U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TOMMIE JOHNSON, JR. and DEPARTMENT OF VETERANS AFFAIRS VETERANS ADMINISTRATION MEDICAL CENTER, Newington, CT

Docket No. 99-2340; Submitted on the Record;
Issued February 26, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant established that he sustained an emotional condition in the performance of duty.

On April 20, 1997 appellant, then a 51-year-old police and security officer, filed a notice of occupational disease alleging that he had experienced stress at work since June 1, 1984. He submitted copies of personnel documents dating from 1975, notices of personnel actions by the employing establishment, copies of Equal Employment Opportunity (EEO) complaints filed by appellant and several medical reports. Appellant alleged that he was harassed and discriminated against on the basis of race and because he had requested a light-duty assignment. He stopped work in April 1997 and filed for social security benefits.

Appellant alleges the following incidents as the cause of his stress:

1. On June 1, 1984 appellant was told not to read the paper, eat lunch, or use the phone for personal calls while writing reports, although a white officer was allowed to do so.

2. On March 19, 1986 appellant received written counseling for displaying disrespect towards his supervisor on March 18, 1996. He was counseled for making inappropriate police journal entries on March 13, 14 and 15, 1986.

3. On November 25, 1986 appellant received a written reprimand for failure to perform his assigned duties, which consisted of unlocking a recreation building at 4:30 a.m. He alleges that he filed a grievance that was settled in his favor.

4. On May 1, 1989 appellant received a letter of reprimand for failing to report to work on December 24, 1988. He notes that he was involved in a motor vehicle accident and was unable to advise his supervisor that he would be late for work.

5. On August 21, 1989 appellant was denied use of emergency annua1 leave and was charged with absence-without-leave for failing to report to work on May 29, 1989. He states that he tried to call to inform his supervisor that his car was broke down. Appellant maintains that a white officer was allowed to call in for emergency leave. After filing a grievance, the record indicates that his eight hours of leave was restored.

6. On December 4, 1990 appellant filed an EEO complaint because he received a minimally successful mid-term evaluation. The complaint was ultimately thrown out of court because appellant failed to file his documents in a timely manner.

7. On December 31, 1990 appellant filed an EEO complaint alleging discrimination based on his race, color, sex and age.

8. On June 18, 1991 appellant received an oral reprimand for leaving his assigned duties on June 8, 1990 and reporting to the employee health unit without notifying or receiving permission from his supervisor. The admonishment was reduced to an oral counseling after the claimant filed a grievance.

9. Appellant generally alleges discrimination with respect to the denials of his requests for annual leave from 1991 to 1992, stating that leave was typically granted to his white coworkers.

10. On August 26, 1992 appellant was not allowed to make a copy of a form UOR-79-92. He contends that this hampered his ability to perform his job.

11. Appellant alleges that during 1991, 1992 and 1996 his appraisals were lower than his white counterparts. He apparently refused to sign the evaluations and filed grievances.

12. In July 1996, appellant was charged with sexual harassment. He contends that he was improperly denied his right to confront his accuser (a white female) or tell his version of the incident. Appellant states that the employing establishment simply accepted the statements made by his accuser without hearing his side of the story. He alleges that in 1992 a white officer was charged with sexual harassment but was treated differently during the investigation. Appellant noted that he has an EEO complaint regarding this incident pending in Federal District Court.

13. On April 1, 1997 appellant contends that he was harassed at work and saw the employing establishment's physician (Dr. Gupta), who sent him home for one week. He alleges that he was not allowed to return to work, that his light-duty request was denied and that he was forced to see an employing establishment's psychiatrist on Apri1 16, 1997, who determined he had post-traumatic stress disorder (PTSD). According to appellant, a white coworker was allowed to work light duty with PTSD.

14. In a December 1994 letter, appellant contends that Assistant Chief Miller told the director (Charlene Szabo) and a human resources representative that he had problems with appellant's mental state and recommended an evaluation. He alleges that it was Mr. Miller, who was having a mental breakdown, but that management accepted his recommendations about appellant's health.

15. In May 1997, the employing establishment failed to send appellant his retirement package, although retirement packages were sent to other white officers in a timely fashion.

16. On May 10, 1997 appellant contends that his pay was stopped and he was improperly charged with annual leave without his consent.

