U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL L. HINES and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, CA

Docket No. 99-1223; Submitted on the Record;
Issued September 11, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

On October 17, 1997 appellant, then a 40-year-old material handler, filed a claim, Form CA-1, alleging that on October 17, 1997 he felt light headed and had high blood pressure when he was suspended for 14 days based on allegedly false charges and for speaking out during a safety meeting about a federal Occupational Safety and Health Administration (OSHA) incident.

In his statement dated October 20, 1997, appellant explained that there had been a sewage spill in the employing establishment's processing and distribution center and that on September 11, 1997 his supervisor, Daniel Perez, improperly assigned custodians, who had no training and did not wear protective clothing, to clean up the spill. Appellant alleged that he was maintenance director of that particular building and, absent proper training and protection, the custodians were exposed to hazardous blood pathogens such as hepatitis and HIV. A notice of unsafe and unhealthful working conditions was issued by OSHA on December 12, 1997, in which the employing establishment was cited for five violations, including failure to train or issue protective clothing to the employees cleaning up the sewage spill in order to prevent exposure to bloodborne pathogens.

Appellant noted that at a September 24, 1997 "Safety Talk" for the employees was held by Mr. Perez. At this meeting, the employees who participated in the sewage cleanup were given letters of appreciation for their effort. Appellant spoke at the end of the meeting, alleging that Mr. Perez mishandled the sewage cleanup on September 11, 1997 and contended that the letters of appreciation were an insult to the employees and a transparent attempt to cover up the hazards to which Mr. Perez and the employer subjected them. Appellant stated that Mr. Perez angrily told him he had made his point. Appellant indicated that he was disappointed by Mr. Perez's response and got up to leave but was told by Mr. Perez not to leave the room and he complied.

On September 29, 1997 Mr. Perez issued appellant a 14-day notice of suspension, stating that appellant exhibited unacceptable conduct in failing to follow instructions from his supervisor at the September 24, 1997 Safety Talk. Mr. Perez indicated that, during the presentation, appellant "rudely interrupted in a high tone of voice" stating "You cannot cover it up." Mr. Perez stated that he told appellant to stop talking and let the presentation continue, but appellant did not follow his instructions and continued talking. Mr. Perez alleged that appellant angrily got up from his chair and headed for the door. Mr. Perez ordered appellant to stay and appellant stopped by the door. Mr. Perez noted that, after the presentation, he told everyone that they could leave and that appellant, who had been standing by the door, angrily slammed the door. Mr. Perez alleged that during a just cause interview, appellant stated that he had slammed the door because he was angry at the situation. Mr. Perez stated that appellant's actions caused a disruption during the Safety Talk and presentation of awards to employees of the unit. Mr. Perez indicated that appellant had violated sections of the Employee and Labor Relations Manual, which require employees to obey the instructions of a supervisor, conduct themselves in a courteous manner and to maintain satisfactory personal habits so as not to be obnoxious or offensive to other persons or to create unpleasant working conditions.

Appellant denied that he did not obey Mr. Perez's instructions during the meeting or that he slammed the door. In a statement dated October 22, 1997, Donnell Covington indicated that during the September 24, 1997 Safety Talk, appellant raised his hand "to say what was on his mind, about the letter of appreciation." He stated that when Mr. Perez told appellant to stop talking, appellant stopped talking. Mr. Covington indicated that appellant got up and went to the door but did not go out, and that he turned around and came back and sat down. He alleged that appellant did not fail to follow Mr. Perez's instructions.

In a statement dated October 20, 1997, Dennis Avelar stated that during the September 24, 1997 meeting, appellant raised his hand to speak. He stated that when appellant "got up to leave, the door slammed" Mr. Avelar did not think appellant had slammed it. Mr. Avelar contended that appellant did not disrupt the meeting as it was over and the awards were passed out. He stated that he did not hear Mr. Perez tell appellant to stay as everyone was talking at once.

In a statement dated October 17, 1997, John H. McLean, Jr., stated that during the safety talk on September 24, 1997, he saw appellant "speak his mind," that Mr. Perez told appellant to stay in the meeting and indicated that appellant complied.

In a statement dated October 20, 1997, Marvin Holmes stated that on September 24, 1997, during the safety talk, he heard appellant make the statement, "You cannot cover it up." He stated that Mr. Perez told appellant to stop talking and appellant sat down and stopped talking. Mr. Holmes stated that when the meeting was over, he walked out the door with appellant, talking to him.

In a statement dated October 20, 1997, Joseph E. Gill alleged that at the just cause interview at which he was present, contrary to Mr. Perez's assertion in the Notice of Suspension, appellant did not make a statement that he slammed the door because he was angry at the situation.

In a statement dated November 12, 1997, Clifton Washington stated that, after the presentation at the September 24, 1997 safety meeting, appellant "in a haste to leave did slam the door into a door stopper. I don't think [appellant] was trying to hit the wall, I think in a haste he careless[ly] let the door hit the door stop."

