



him in retaliation for exercising protected Equal Employment Opportunity (EEO) activity. In a May 21, 2002 letter, appellant addressed his sexual orientation as a homosexual who was subjected to humiliating and hostile behavior from Harold Cohn, a third level supervisor. On April 23, 2002 appellant opened his computer to the employing establishment's official webpage and read a statement regarding prohibited personnel practices that did not include discrimination based on sexual orientation. He then approached Robert Schlesinger, his acting supervisor, to alert him of the omission. According to appellant, Mr. Schlesinger approved his suggestion that he write an email complaint to the EEO officer, the inspector general and several other senior level personnel.

In the email, appellant noted that the employing establishment did not publicly recognize sexual orientation as a prohibited personnel practice and provided a link to Office of Personnel Management (OPM) policies and questioned whether this was an inadvertent omission. Appellant added that "gays and lesbians at [the employing establishment] can feel nothing less than strong disappointment in [the employing establishment's] obvious neglect of a long pursued and hard fought status ... as protected members of the federal workforce." He stated that within two hours the webpage was changed to include Title VII prohibitions, but did not address sexual orientation. Appellant stated that he became furious and bewildered about this "arrogantly offensive and grossly insensitive correction."

Appellant was later told by Mr. Schlesinger that Mr. Cohn had called him and was upset by appellant's email and said, "I don't care about [appellant's] feelings, I don't care about [his] constitutional rights." Appellant stated that he was physically and emotionally disturbed by the offensive and insensitive remark and coworkers who overheard it stated, "homophobia is alive and well at [the employing establishment]." Appellant added that he recalled Mr. Schlesinger stating that he felt Mr. Cohn "had it in" for him and was homophobic. Appellant noted that, with permission from Kay Teeters, a senior attorney in the office, he went home ill and felt as if he was going to have a heart attack.

Appellant returned to work the next day and a meeting was scheduled at 5:00 p.m. with Mr. Cohn and Mr. Schlesinger. Appellant asked Mr. Schlesinger if Ms. Teeters could attend as she was an open lesbian and he wanted her to be a witness. Before Mr. Schlesinger arrived at the meeting, appellant told Mr. Cohn that he looked hostile and he responded "[b]eyond, beyond angry." Appellant then apologized for the incident but added that he was personally disappointed that the employing establishment was not more inclusive of gays and lesbians. Appellant told Mr. Cohn that it was the talk of the office that he had not attended Ms. Teeters' recent commitment ceremony. He stated that Mr. Cohn then responded, "It is none of your God damned business what I do in my private life and I don't care how you or anyone else feel about this." Appellant stated that it was then clear to him that Mr. Cohn considered him inhuman and he felt humiliated.

Mr. Cohn allegedly stated that appellant should not have gone outside of the office with his concerns, that he had lost credibility, and that he was not to provide advice to clients as he had let his personal feelings get in the way of his professional judgment. Appellant stated that Mr. Cohn indicated that this was similar to a situation a year ago when appellant was removed from a case because his hurt feelings complicated the negotiations. Appellant denied the matter.

According to appellant, he missed work the day after the meeting. He stated:

“These events made me physically and emotionally ill: severe ‘stomach’ illness (IBS), insomnia, nausea, seeming high blood pressure, seeming temperature and other common symptoms of anxiety, panic and depression (rapid heart rate, pounding chest, suicidal ideation, rumination, obses[s]ive thoughts, failure to concentrate, loss of memory). I am constantly overwhelmed with the effects of Mr. Cohn’s hostility. My heart races unexpectedly and seemingly unprovokedly. My palms sweat for no clear physiological reason. I feel almost daily like I am going to have a heart attack. I fear for my life. These feelings persist throughout the day and night.... I was so sore I could barely walk.”

He contended that Mr. Cohn had reduced his job to that of a law clerk and that his words and demeanor created a “hostile, intimidating, threatening, offensive and abusive environment” that was made worse by an invasion of his privacy. Appellant added that a hostile environment existed even when he was not in the office. He alleged retaliation when his requested transfer was denied and he was downgraded in his performance review. Appellant was later told that two attorneys knew he was “disabled” and that it was their belief that Mr. Cohn was going to get appellant by discrediting his legal work.

