U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES M. PAGNANO and U.S. POSTAL SERVICE, POST OFFICE, Jersey City, NJ

Docket No. 02-326; Submitted on the Record; Issued July 10, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO, MICHAEL E. GROOM

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

On April 27, 2001 appellant, then a 39-year-old letter carrier, filed an occupational claim alleging that he sustained stress while working under hostile and stressful conditions consisting of his supervisor's harassment and discrimination. Appellant stated that the situation had been "real bad" for the last two months. He indicated that he stopped working on April 26, 2001.

By letter dated May 30, 2001, the Office of Workers' Compensation Programs requested additional information from appellant including a description of specific employment-related conditions or incidents which he believed contributed to his illness and a medical report from his treating physician addressing, in part, the cause of his condition.

By letter dated April 25, 2001, appellant described an incident where his supervisor, Mr. Aziz, came over to him while he doing his relay run and was sitting in his truck and asked appellant why his hand brake was not set. Appellant stated that he told Mr. Aziz that his brake was not set because he had just released it in order to drive off. He told Mr. Aziz that he put the truck in park when he noticed Mr. Aziz. Appellant stated that Mr. Aziz "did [not] want to hear" his explanation, asked appellant for his license which appellant gave him, then copied appellant's license number down and gave the license back to appellant. He stated that, during the whole incident, Mr. Aziz "was aggressive and hostile" and he felt as if he were "being interrogated." Appellant stated that, when Mr. Aziz left, he felt nervous, had lots of anxiety and could not concentrate on his driving. He stated that he feared for his safety. Appellant stated that he felt Mr. Aziz's action was "way out of line" and that further "harassment or retaliation" would increase the risk of an accident due to the stress and anxiety.

Appellant said another incident occurred between him and Mr. Aziz approximately two weeks prior to April 25, 2001 when Mr. Aziz wanted him to do 20 packages in an hour. He stated that he told Mr. Aziz that he would try his best but Mr. Aziz said to him, "[f]orget about

trying your best! [y]ou better do it if you know what [is] good for you or else!" Appellant stated that Mr. Aziz was "very aggressive and hostile" toward him and he perceived his words as a threat. He said that Mr. Aziz and another supervisor, Robert Bethune, told him the last couple of weeks to clean up two post cartons which might involve significantly more work and was not the way he usually measured cleanup which was by pieces. Appellant felt they were trying to provoke him into a confrontation and their behavior was unacceptable.

Appellant stated that he punched in at 7:30 a.m. to start his workday on April 26, 2001 when Mr. Bethune asked him how many packages he delivered in an hour. When he said 12 to 15 depending on road conditions, Mr. Bethune said that was not good enough and they were going to watch appellant and ride with him everyday until he did 20 packages an hour. Appellant stated that Mr. Bethune was "very hostile and aggressive," that he felt very threatened and that Mr. Bethune was clearly harassing him. He stated that, when he returned in a little over an hour, Mr. Bethune asked him how many packages he had delivered and appellant told him about 15. Appellant stated that Mr. Bethune said in a hostile and threatening manner "that was it" and that appellant's delivery was "unacceptable." He became nervous and anxious as he was unloading his relays and told Mr. Bethune that he was not feeling well and was going to go home. Appellant stated that Mr. Bethune told him that he must unload his truck's packages that he had signed for. He stated that he told Mr. Bethune that he wrote on the sheet where he signed for them. Mr. Bethune told appellant that was not good enough and in a hostile and threatening manner stated that he was giving him a direct order and that appellant should still unload his truck. Appellant stated that he began to feel increased anxiety and chest pains. An ambulance was called and appellant went to the hospital in the ambulance. Appellant stated that on the way to the hospital, Mr. Bethune tailgated him and even when the ambulance driver stopped the car and told Mr. Bethune to go back to the employing establishment, Mr. Bethune followed appellant to the hospital. When appellant arrived at the hospital, the hospital security guard informed appellant that Mr. Bethune was outside, wanting to come in to see him, but they would not let him in because they perceived he was a threat to appellant.

By letter dated May 20, 2001, appellant stated that he had worked as a letter carrier for almost fourteen years with a good record but about three months ago when the supervisors were replaced, "all hell broke loose!" He stated that the employees were treated like criminals in that they were not allowed to talk and if one went to the bathroom more than once, one would get a suspension.

