

**United States Department of Labor
Employees' Compensation Appeals Board**

T.F., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Brooklyn, NY, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 06-1023
Issued: March 8, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 30, 2006 appellant filed a timely appeal from a February 21, 2006 decision of an Office of Workers' Compensation Programs' hearing representative, who affirmed a June 13, 2005 decision denying his emotional condition claim. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly found that appellant failed to meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

Appellant, a 36-year-old corrections officer, filed a Form CA-2 claim for benefits based on an emotional condition on November 16, 2004. He stated that he experienced chest pain, palpitations, sleep disorder and erectile dysfunction on August 22, 2004 due to stress caused by the September 11, 2001 attacks on the World Trade Center. On December 7, 2004 appellant filed a Form CA-1 claim for benefits, due to stress, anxiety, shortness of breath and heart

palpitations following an incident at work which occurred on November 5, 2004. He alleged that he was approached by Mark Hunt, a registered nurse at the prison, who told him that he looked stressed. Mr. Hunt placed his hand on appellant's chest and offered his cell number. He allegedly told appellant that "it was okay to spend four hours in jail for the safety of the country." Appellant stopped working on December 29, 2004.

In a report dated November 29, 2004, Dr. Howard Hertz, a specialist in internal medicine, stated that he had treated appellant since October 13, 2004 for anxiety, shortness of breath, and palpitations. He advised that appellant would see a cardiologist and undergo laboratory work for hepatitis.

In a memorandum to appellant dated December 9, 2004, Warden Michael A. Zenk stated:

"Effective immediately, Mr. Hunt has been informed that he is to have no contact with you. Any contact required between the two of you as you carry out your respective duties will be through your supervisors as intermediaries. Should you have any contact with Mr. Hunt, you must immediately report it to your supervisor."

In a December 9, 2004 report, Dr. Hertz stated that he had seen appellant for his stress and anxiety and that appellant would be well served by taking some time off from work.

By letter dated January 11, 2005, the Office requested that appellant submit additional medical evidence in support of his claim, including a comprehensive medical report describing how the claimed incident on November 5, 2004 resulted in the diagnosed condition and provide factual evidence, which would establish that he had developed an emotional condition caused by factors of his employment.

On February 8, 2005 the Office received a copy of the January 11, 2004 developmental letter from appellant who made the following allegations:

1. Since the September 11, 2001 incident, several supervisors and staff members said that terrorists were at large on the ninth floor.
2. Mr. Ingram, safety manager, told appellant that "We should bomb the whole Middle East and kill everybody."
3. Numerous coworkers insulted his ethnicity, called him epithets such as "Bin Laden," "Al Qaeda," "terrorist," "towel head," and "killer." Appellant alleged that R. Diaz, a coworker, asked him during ART training "Which Al Qaeda school do you belong to?"
4. Numerous posters were posted throughout the housing units depicting negative portrayals of Muslim prisoners, including one depicting an eagle with its middle finger upraised and asserting "Jihad this."
5. On January 9, 2004 Lieutenant Ortiz and Lieutenant Tamayo told him not to speak Arabic in the prison to inmate Zayed and Lieutenant Ortiz told appellant to

sit in the rear of the prison van with inmate Zayed in the presence of Dr. Celestine. Appellant asked to sit in another vehicle but when Lieutenant Ortiz said something about speaking to the captain appellant complied to avoid a verbal altercation.

6. On May 10, 2004 he spoke with Manar and Lieutenant Beck about having his post changed to west and east special housing. Lieutenant Ortiz informed him that he as still consider a pick because he was given the same days and hours off.

7. Verbal harassment and racial remarks were made about appellant by inmate Sequencia and Lieutenant Ortiz, who said "that is where they want him." He was confined to work for three consecutive quarters in a hostile environment.

8. A trainer said "the ones you have to watch out for are the Muslims the Musjide who wash their hands and feet rigorously, those are the extremists."

9. A training lesson degraded a Muslim Imam during ART.

10. During DCT training, Lieutenant Ortiz asked appellant "is [that] the way they shoot in Palestine?"

11. On November 26, 2004 Lieutenant Ortiz removed him from his post and reassigned him as link officer. Appellant told Lieutenant Ortiz this was favoritism and he hung up the telephone on appellant.

In a letter to the Office dated January 31, 2005, appellant stated:

"On November 5, 2004 I was assigned as East Freight Operator. During my working hours Mr. Hunt placed his hand on my chest and said you look stressed, and how it's okay to spend four hours in jail for the safety of the country. Mr. Hunt left then returned a second time on my post riding the elevator up and down with me and conversing with me. This action of riding up and down with me without getting off of the elevator was extremely annoying and insulting, especially after he offered me his [tele]phone number. I clearly told him I do not appreciate that conversation.

"Later that day the following staff w[as] present on my post: Christine Rivera, Robert Lytel, Mr. Hurley, and Mr. Sigh happened to enter the elevator during Mr. Hunt's annoyance. After Mr. Hunt finally left the elevator I informed Ms. Rivera [of] the situation and [suggested] that she should keep a mental note of my incident with Mr. Hunt. I also emailed SIS and warden, Mr. Zenk, and made them aware of the humiliating incident."

