside and shovel the snow.' Mr. Walsch also yelled at me." Appellant alleged that on March 18, 1997 at 12:35 p.m. "he said 'next time it snows you will shovel alone and I will shove it up your f—king a—hole.'" He indicated that he was on permanent work restrictions which provided for no deep knee bending, kneeling or snow shoveling.[1]

In a May 27, 1997 statement, appellant's supervisor noted that during the late fall of 1996 he and the postmaster had a discussion with appellant regarding his physical limitations and what appellant could do to help during snow storms. Mr. Walsch indicated that appellant said he would be able to push snow off sidewalks and lay down salt provided he could use a special shovel that he saw or was trained to use a snow blower. He informed appellant that it was not

---

[1] The record contains a December 7, 1994 return to work certificate, signed by a Dr. Lillie, placing permanent restrictions on appellant due to chronic left knee pain.

expected that he would lift or twist and bend with heavy snow, but to help the other maintenance workers using the snow blower or shovel to move light snow. Mr. Walsch indicated that on March 14, 1997 he was short of help in maintenance and appellant was asked to help move snow, which he described as less than an inch of accumulation, by use of a shovel or snow blower. He indicated that appellant refused, citing his physical restrictions. Mr. Walsch stated he explained to appellant that he need not lift nor twist, just use the blower or shovel to remove the snow from the sidewalk. He said that appellant became "loud and belligerent" increasing in volume until Jodie Massey, a window clerk, came over to appellant to ask him to stop shouting as it was disturbing postal patrons in the lobby. Mr. Walsch advised appellant that the customers safety was his first priority and that he should go help with the snow removal as shouting was not accomplishing anything. Appellant turned and started to walk away, but came back to Mr. Walsch and again started shouting loudly. Mr. Walsch stated: "I lost my composure. I said 'Denis, shut up and go out and do your f—king job' in a quiet and firm tone." Mr. Walsch noted that he immediately realized what he had said and apologized several times to appellant, explaining that he did not mean to swear but that the customers were his first concern. He indicated that appellant told him he was not going to shovel snow. Mr. Walsch stated he was not asking appellant to shovel the snow, but if he was refusing to help he should end his tour and leave the premises. He noted he would put appellant on emergency suspension if he refused his order, and appellant left work at that time.

With regard to the March 18, 1997 incident, Mr. Walsch stated that in the late morning a weather report indicated that light snow was due that afternoon. He indicated that appellant was the only maintenance employee available and sought him out to advise him of the weather forecast. Mr. Walsch noted that he would need appellant only if it snowed more than salt would melt and then to only push the snow from the sidewalk. He stated that appellant pointed at him and said loudly, "you swore at me, you swore at me." Mr. Walsch thought appellant was referring to the March 14, 1997 incident but appellant then turned to another employee who was walking past to ask whether he had just heard Mr. Walsch swear at him. Mr. Walsch noted that the employee said "no" to appellant. Appellant thereafter walked away, pushing a broom and continued to work in the delivery area. Mr. Walsch noted that appellant continued to work that day for several hours and, after it did not snow, he sought appellant out to inform him he would not be needed for salting or cleaning the sidewalk. However, appellant could not be found. On March 24, 1999 appellant was placed in an AWOL status and, as of the date of his statement, no medical documentation had been received pertaining to appellant's claim.

In a May 27, 1997 statement, Ms. Massey noted that she was working at the window on March 14, 1997 waiting on customers. At approximately 9:30 a.m. she heard shouting behind the window area. Ms. Massey recognized the voice as that of appellant and asked him to please be quiet as the customers could hear it and were commenting on it in the lobby. She stated that she went back to the window area and the shouting continued. Ms. Massey noted that appellant was shouting at Mr. Walsch and that this went on for some time before it became quiet.

On June 5, 1997 the Office issued a decision denying appellant's claim.

In a letter received June 23, 1997, appellant requested review of the written record. He submitted a report dated June 17, 1997 from Dr. Saydel who stated that he first saw appellant on

March 19, 1997 and that appellant stated he had been verbally harassed by his boss on March 18, 1997. Dr. Saydel stated the verbal harassment consisted of loud verbal abuse, swearing and vulgar language. He indicated that appellant had an anxiety reaction which prevented him from working from March 18 to April 26, 1997.