In support of his claim, appellant submitted a 52-page “Memorandum of Points and Authorities in Support ... Claim,” received by the Office on July 15, 2002. Appellant stated that Mr. Cohn belittled him by coming to his office and saying to him “Guess what you don’t know?,” by reading or writing emails or by answering or making telephone calls while meeting with appellant. He added that Mr. Cohn would demoralize his staff by making even the most mundane decisions, such as approving leave requests. Appellant alleged that Mr. Cohn often required staff to accompany him to the bathroom to continue substantive legal discussions which required his staff to listen to his bowel movements and urination. Appellant contended that Mr. Cohn knew that he was gay and that this was offensive and equated to sexual harassment. He stated that Mr. Cohn deliberately overloaded him with work while others were underutilized. Appellant noted that at one time he carried 17 contractual programs while 3 other attorneys had a combined total of 8 contractual programs. He added that there was no office policy related to sending emails to the commander and deputy commander.

In a May 21, 2002 statement, Mr. Schlesinger stated that he approved of appellant sending an email to the author of the article, but he did not see it before it went out and did not know that appellant would send it outside of their office. Mr. Cohn called him with serious concerns about the “inflammatory nature” of the email and to whom it was sent. Mr. Schlesinger told appellant about Mr. Cohn’s response to appellant’s feelings and constitutional rights. He noted that Mr. Cohn indicated that he would deal with those matters upon his return to the office, but made no mention that he was out to get appellant. Mr. Schlesinger stated that Mr. Cohn never raised his voice at the April 24, 2002 meeting but did say that sending the email to the highest levels of command showed a total lack of judgment and that Mr. Cohn had lost trust and confidence in appellant. Mr. Cohn told appellant not to have contact with the “front office” and directed him to write a legal memorandum.

In a July 13, 2002 statement, James Haag, an attorney, stated that Mr. Cohn read emails while in meetings with staff members. He noted that appellant indicated that he was overworked during a time when he had informed management that he was underutilized, but nothing was done to correct the imbalance. Mr. Haag added that he considered the office a hostile place to work, mostly due to Mr. Cohn's management style.

In a November 12, 2002 statement, as part of an EEO investigation, Mr. Schlesinger stated that he had never been directed to, or seen anyone who was directed to, accompany Mr. Cohn to the restroom. He noted that appellant was never clear that he felt overworked; sometimes saying he felt overwhelmed and at other times saying he had a manageable workload.

In a November 12, 2002 statement, Mr. Cohn indicated that when he learned of the omission on the webpage, he immediately took steps to correct it and that he unequivocally told appellant that he was unhappy with the way appellant had handled the issue. He denied raising his voice to appellant and did not say that he did not care about appellant's constitutional rights or feelings but that he would deal with appellant after it was decided how management would deal with the materials posted on the webpage. Mr. Cohn denied that he became enraged at appellant when he raised the issue of attending Ms. Teeters' commitment ceremony and noted that he later attended a party for those involved. He stated that in an email assignment, he instructed appellant not to contact the client on a specific legal matter and that he should not attend meetings as a representative of the office while he was away on travel for a week. Mr. Cohn stated that he did not intend to humiliate appellant at any time and that he often read email while at meetings. He stated that there was tension in the Office, but several coworkers had stated that appellant was a big part of the problem as he was a negative influence. Mr. Cohn denied ever requiring anyone to follow him into the bathroom, though he might enter it while on his way to a meeting and continue an ongoing discussion if others accompanied him. He added that appellant's email was substantively correct but abusive and appellant violated office procedure by sending the email up the chain of command without supervisory approval. He denied that he was homophobic, noting that two other staff members were homosexual and both conducted themselves professionally and did their jobs well. Mr. Cohn denied any retaliation against appellant.

In November 13, 2002 statements, John Higley, an associate counsel, stated that he was not aware of any wrongdoing by Mr. Cohn and had no knowledge concerning the alleged homophobia statement. Arthur Hildebrand, an associate counsel, stated that there was no evidence supporting the allegation of discrimination based on sexual orientation by Mr. Cohn.

In a November 14, 2002 statement, Ms. Teeters stated that she was present at the meeting when appellant alleged that Mr. Schelssinger stated that Mr. Cohn "had it in" for appellant. She did not recall the statement being made by anyone. Ms. Teeters added that she had never heard Mr. Cohn make a homophobic remark, but thought he might sometimes be "uncomfortable." She stated that when she and appellant discussed the email, she told him that she did not have the "energy" to add the language about sexual orientation to the site. Ms. Teeters noted that her statement referred to her having long discussions with several people to get the article as it was and she did not have the energy to start the process again. She noted that she was very active in the Gay/Lesbian Civil Rights Movement.