By letter dated April 28, 1997, the Office of Workers' Compensation Programs advised appellant of the factual and medical evidence required to establish his claim.

Appellant subsequently submitted numerous documents including: A letter dated September 17, 1998 advising him of his entitlement to Social Security Administration benefits; an April 16, 1997 letter scheduling him for a medical appointment; an Apri1 15, 1997 certificate of disability; a memorandum placing appellant on light duty effective April 10, 1997; medical progress notes dated June 8, 1990, February 19 and 24, 1993, July 14, August 5, 9 and 12, 1996 and April 16, 1997; and psychiatric reports dated January 11 and Apri1 21, 1995 and Apri1 22, 1997 from Dr. Richard J. Lauennan, a Board-certified psychologist. Also submitted were a January 10, 1995 psychological evaluation; a medical certificate from the Veterans Administration dated April 1, 1997; a January 10, 1995 memorandum on security service completed by the psychology service chief; an e-mail from Gary Miller concerning his problems with his presence in a high responsibility area; notes from an EEO counselor regarding management's handling of an alleged illicit drug transaction on December 16, 1994; a readjustment counseling service contract initial assessment form dated October 27 and February 4, 1997 and September 10, 1998 post-traumatic stress disorder examination reports. Additional submissions include e-mail correspondence from Dr. John Rixon of the employee health unit; a memorandum dated April 30, 1997 proposing to place appellant in an enforced indefinite leave status; and medical reports dated January 7 and 17 and June 10, 1998 from Dr. Kevin J. Connolly, a Board-certified psychologist.

In a decision dated April 1, 1998, the Office denied appellant's claim on the grounds that his emotional condition did not arise in the performance of duty.

Appellant disagreed with the Office's decision and requested an oral hearing.[1]

[1] Appellant was present at the hearing and testified on his own behalf. He described his military service from July 1965 to July 1969. After his honorable discharge from the Marine Corps, appellant worked as a police officer, attended the police academy, drove cabs, worked for a security firm and began working for the employing establishment in April 1984. He confirmed he suffered from PTSD from his military service, but the diagnosis was not made until 1996. Appellant testified that he attempted to hide his condition and self-medicated to avoid detection. He described the flashbacks and feelings of fear he experienced and his belief that trees were the enemy and his reactions to hearing trucks backfire, seeing fire and smelling rice. Appellant maintained he developed increased anxiety.

At the hearing appellant submitted a copy of a decision by an administrative law judge for the Federal Labor Regulations Authority (FLRA) dated January 8, 1992 and issued on February 21, 1992. The FLRA's decision found that the employing establishment had engaged in an unfair labor practice.[2]

In a decision dated April 22, 1999, an Office hearing representative affirmed the Office's April 1, 1998 decision.

The Board has duly reviewed the case record and finds that appellant has failed to establish that he sustained an emotional condition in the performance of duty.

Appellant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by factors of his employment.[3] This burden includes the submission of a detailed description of the employment conditions or factors which appellant believes caused or adversely affected the condition for which he or she claims compensation.[4] This burden also includes the submission of rationalized medical opinion evidence, based upon a complete and accurate factual and medical background of appellant, showing a causal relationship between the condition for which compensation is claimed and the implicated factors or conditions of his federal employment.[5]

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 illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of employment and have some kind of causal connection with it but nevertheless are not covered because they are not found to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within coverage of the Federal Employees' Compensation Act.[6]

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[2] The record indicates that appellant wished to file an EEO complaint, charging racial discrimination with respect to his receipt of a below standard performance evaluation. He met with the Director of the medical unit who was also the EEO officer regarding the merits of his EEO complaint. When the union found that appellant had been in a meeting without union representation it filed an unfair labor practice charge against the employing establishment. The administrative law judge essentially determined that the union should have been present at the meeting and ordered the employing establishment to cease and desist from holding any further "formal discussions" with its employees in the bargaining unit concerning any grievance or personnel practice without affording the union a proper opportunity to participate in and be represented at the formal discussions.

[3] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[4] *See generally* 20 C.F.R. § 10.115-116 (1999).

[5] *See Ruth C. Borden*, 43 ECAB 146 (1991).

[6] *Lillian Cutler*, 28 ECAB 125 (1976).