By decision dated September 18, 1997, finalized October 6, 1997, an Office hearing representative affirmed the June 5, 1997 decision, as modified to find that appellant failed to establish a compensable injury in the performance of duty, as alleged.

By letter dated January 2, 1997, appellant requested a copy of the statement provided by Ms. Massey.

In a February 6, 1998 letter, appellant requested reconsideration of his claim. Appellant submitted an undated statement from Barbara Popovich, who alleged that on March 14, 1997 she saw Ms. Massey "issue orders to Dennis Dupor. I wasn't sure just what the 'orders' were but she was doing it in a harassing and menacing manner." She indicated that Ms. Massey spoke to Mr. Walsch and "[r]ight after that I heard very loud shouting coming from directly behind the window section, yet out on the floor. It was Bryan Walsch's voice I first heard and so did all the customers in the lobby. He shouted, 'get the f—k out there and shovel the snow.' I then heard Dennis Dupor's voice. He said, 'I do n[o]t have to take that kind of verbal abuse from you, Bryan.' Jodi[e] Massey is Bryan's friend. He covered for her and she covered for him."

By decision dated July 10, 1998, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant merit review.

The Board finds that appellant has not established that his emotional condition is causally related to his federal employment.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act. On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.[2]

In the present case, appellant has alleged that he sustained an emotional condition as the result of two incidents arising at work in which his supervisor was verbally abusive. The Board must review these alleged incidents and determine whether they constitute conditions of employment covered as compensable factors under the terms of the Act. It is noted that

[2] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

appellant has not attributed his emotional condition to the performance of his regular or specially assigned employment duties.

Appellant alleged that on March 14, 1997 he was yelled at by his supervisor, Mr. Walsch, and was told to "get the f—k outside and shovel the snow." The Board has recognized the compensability of verbal and physical altercations under certain circumstances.[3] This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[4] The Board will carefully review the factual circumstances of each case to make an independent determination of whether the evidence establishes a compensable factor of employment. The evidence in this case consists of the statements of appellant, his supervisor and a contemporaneous statement from Ms. Massey. These statements reflect that, after being requested by Mr. Walsch to assist with snow removal on March 14, 1997, appellant became loud and belligerent and commenced shouting at his supervisor. The statement from Ms. Massey reflects that it was appellant who was shouting at Mr. Walsch to such an extent that it interrupted her work at the window and she sought appellant out to request that he stop, noting it was disturbing postal patrons in the lobby area. Mr. Walsch also noted that appellant started shouting at him and that Ms. Massey came from her work area to request that he stop. After instructing appellant to assist in the snow removal, appellant turned away but came back and again started shouting at his supervisor. Mr. Walsch acknowledged that at this time he told appellant in a quiet but firm tone of voice to shut up "and go out and do your f—king job." The Board finds, under the circumstances of this case, that appellant has not shown how this isolated remark of Mr. Walsch rises to the level of verbal abuse to fall within coverage under the Act. While the epithet used by Mr. Walsch may have engendered offensive feelings in appellant, which the supervisor recognized and for which he apologized, the record establishes that it was appellant who instigated shouting at Mr. Walsch and escalated the verbal exchange with his supervisor on that date. Under these circumstances, the Board finds the mere utterance of an epithet which may engender offensive feelings in an employee does not sufficiently affect the conditions of his employment to constitute a compensable factor.[5]

With regard to his allegations pertaining to March 18, 1997, the evidence of record reflects that Mr. Walsch approached appellant after hearing a weather forecast indicating snow was due to fall in the area during that afternoon. The supervisor noted that appellant might be needed to aid in snow removal if the accumulation was more than salt could dissolve. Appellant

---

[3] *See Harriet J. Landry*, 47 ECAB 543 (1996); *Mary A. Sisneros*, 46 ECAB 155 (1995); *David W. Shirey*, 42 ECAB 783 (1991); *Alton White*, 42 ECAB 666 (1991).

