

being placed in a work environment that was made more dangerous by some staff.”¹ Appellant alleged, prior to his termination on November 18, 1999, two correctional officers at the employing establishment spoke with inmates in June and July 1999 about his Equal Employment Opportunity (EEO) case against the employing establishment. They allegedly told the inmates that he was not liked because of the EEO action and, should he ever need any help, he would not get any. Appellant contended that nothing was done after he reported this incident to Skip Paciorek, the associate warden of programs, an agent of the Office of Internal Affairs and a supervisory attorney in the regional office. Appellant contended that inmates refused to be searched by him or complained when he searched or assisted in searching their cells. On July 23, 2001 he received a letter dated July 8, 2001 from an inmate, who indicated that personal information from his official personnel folder had been photocopied by another inmate and distributed within the general population. Appellant contended that, upon his reinstatement to work, he should have been assigned to a location other than Oxford, Wisconsin, and noted that his request for assignment to Atlanta, Georgia, had been denied. When he reported for work on October 21, 2002, he was informed that he would not be allowed to return to the Federal Correctional Institution but was assigned to the Federal Prison Camp. Appellant noted that this facility was located next to the Federal Correctional Institution and that correctional officers with whom he had worked in the past could be assigned within the camp.

Appellant submitted a report of his sessions on November 11 and 12, 2002 with William A. Wray, Ed.D., a licensed psychologist.² He related appellant’s history that guards had made statements that they would not protect appellant and that his personnel records were given to inmates. Dr. Wray diagnosed anxiety disorder with clinical depression and stated that appellant’s persecutory ideation seemed an appropriate response to real threats and that appellant could not return to work.

In support of his claim, appellant submitted affidavits and copies of depositions from coworkers related to his complaint to the EEOC regarding his termination in 1999. He also submitted correspondence to employing establishment officials and the EEOC, including documentation of his attempts to be reassigned in 2002 to a location other than Oxford, Wisconsin, together with the May 1, 2002 decision of the EEOC administrative judge. In a July 29, 1999 letter to Mr. Paciorek, the associate warden of programs, appellant related that an inmate had told him that two unidentified correctional officers had spoken to inmates about his EEO case and related that, in the event he ever needed help, he would not get any due to the result of the EEO action that caused his reinstatement. In an August 6, 1999 letter to Mr. Paciorek, appellant alleged that on July 29, 1999 an inmate was belligerent and disrespectful and had referred to his lack of support from the “hacks.”

¹ The record reflects that, prior to submitting his claim, appellant started working at the employing establishment on November 22, 1998 as a correctional treatment specialist. He was terminated from this position on November 18, 1999. Following the May 1, 2002 decision of an Equal Employment Opportunity Commission (EEOC) administrative judge, his claim of retaliation was upheld and it was ordered that appellant be reinstated with back pay. He returned to work on October 21, 2002.

² Although Dr. Wray’s doctorate degree is in education rather than psychology, he is listed in the national register of health service providers in psychology, and therefore meets the Office’s criteria to be considered a “clinical psychologist,” as set forth at Federal (FECA) Procedure Manual, Part 3 -- Medical, *Overview*, Chapter 3.100.3a (October 1990).

In a December 30, 2000 deposition, Jerrold Brown, a personnel management specialist, indicated that the position to which appellant was assigned when he began work at the Oxford facility in November 1998 was not probationary, as appellant had previously completed a one-year probationary period. In a January 31, 2001 deposition, Harvey L. Simpson, a chaplain at the facility during 1998 and 1999, stated that there were occasions while he and appellant were walking when other staff did not acknowledge appellant. He commented that negative gestures were made by unidentified staff members at a meeting concerning appellant's assignment to work at Oxford. In a February 28, 2001 deposition, Larry S. Raney, a former union vice-president, related that Mark Ciske, a union representative, met with appellant on December 6, 2000 to prepare for appellant's grievance concerning denial of family and medical leave. Mr. Ciske related to appellant that an unidentified supervisor had called appellant a bad employee who was making a lot of money off the government and would file suit against employees just to make money. Mr. Raney indicated that he was not at the grievance preparation meeting.