On November 13, 1997 appellant filed an Equal Employment Opportunity (EEO) complaint and filed a grievance which he appealed to Step 3.

Appellant also submitted medical documents to support his claim.

By decision dated April 22, 1998, the Office of Workers' Compensation Programs denied appellant's claim, stating that appellant failed to establish that he sustained an emotional condition in the performance of duty.

By letter dated April 30, 1998, appellant requested reconsideration of the Office's April 22, 1998 decision and submitted additional evidence, including documents related to arbitration of his grievance with the National Labor Relations Board (NLRB) and OSHA's findings on the employing establishment's treatment of the sewage spill. At the hearing, appellant contended that the charges against him in the Notice of Suspension were false and that he was being harassed because he spoke out against Mr. Perez's handling of the sewage spill. Appellant stated that the two week suspension caused him financial hardship and stress as he lived from paycheck to paycheck, that he had to readjust his finances and borrow money and that his children did not receive their child support. He stated that his grievance on the suspension had gone to arbitration, that he dropped the EEO complaint and that the complaint he filed with NLRB was on hold pending the outcome of his grievance. Appellant alleged that Mr. Perez harassed him on two other occasions: on November 18, 1997 when, in a conversation with appellant, he threatened to take away his job; and on November 25, 1997, when Mr. Perez told him he must work on a Sunday, although appellant had previously advised Mr. Perez he could not work on Sunday. Appellant indicated the matter was resolved so he did not have to work on that Sunday.

By decision dated November 20, 1998, the Office hearing representative affirmed the Office's April 22, 1998 decision.

The Board finds that appellant has not met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

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 her 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.[1] On the other hand, the disability is not covered where it results from such factors as an

[1] *Dinna M. Ramirez*, 48 ECAB 308, 312 (1997); *see Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.[2]

Where an employee alleges harassment and cites to specific incidents and the employer denies that harassment occurred, the Office or some other appropriate fact finder must make a determination as to the truth of the allegations.[3] The issue is not whether the claimant has established harassment or discrimination under standards applied by the Equal Employment Opportunity Commission or another adjudicatory Board. Rather the issue is whether the claimant under the Act has submitted evidence sufficient to establish an injury arising in the performance of duty.[4] To establish entitlement to benefits, the claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.[5]

The Board has also held that disciplinary measures consisting of counseling sessions, discussions, letters of warning or notices of warning for conduct pertaining to actions taken in an administrative capacity are not compensable under the Act unless it is demonstrated that the employing establishment has erred or acted abusively in its administrative capacity.[6] In the present case, appellant has failed to establish a compensable factor of employment. The evidence of record is insufficient to establish that his supervisor, Mr. Perez, acted unreasonably or abusively in issuing him a 14-day notice of suspension on September 29, 1997 following the September 24, 1997 meeting. In the notice of suspension, Mr. Perez charged appellant with interrupting the September 24, 1997 safety meeting, failing to follow his instructions to stop talking and by acting inappropriately by slamming the door. Although appellant has denied these charges in his grievance, his statements to the Office and at the hearing, and from the witnesses indicate that appellant spoke up at the meeting, alleging a cover up by his supervisor and contending the awards presentation was an insult to the employees. Appellant acknowledged that at the meeting he stated that the letters of appreciation management issued were a "transparent attempt" to cover up the hazards relating to the sewage spill. The record indicates that appellant was directed to remain at the meeting after rising to leave and was observed slamming the door following the conclusion of the meeting. Appellant has not established that management mishandled the sewage spill cleanup or that the issuance of the letters of appreciation to the employees for performing the cleanup constituted a cover up. Appellant has not shown that Mr. Perez acted abusively or erred by issuing him the September 29, 1997 notice of suspension and has failed to establish that the action constituted a factor of employment.

Further, appellant has not proved his other allegations of harassment, *i.e.,* that on November 18, 1997 Mr. Perez threatened to take his job away or on November 25, 1997 Mr. Perez told appellant that he had to work on Sunday when Mr. Perez knew appellant could

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[2] *Michael Ewanichak*, 48 ECAB 364, 366 (1977); *Lillian Cutler*, 28 ECAB 125 (1976).

[3] *Michael Ewanichak*, *supra* note 2; *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

[4] *See Martha L. Cook*, 47 ECAB 226, 231-32 (1995).

[5] *Barbara E. Hamm*, 45 ECAB 843, 851 (1994).

[6] *Barbara J. Nicholson*, 45 ECAB 803, 809 (1994).

not work on Sundays although appellant stated they resolved the matter. Appellant submitted no evidence establishing that these incidents happened as alleged. Since appellant has not established any factors of employment, he has failed to establish his claim.[7]

The decisions of the Office of Workers' Compensation Programs dated November 20 and April 22, 1998 are affirmed.

Dated, Washington, D.C.
September 11, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

[7] Since no compensable factors of employment have been established, it is not necessary to address the medical evidence; *see Diane C. Bernard*, 45 ECAB 223, 228 (1993).