[4] *See Frank B. Gwozdz,* 50 ECAB ___ (Docket No. 97-2621, issued June 25, 1999) (the evidence established that the employee's supervisor asked if he had changed his name; held not to constitute verbal abuse or harassment); *Christophe Jolicoeur*, 49 ECAB ___ (Docket No. 96-597, issued June 11, 1998) (the employee alleged and a witness verified that his supervisor loudly asked why the employee was not looking for "damn" forms; held not to constitute verbal abuse within coverage of the Act); *Daniel B. Arroyo*, 48 ECAB 204 (1996) (evidence that the employee's supervisor had used profanity in the workplace; held not to constitute a compensable factor of employment); *Mary A. Sisneros*, *supra* note 3 (evidence that a coworker referred to the employee as a "bitch"; held no error or abuse by management in the investigation of name calling); *David W. Shirey*, *supra* note 3 (evidence the employee was called a "sucker" by coemployees; held not to constitute a compensable factor).

[5] *See Paul Trotman-Hall*, 45 ECAB 229, 242 (1993) (Groom, M.E., concurring).

has alleged that Mr. Walsch again swore at him. Mr. Walsch noted that appellant started pointing at him and stating loudly, "you swore at me, you swore at me," believing this to be a reference to the March 14, 1997 incident. Mr. Walsch noted that appellant returned to his custodial duties but, when he sought appellant out after it did not snow, appellant had left the workplace and was subsequently placed on AWOL status. The Board finds that, as to the allegation of verbal abuse or harassment by Mr. Walsch on March 18, 1997, appellant has not submitted sufficient evidence to support his allegations. It is well established that actions of an employee's supervisor or coworkers which the employee characterizes as discrimination or harassment must be supported by evidence establishing that the alleged incidents did, in fact, occur.[6] Mere perceptions of harassment or discrimination are not compensable. The Board finds that appellant has not submitted sufficient evidence to support his allegation of verbal abuse or harassment by his supervisor on March 18, 1997.

The Board also finds that the Office properly denied appellant's request for reconsideration.

Following the Office hearing representative's September 18, 1997 decision, appellant requested reconsideration and submitted additional evidence, the undated statement of Ms. Popovich.

Under section 8128(a) of the Act,[7] the Office has the discretion to reopen a case for review of the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of its implementing federal regulations,[8] which provides that a claimant may obtain review of the merits of the claim by: "(i) showing that the Office erroneously applied or interpreted a point of law; or (ii) advancing a point of law or fact not previously considered by the Office; or (iii) submitting relevant and pertinent evidence not previously considered by the Office." Section 10.138(b)(2) provides that any application for review which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) will be denied by the Office without review of the merits of the claim.[9]

In support of his request for reconsideration, appellant submitted an undated statement from Ms. Popovich, pertaining to the March 14, 1997 incident. This evidence is cumulative and duplicative in nature as the events surrounding the March 14, 1997 incident are not in dispute. Mr. Walsch acknowledged making a statement to appellant in which he used an expletive directed at appellant. However, as noted above, the March 14, 1997 incident does not constitute a compensable factor. Material which is cumulative or duplicative of that already in the record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a

---

[6] *See Anna C. Leanza*, 48 ECAB 115 (1996); *Martha L. Cook*, 47 ECAB 226 (1995).

[7] 5 U.S.C. § 8128(a).

[8] 20 C.F.R. § 10.138(b)(1).

[9] 20 C.F.R. § 10.138(b)(2).

case for further merit review.[10] Therefore, the Office properly declined to reopen appellant's claim for review on the merits.

The July 10, 1998 and September 18, 1997 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
April 18, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott, Alternate Member, concurring:

I differ with my colleagues in this case. I find the events of March 14, 1997 rise to the level of a compensable factor. I concur with the majority on the ultimate issue of compensability because I find the medical evidence insufficient to meet appellant's burden of proof. I also agree with the majority that each case must be looked at individually for the factual circumstances.

In looking at the facts of this case I find:

(1) a vulgar epithet was
(2) spoken by a supervisor
(3) who admitted losing his composure
(4) to a degree that he felt compelled to apologize repeatedly.

Furthermore, I cannot separate the epithet and the way it was delivered from the context of the supervisor/employee relationship. Unlike with a coworker, a supervisor/employee

[10] *See James A. England*, 47 ECAB 115 (1995); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

relationship in the employment setting is not of equals. The supervisor has the power to dramatically impact the employee's working conditions; a fact that cannot escape the employee and therefore impacts on his/her mental and emotional response to confrontations like we have in this case.

Accordingly, I would find the incident of March 14, 1997 a compensable factor and affirm as modified.

Bradley T. Knott
Alternate Member