In a March 13, 2001 interrogatory, Diane Mittelstedt, a coworker, stated that the only derogatory comments she ever heard about appellant were during a December 1999 union meeting, where she got the impression he was not well liked based on various negative comments made about him. She did not identify the individuals making the comments. In a March 16, 2001 interrogatory, LaTonya A. Niravanh, a coworker, indicated that derogatory comments had been made that appellant was not liked and thought he knew everything. She stated that these comments were made at the Federal Law Enforcement Training Center in January 1999, but did not identify the individuals making the comments. In a March 27, 2001 deposition, John Gentry, a coworker, stated that an inmate became upset on September 2, 1999 when he and appellant confiscated pornographic magazines. Mr. Gentry indicated that he had heard employees talk about the amount of money appellant obtained in his EEO settlement and that he had scammed his way into his job. In a July 8, 2001 letter, John Schuler, an inmate, stated that he was transferred from the Oxford facility to another correctional institution. He related that an unidentified staff member at Oxford handed appellant's grievance to an inmate working in the education office to make a photocopy. The inmate was unsupervised and made several copies which he brought back to the unit. Mr. Schuler stated that this inmate provided a copy to an unidentified lieutenant at the employing establishment.

The May 1, 2002 bench decision of Judge Henry Hamilton, an EEOC administrative judge, addressed appellant's allegations surrounding his November 17, 1999 termination and complaint alleging discrimination, a hostile work environment, an erroneous probationary period and retaliation for his prior EEO activities. He noted that appellant's employment after November 22, 1998 gave rise to the complaint and that appellant was removed from his position on November 18, 1999, during a probationary period. Judge Hamilton noted that in June 1989 appellant had first applied for a position with the correctional facility in Oxford, but was found disqualified due to a previous dismissal from employment with the Postal Service in 1987. Appellant initiated the prior EEO action and on January 3, 1995 it was found that the employing establishment had violated the Rehabilitation Act by declaring appellant ineligible for employment without any attempt to accommodate his known medical needs. The judge in that action recommended that appellant be offered employment, and an offer was made on July 13, 1995. Thereafter, appellant initiated another EEO complaint, which found in favor of

both appellant and the employing establishment. On November 22, 1998 appellant reported to work at the Oxford Correctional Facility.

As to appellant's complaint as to whether he was required to complete a probationary period upon his return to Oxford, Judge Hamilton noted that the issue was not before him. He found that appellant failed to establish that he was subjected to a hostile work environment or otherwise discriminated against based on his ethnicity, national origin or association with his wife, who also has a disabling condition. As to appellant's allegations that he was shunned and not afforded common courtesies by other employees, the evidence reflected that many coworkers believed him to be arrogant and condescending. Judge Hamilton found this did not constitute harassment but merely personality conflicts within the workplace. He did find, however, that appellant was retaliated against because of his prior EEO activity when terminated in 1999. Judge Hamilton directed that appellant be reinstated and receive back pay.

Appellant was offered reinstatement at the Oxford facility but he requested that the EEOC stay this action and assign him to work in Atlanta, Georgia. He alleged that, upon his initial arrival at Oxford in November 1998, a secretary asked him what he was doing there considering all the money he made from his case. Appellant stated that the secretary made these types of statements on a daily basis, that she "would literally throw my dictation tapes against the wall when I handed them to her," but that this stopped after he complained to the administrator. In a December 30, 2002 letter, appellant stated that he was "subjected to a near daily amount of abuse, both verbal and the lack of social and professional support" at the Oxford Correctional Facility from June 1 to November 1999 and was harassed when requested to document his wife's medical condition to support his request for leave under the Family and Medical Leave Act. He stated that the attempt to assign him to the Federal Prison Camp on October 21, 2002 adversely affected his ability to perform his job; contending that he would not be able to participate in regular meetings, conduct rounds or engage in training, all of which took place at the Federal Correctional Institution.

In a March 25, 2003 report, Dr. Michael Cross, a Board-certified psychiatrist, diagnosed a major depressive disorder and anxiety disorder. He indicated, by checking a box on the form, that these conditions were caused or aggravated by an employment activity. Dr. Cross stated, "Due to the employment stressors and loss of the feeling of personal security at his present working facility, it is my opinion that appellant could not/should not return to his past worksite. A new worksite would be preferable."

On January 6, 2003 R.L. Stiff, the warden, addressed appellant's allegations, noting that on August 23, 2002 appellant accepted an interim appointment at the Federal Correctional Institution but used sick leave for back surgery until October 21, 2002. Due to appellant's objections to returning to the Federal Correctional Institution based on perceived threats to his safety, he was assigned to the Federal Prison Camp, where the majority of inmates were first-time offenders with short sentences who were not viewed as escape or assault risks. At the camp, appellant's supervisor would be someone who had not been at the employing establishment during his prior service. Appellant reported to work on October 21, 2002 but, upon learning of his assignment at the camp facility, he requested sick leave due to emotional distress. He noted that Mr. Paciorek, the associate warden, and a special agent of the Office of Internal Affairs, had interviewed appellant in October 1999 concerning his allegations that

correctional officers told inmates that he was not liked and would not get any help. They related that appellant never told them that he feared for his safety from staff or inmates. Regarding appellant's allegation that inmates were uncooperative because they were aware of his "status," the warden noted that the inmate population was a recalcitrant group, many of whom had difficulty dealing with authority figures. He indicated that inmates who refused orders or made threats or disrespectful remarks to staff were subject to disciplinary action. Mr. Stiff stated that "any and all information submitted by [appellant] regarding his claims of personal danger have been thoroughly investigated and remain unsubstantiated in their entirety...."