Appellant submitted various documents related to stress at work, sexual orientation discrimination, the EEO complaint process and a copy of an executive order prohibiting discrimination based on sexual orientation in the federal workforce.

By decision dated February 10, 2003, the Office denied appellant's claim finding that he failed to establish a compensable employment factor that arose in the performance of duty.

On February 18, 2003 appellant requested an oral hearing and asked that subpoenas be sent to several witnesses. The hearing representative approved the request for a subpoena to Mr. Schlesinger but denied the other requests finding them vague. Appellant withdrew his request for subpoenas and asked for a review of the written record.

The record contains an EEO investigation report that listed appellant's allegations but contained no findings. It included a statement from Mr. Cohn, who noted that he was not responsible for formulating, or trying to influence, appellant's performance rating although he did sign off on them. He noted that he asked the employing establishment commander to give appellant a second chance after he had been demoted in his last job for using an office computer to download pornography as well as having time and attendance issues. Appellant submitted other documents already a part of the record.

By decision dated March 30, 2004, the hearing representative affirmed the February 10, 2003 decision, finding appellant failed to establish a compensable factor that arose in the performance of his federal duties.

### **LEGAL PRECEDENT**

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.<sup>1</sup> 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 his frustration from not being permitted to work in a particular environment or to hold a particular position.<sup>2</sup>

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.<sup>3</sup> This burden includes the submission of a detailed

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

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

<sup>3</sup> *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.<sup>4</sup>

The Board has recognized the compensability of verbal altercations or abuse in certain circumstances; however, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.<sup>5</sup> For harassment or discrimination to give rise to a compensable disability, there must be evidence that the alleged actions did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable.<sup>6</sup> When an employee alleges harassment and cites specific incidents, the Office or other appropriate fact finder must determine the truth of the allegations. The issue is not whether the claimant has established harassment or discrimination under EEO standards. Rather, the issue is whether sufficient evidence has been submitted to factually support the claimant's allegations.<sup>7</sup>

### ANALYSIS

In the present case, appellant alleged that he sustained stress as a result of abusive language, threats and retaliatory actions by Mr. Cohn, an up-line supervisor. The Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, issued unfair performance evaluations, improperly assigned work duties, and unreasonably monitored his activities at work, the Board finds that these allegations relate to administrative or personnel matters, unrelated to his regular or specially assigned work duties and do not fall within the coverage of the Act.<sup>8</sup> Although the handling of disciplinary actions, evaluations and leave requests, the assignment of work duties and the monitoring of work activities are generally related to the employment, they are administrative functions of the employer and not duties of the employee.<sup>9</sup> However, the Board has noted that an administrative or personnel matter will be considered an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.<sup>10</sup> The Board finds that appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to

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<sup>4</sup> *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

<sup>5</sup> See *Dennis J. Balogh*, 52 ECAB 232 (2001); *Robert Knoke*, 51 ECAB 319 (2000).

<sup>6</sup> See *James E. Norris*, 52 ECAB 93 (2000).

<sup>7</sup> *Id.*

<sup>8</sup> See *Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

<sup>9</sup> *Id.*

<sup>10</sup> See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

these matters. He generally alleged that Mr. Cohn was homophobic and retaliated against him based on his sexual orientation but no witnesses have supported appellant's allegations. Mr. Cohn acknowledged his displeasure upon learning of appellant's email concerning the webpage. He denied that he retaliated against appellant and noted that he did not influence appellant's performance rating. Thus, appellant has not established a compensable employment factor under the Act with respect to these administrative matters.

Likewise, the mere fact that actions of the employing establishment, such as the statements on prohibited personnel policies on the office website at the center of this case, were later modified does not in and of itself, establish error or abuse by management in its administrative duties.<sup>11</sup>

Appellant alleged that harassment and discrimination on the part of his supervisor contributed to his claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.<sup>12</sup> However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.<sup>13</sup> In the present case, Mr. Cohn, Mr. Schlesinger and Ms. Teeters denied that appellant was subjected to harassment or discrimination based on his sexual orientation or for sending the April 23, 2002 email. They also denied that Mr. Cohn required appellant or any other workers to follow him into the restroom. For these reasons, the Board finds that appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors.<sup>14</sup> He provided insufficient evidence, such as witness statements, to establish that the retaliatory statements were actually made or that the actions actually occurred.<sup>15</sup> Appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

The Board has held that emotional reactions to situations in which an employee is trying to meet his position requirements are compensable under the principles of *Cutler*.<sup>16</sup> In the present case, appellant alleged that he was overworked but he did not submit sufficient evidence to establish the allegations as factual. The evidence supports that appellant stated that he felt overworked but also said he could manage his workload and was eager to take on more work.