The Board notes that the allocation of breaks, the use of sick leave and the monitoring of work assignments involve matters that are administrative in nature and do not involve an employee's regular or specially assigned work duties. As such these matters are not considered to be employment factors.[7] An administrative or personnel matter will only be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. The Board has duly reviewed the record and finds no evidence of agency abuse or error with regard to how administrative matters were handled. Appellant's allegations of error and abuse are without any factual basis such as corroborating witness statements.

The record indicates that the employing establishment reached a settlement with appellant and agreed to restore annual leave to him with respect the August 21, 1989 incident. The employing establishment also reduced appellant's admonishment to oral counseling with respect to the June 8, 1990 incident. Contrary to appellant's argument, however, the mere fact that personnel actions were later modified or rescinded does not, in and of itself, establish error or abuse.[8] In this case, the employing establishment made statements to indicate that the change in the personnel actions were made to avoid further disruption of the work relationship between itself and appellant. The employing establishment, therefore, has not conceded any error or abuse in the handling of its personnel matters. Rather, the employing establishment considers that the disciplinary actions take in the first instance were correct. Under these circumstances, the Board does not consider the change in personnel actions to establish error or abuse for the purpose of finding an employment factor.

Appellant alleges as a basis for his claim that he was the victim of racial, age and sex discrimination. Actions of an employee's supervisors or coworkers, which the employee characterizes as discrimination or harassment, may constitute factors of employment giving rise to coverage under the Act.[9] However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that the harassment or discrimination did in fact occur.[10] In this case, the Board finds no factual evidence to corroborate appellant's allegations of disparate treatment by the employer.

The record indicates that appellant filed two EEO complaints during December 1990, but he did not provide copies of any final decisions to corroborate that he was discriminated or harassed by his employer. The first grievance in November 25, 1986 was apparently settled by the employer to avoid further disruption of the work relationship. The employer specifically maintained that corrective measures and reprimands taken against appellant were proper. The second grievance pertained to appellant reporting to the health unit on June 8, 1990 without notifying his supervisor. Although the employing establishment agreed to reduce appellant's reprimand to oral counseling, the motivation once again was to avoid animosity. The employing establishment did not admit to any wrongdoing.

[7] *Patricia English*, 49 ECAB 532 (1998).

[8] *Michael Thomas Plante*, 44 ECAB 510 (1993).

[9] *Anna C. Leanza*, 48 ECAB 115 (1996).

[10] *Id*.

Finally, appellant submitted a formal decision by an administrative law judge finding that the employing establishment had been guilty of an unfair labor practice because it had not seen to it that appellant's legal representative was copied on decisions issued with respect to appellant's EEO complaints. The employing establishment was found guilty by the administrative law judge of not providing copies of EEOC decisions to the union. Appellant was one of several named employees whose union representative did not receive a copy of a formal EEOC decision. In reviewing the decision and corresponding evidence, it is noted that the FLRA determined that the employing establishment had every reason to know that appellant had a union representative and the name of his legal representative. The FLRA determined that the actions of the employing establishment in bypassing appellant's legal representative had constituted an unfair labor practice.

The issue of the unfair labor practice involves the administrative handling of appellant's grievance complaint and would not constitute a factor of employment unless the employing establishment committed substantial error or acted abusively in handling the personnel or administrative matter. The Board does not find such substantial error or abuse. The unfair labor practice charge brought against the employing establishment pertains to a procedural matter relating to the union's opportunity to participate in and be present in matters pertaining to bargaining unit employees. Although appellant did not have union representation at his grievance meeting, the administrative law judge noted no circumstance by which he had been denied his right to proceed with his EEO complaint. The administrative law judge merely ruled that in all formal grievance meetings the union should be present to represent the bargaining unit. Although appellant had filed the EEO complaint originating the union's case, his involvement with the unfair labor practice charge is indirect. Moreover, with the evidence shows that appellant filed an EEO complaint for racial discrimination, there is no documentation to show that a final EEO decision was rendered on his complaint. Thus, appellant has not established that the employing establishment acted abusively or committed a substantial error in this particular administrative matter.

The decision of the Office of Workers' Compensation Programs dated April 22, 1999 is hereby affirmed.

Dated, Washington, DC
February 26, 2002

Alec J. Koromilas
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member