By decision dated July 1, 2003, the Office found that appellant failed to establish any compensable factors of employment arising in the performance of duty.

By letter dated July 9, 2003, appellant requested a hearing, which was held on March 22, 2004. He submitted a March 4, 2003 affidavit from a painter foreman and former chief steward, indicating that appellant needed access to the Federal Correctional Institution to meet with staff members and department heads. Appellant also submitted July 24, 2003 and March 3, 2004 reports from Dr. Wray describing his treatment and progress. He stated that appellant could not return to work at the employing establishment, but could possibly work at an alternative facility.

By decision dated June 8, 2004, an Office hearing representative found that appellant had established a compensable employment factor -- retaliation related to his erroneous discharge in November 1999 -- but the medical evidence did not support that his emotional condition was causally related to this factor.

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 work 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 his frustration from not being permitted to work in a particular environment or to hold a particular position.³

Generally, actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of personnel matters, coverage may be afforded.⁴

³ *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Michael Thomas Plante*, 44 ECAB 510 (1993).

Assignment of work is an administrative function of the employer,⁵ as is an investigation by the employing establishment.⁶

Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.⁷ The fact that a claimant has established compensable factors of employment does not establish entitlement to compensation. The employee must also submit rationalized medical opinion evidence establishing that he or she has an emotional condition that is causally related to the compensable employment factor.⁸ The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific compensable employment factors identified by appellant.⁹

ANALYSIS

The Board notes that appellant has not attributed his emotional condition as a reaction to his regular or specially assigned job duties. In this regard, the record reflects that appellant last worked on or about November 18, 1999. Upon his reinstatement on October 21, 2002, he was advised that he would work at the Federal Prison Camp, at which time he requested sick leave due to emotional stress. The record does not reflect that he returned to work prior to filing this claim on October 31, 2002.

Following Judge Hamilton's direction that appellant be reinstated at work, he attempted to obtain a transfer to Atlanta, Georgia. Appellant argued that he should not return to the Oxford Federal Correctional Institution based on prior harassment and discrimination during his employment during 1998 and 1999. However, upon notification of his assignment to the neighboring Federal Prison Camp, he contended that he should not have to work at that facility because he would be unable to attend meetings and training at the main correctional institution. The Board notes that Judge Hamilton's decision directed appellant's reinstatement at work; it did not direct that he be assigned to a facility away from Oxford, Wisconsin. Mr. Stiff noted that appellant's assignment to the camp facility was made in order that he could work under a supervisor who was not at Oxford during the period of his prior employment. It was also noted that appellant would be working around inmates who were largely first-time offenders with short sentences and who were not viewed as escape or assault risks. The Board has held that the assignment of work is an administrative function of the employer and the manner in which a supervisor exercises his or her discretion falls outside the ambit of the Act.¹⁰ Absent evidence establishing error or abuse, a claimant's disagreement or dislike of such a managerial action is

⁵ *James W. Griffin*, 45 ECAB 774 (1994).

⁶ *Jimmy B. Copeland*, 43 ECAB 339 (1991).

⁷ *Joel Parker, Sr.*, 43 ECAB 220 (1991).

⁸ *James W. Griffin*, *supra* note 5.

⁹ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

¹⁰ *See Barbara J. Latham*, 53 ECAB 316 (2002).

not a compensable factor of employment. Appellant has not demonstrated that his reinstatement to work at Oxford violated the order of the EEOC administrative judge or that his assignment to work at the Oxford Camp Facility was in error or an abuse by the prison warden. Therefore, these allegations do not constitute compensable employment factors. Appellant's work assignment beginning October 21, 2002 was not unreasonable and his dissatisfaction with it appears to be based on his desire to work in another location, which is not compensable.