Appellant submitted witness statements which corroborate that on April 26, 2001, Mr. Bethune twice directed appellant to unload the truck even though appellant told Mr. Bethune he was sick and felt unable to do it and between ll:30 a.m. and noon, Mr. Bethune was observed tailgating an ambulance in which appellant was a passenger. Another witness stated that on April 26, 2001, Mr. Bethune "aggressively" told appellant he had better do 20 packages in an hour and when appellant stated that he would do his best, Mr. Bethune stated "in a hostile manner" that if appellant did not deliver 20 packages in an hour, he would be "ridden with" and watched until it was done.

A decision dated August 28, 2000 by a dispute resolution team directed that Mr. Bethune should be removed from his position of supervisor for showing disparate treatment toward Carrier Sepulveda when he pushed him and management sent the carrier home.

On April 26, 2001 appellant made an appointment with an Equal Employment Opportunity (EEO) counselor and alleged that he was being retaliated and discriminated against "possibly" because he was an Italian American white male. Part of his complaint was that he was being threatened to do 20 packages in an hour.

By decision dated November 15, 2001, the Office denied appellant's claim, stating that he did not establish any compensable factors of employment.

The Board finds that appellant did not establish that he sustained an emotional condition in the performance of duty, as alleged.

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 employee's fear of a reduction-in-force or her 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 the Equal Employment Opportunity (EEO). 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]

To the extent that disputes and incidents alleged as constituting harassment by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[6] However, for harassment to

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Clara T. Norga*, 46 ECAB 473, 480 (1995); *see Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[3] *Michael Ewanichak*, 48 ECAB 364, 366 (1997); *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

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

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

[6] *Clara T. Noga*, *supra* note 2 at 481; *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[7]

Regarding appellant's contention that he was harassed when on April 25, 2001 his supervisor, Mr. Aziz, asked him why his hand brake was not set and asked for his licensed number, Mr. Aziz's conduct was an administrative action and as such is only compensable if appellant shows it was unreasonable or abusive. Appellant did not present sufficient evidence to establish that incident happened, as alleged. Further, appellant did not show that Mr. Aziz's conduct was an abuse of his administrative duty of monitoring appellant. He, therefore, did not establish that Mr. Aziz's conduct towards him constituted a compensable factor of employment.[8] Appellant also did not present evidence to corroborate that approximately two weeks prior to April 25, 2001, Mr. Aziz and Mr. Bethune told him to clean up two cartons. Even so, appellant did not establish that their instruction was an abuse of their administrative discretion to supervise and monitor appellant.[9] Therefore, appellant failed to establish that their behavior constituted a compensable factor of employment.

A witness' statement corroborates appellant's assertion that on April 25, 2001 Mr. Bethune told appellant he should do 20 packages in an hour and that he would be watched until he did. However, appellant submitted no evidence to show that Mr. Bethune's demand was abusive in nature or in error. Appellant, therefore, did not show that Mr. Bethune abused his discretion in monitoring appellant's work in this manner.[10]

Witness statements also corroborated that on April 26, 2001 Mr. Bethune twice instructed appellant to unload packages from his truck even though appellant told Mr. Bethune he was sick and that Mr. Bethune subsequently followed appellant's ambulance to the hospital. The witness statements are not sufficient to establish error or abuse in directing appellant's work or in accompanying him to the hospital.[11] Appellant's general allegations of being discriminated against, retaliated against, harassed and being "treated like a criminal," were not supported by the evidence of record. The dispute resolution decision dated August 28, 2000 authorizing Mr. Bethune to be removed from his supervisory position for showing violent behavior towards a carrier is not relevant to whether Mr. Bethune acted abusively toward appellant. Further, appellant's initiating an EEO complaint by making an appointment with an EEO counselor does not establish his allegations of harassment in this case. Appellant has, therefore, failed to establish compensable factors of employment.[12]

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[7] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[8] *See John Polito*, 50 ECAB 347, 349 (1999).

[9] *See Daryl R. Davis*, 45 ECB 907, 911 (1994).

[10] *See John Polito*, *supra* note 8; *Daryl R. Davis, supra* note 9.

[11] *See Frank B. Gwozdz*, 50 ECAB 434, 437-38 (1999).

[12] Since appellant did not establish any compensable factors of employment, the medical evidence need not be addressed. *See Diane C. Bernard*, 45 ECAB 223, 228 (1993).

The November 15, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 10, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member