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<sup>11</sup> *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

<sup>12</sup> *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

<sup>13</sup> *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

<sup>14</sup> *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

<sup>15</sup> *See William P. George*, 43 ECAB 1159, 1167 (1992).

<sup>16</sup> *See Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984); *Joseph A. Antal*, 34 ECAB 608, 612 (1983).

Regarding appellant's allegation of denial of a transfer, the Board has previously held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Act, as they do not involve appellant's ability to perform his regular or specially assigned work duties but rather constitute appellant's desire to work in a different position.<sup>17</sup> Appellant has not established a compensable employment factor under the Act in this respect.

Regarding appellant's allegation that he developed stress due to insecurity about maintaining his position, the Board has previously held that a claimant's job insecurity, including fear of a reduction-in-force, is not a compensable factor of employment under the Act.<sup>18</sup> The Board has held that an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.<sup>19</sup>

Appellant alleged that he was told not to meet with clients while Mr. Cohn was out of the office for a week and this equated to a demotion. The Board has held that an employee's dissatisfaction with holding a position in which he feels underutilized, performing duties for which he feels overqualified or holding a position which he feels to be unchallenging or uninteresting is not compensable under the Act.<sup>20</sup> The Board has held that an employee's dissatisfaction with working in an environment which is considered to be tedious, monotonous, boring or otherwise undesirable constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.<sup>21</sup> The Board notes that appellant's reaction to such conditions and incidents at work must be considered self-generated in that it resulted from his frustration in not being permitted to work in a particular environment or to hold a particular position.<sup>22</sup>

The Board has recognized the compensability of physical threats or verbal abuse in certain circumstances.<sup>23</sup> The fact that Mr. Cohn told appellant that he was beyond angry in response to the email does not constitute a compensable factor as appellant has not shown how such an isolated comment would rise to the level of verbal abuse or otherwise fall within the coverage of the Act.<sup>24</sup> The fact that Mr. Haag stated his disagreement with Mr. Cohn's

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<sup>17</sup> *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

<sup>18</sup> *See Artice Dotson*, 42 ECAB 754, 758 (1990); *Allen C. Godfrey*, 37 ECAB 334, 337-38 (1986).

<sup>19</sup> *See Michael Thomas Plante*, *supra* note 11.

<sup>20</sup> *See Purvis Nettles*, 44 ECAB 623, 628 (1993).

<sup>21</sup> *See David M. Furey*, 44 ECAB 302, 305-06 (1992).

<sup>22</sup> *Tanya A. Gaines*, 44 ECAB 923, 934-35 (1993).

<sup>23</sup> *See Leroy Thomas, III*, 46 ECAB 946, 954 (1995); *Alton L. White*, 42 ECAB 666, 669-70 (1991).

<sup>24</sup> *See, e.g., Alfred Arts*, 45 ECAB 530, 543-44 (1994) and cases cited therein (finding that the employee's reaction to coworkers' comments such as "you might be able to do something useful" and "here he comes" was self-generated and stemmed from general job dissatisfaction). *Compare Abe E. Scott*, 45 ECAB 164, 173 (1993) and cases cited therein (finding that a supervisor's calling an employee by the epithet "ape" was a compensable employment factor).

management style does not constitute a compensable factor.<sup>25</sup> Other attorneys did not support allegations concerning homophobic statements or discrimination by Mr. Cohn based on sexual orientation. The mere fact that he may have been uncomfortable in discussing such matters does not establish harassment in this case. For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.<sup>26</sup>

**CONCLUSION**

The Board finds that appellant has not established that he sustained stress in the performance of his federal duties.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions by the Office of Workers' Compensation Programs dated March 30, 2004 is affirmed.

Issued: October 13, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>25</sup> See *Marguerite J. Toland*, 52 ECAB 294 (2001).

<sup>26</sup> As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).