Appellant submitted depositions from coworkers and a former inmate at Oxford which addressed allegations that he characterized as harassment and discrimination. He alleged that derogatory comments were made about obtaining his position through a prior EEO action and, following his arrival at work in 1998, he was not liked or respected by certain staff and inmates. The Board has generally recognized that verbal abuse or threats of violence in the workplace will be compensable factors when established by the evidence of record.¹¹ This does not imply, however, that every statement uttered in the workplace will give rise to a compensable factor of employment. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such actions occurred; a claimant must substantiate a factual basis for his allegations with probative and reliable evidence.¹²

The evidence of record is not sufficient to establish appellant's allegations of harassment, discrimination or derogatory verbal abuse by staff or inmates at the Oxford facility during his employment in 1998 and 1999. Mr. Stiff, the warden, noted that appellant's allegations regarding his life being in danger were investigated by the employing establishment and found unsubstantiated. The statements submitted by various coworkers and a former inmate at the Oxford facility are deficient in that these individuals did not identify with sufficient specificity the derogatory nature of comments made, the identity of the parties making such comments, or the time and date remarks were made. Chaplain Simpson did not describe any derogatory comments or negative gestures with specificity and merely noted that appellant was not acknowledged on occasion by other staff. Mr. Raney addressed comments apparently made by another union official concerning an unidentified supervisor at work. Ms. Mittelstedt stated that, based on comments she overheard at a union meeting after appellant stopped work in 1999, she got the impression he was not well liked. Similarly, Ms. Niravanh and Mr. Gentry did not identify the individuals or parties making any alleged comments concerning appellant. Mr. Schuler did not identify the inmate or staff member who allegedly made unauthorized copies of appellant's grievance. The Board finds that the evidence submitted by appellant is not sufficient to establish a compensable factor of employment pertaining to these allegations. The fact that coworkers may not generally like one another will not constitute a compensable factor of employment absent probative evidence of conduct that may be characterized as harassment, discrimination or verbal abuse. Of note is the decision of Judge Hamilton, who reviewed much

¹¹ See *Fred Faber*, 52 ECAB 107 (2000).

¹² See *Dennis J. Balogh*, 52 ECAB 232 (2001).

of the same evidence submitted on this appeal. He found that appellant's allegations of harassment and discrimination were not established and that much of record reflected mere personality conflicts in the workplace.¹³

The record indicates that inmates at the correctional facility were, on occasion, belligerent and disrespectful. Mr. Gentry noted that an inmate became upset after he and appellant confiscated some pornographic magazines. Mr. Stiff, the warden, acknowledged that the inmates were a recalcitrant group of individuals who had difficulty dealing with authority figures. The warden generally noted that all institutional positions were considered hazardous duty due to the nature of the work and its inherent risks. The Board notes, however, that appellant did not attribute his emotional condition to any inherent danger of his position as a correctional treatment specialist. Rather, the focus of his claim has pertained to actions he described as harassment and discrimination during his employment and disagreement with his work assignment upon his reinstatement in October 2002. Similarly, appellant has not established error or abuse in the denial of his request for leave under the Family and Medical Leave Act. Requests for documentation for absences from work are administrative in nature.¹⁴ The evidence submitted to the record is not sufficient to establish that the employing establishment's requests were erroneous.

Appellant did establish error in his termination from work in November 1999. Judge Hamilton found that the discharge was in retaliation for his prior EEO activity.¹⁵ As appellant has substantiated a compensable factor of employment, the Board will review the medical evidence to determine whether it establishes that this factor caused or aggravated his emotional condition. The March 25, 2003 report from Dr. Cross, a Board-certified psychiatrist, indicated that appellant's major depressive disorder and anxiety disorder were related to his employment. However, the Board finds that the physician's opinion is of diminished probative value as the report provided no history of any specific employment factors and no rationale for his conclusion on causal relationship. Dr. Wray, a licensed psychologist, concluded that appellant's anxiety disorder with associated clinical depression was a work-related disorder, but did not cite to any compensable factor of employment in his reports. For this reason, his opinion is insufficient to meet appellant's burden of proof.

CONCLUSION

The Board finds that appellant has established a compensable factor of employment; however, the medical evidence is insufficient to establish that this factor caused or aggravated his emotional condition.

¹³ The findings of other federal agencies or bodies are not dispositive with regard to questions arising under the Act. However, such evidence may be given weight by the Office and the Board. See *Ernest J. Malagrida*, 51 ECAB 287 (2000); *Richard L. Ballard*, 44 ECAB 146 (1992).

¹⁴ *Helen Castillas*, 46 ECAB 1044 (1995).

¹⁵ With regard to whether appellant was properly in a probationary status when he was wrongfully discharged, the EEOC administrative judge found this was an issue for another adjudicator. Appellant has not submitted evidence to establish his allegations that his probationary status was in error.

ORDER

IT IS HEREBY ORDERED THAT the June 8, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 26, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member