Appellant also submitted a copy of a March 2, 2005 letter he sent to Senator Edward M. Kennedy in which he alleged that he experienced extremely stressful conditions at the prison.

By decision dated June 13, 2005, the Office denied appellant's claim, finding that he failed to establish any compensable factor of employment.

On June 29, 2005 appellant requested an oral hearing, which was held on December 12, 2005.¹

By decision dated February 21, 2006, an Office hearing representative affirmed the June 13, 2005 Office decision. The hearing representative found that the November 5, 2004 elevator incident involving Mr. Hunt occurred but there was insufficient evidence to substantiate that this incident constituted an act of harassment.² The hearing representative further found that appellant did not submit any evidence to support any of his other allegations.

LEGAL PRECEDENT

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition and rationalized medical opinion establishing that compensable employment factors are causally related to the claimed emotional condition.³ There must be evidence that implicated acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.⁴

The first issue to be addressed is whether appellant has cited factors of employment that contributed to his alleged emotional condition or disability. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Act.⁵ On the other hand, disability is not covered where it results from an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute a personal injury sustained while in the performance of duty within the meaning of the Act.⁶

ANALYSIS

The Board finds that appellant has failed to submit sufficient evidence to establish his allegations that his managers or coworkers engaged in harassment or acted in a discriminatory manner towards him. Appellant alleged that he was subjected to harassment at the employing establishment. However, he did not provide evidence to support his allegations that he was

¹ Appellant testified at the hearing that his last day of employment with the employing establishment was actually February 17, 2005.

² The hearing representative noted that there was no evidence to corroborate appellant's account of the incident.

³ See *Debbie J. Hobbs*, 43 ECAB 135 (1991).

⁴ See *Ruth C. Borden*, 43 ECAB 146 (1991).

⁵ *Lillian Cutler*, 28 ECAB 125 (1976).

⁶ *Id.*

harassed or treated in a discriminatory manner.⁷ For this reason, the Office properly determined that appellant did not establish a compensable factor of employment.

Appellant failed to establish that his supervisors or coworkers threatened or verbally abused him based on his race, religion or ethnicity. He did not submit evidence to substantiate posters at his workplace making negative depictions of prisoners. While the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.⁸ Appellant did not submit evidence, such as witness statements to substantiate his allegations that he was called names or epithets.⁹ He alleged that various employees made derogatory remarks against him and treated him in a demeaning manner. Appellant did not provide evidence to substantiate his allegations.¹⁰ Accordingly, he has not established his allegations that he was harassed, mistreated, verbally abused or discriminated against by his supervisors or coworkers.

The Board finds that there is no evidence to establish that the administrative and personnel actions taken by management were erroneous or abusive. An employee's emotional reaction to an administrative or personnel matter is not covered under the Act, unless there is evidence that the employing establishment acted unreasonably.¹¹

Appellant alleged that he was wrongly denied a transfer to west and east special housing. The Board has held that denials of a request for a different job, promotion or transfer are not compensable factors of employment as they do not involve the employee's ability to perform his or her regular or specially assigned work duties but rather constitute his or her desire to work in a different position.¹² 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.¹³ Appellant did not substantiate that the denial of his request to transfer was erroneous.

Appellant alleged that Lieutenant Ortiz committed administrative error by removing him from his post on November 26, 2004 and reassigning him as a link officer. However, assignment of a work schedule is an administrative function and is not compensable absent a showing of

⁷ See *Joel Parker, Sr.*, 43 ECAB 220 (1991). (The Board held that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.)

⁸ *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

⁹ 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).

¹⁰ See *Joel Parker, Sr.*, *supra* note 7.

¹¹ See *Alfred Arts*, *supra* note 9.

¹² *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

¹³ See *Michael Thomas Plante*, 44 ECAB 510, 515 (1993).

error or abuse. Appellant has also alleged that management acted improperly in its administrative capacity by forcing him to work for three consecutive quarters in a hostile work environment. Appellant also alleged that his work environment was unsafe because management did not address the harassment and abuse he experienced due to his race, religion or ethnicity. However, he has provided no factual evidence to substantiate these allegations. There is no evidence of record that the employing establishment acted unreasonably or committed error with regard to these administrative functions. There is one incident, however, not of an administrative or personnel nature, that the Office hearing representative accepted as factual but not compensable; *i.e.*, the November 5, 2004 incident in the elevator with Mr. Hunt. As indicated previously, Mr. Hunt entered the elevator, placed his hand on appellant's chest, told him look stressed and that it was "okay to spend four hours in jail for the safety of the country," and refused to leave the elevator until four management employees entered the elevator. Appellant stated that he was annoyed and insulted by Mr. Hunt's actions and alleged that he experienced humiliation, especially when Mr. Hunt offered him his cell phone number. The Board finds that, given the circumstances described by appellant and accepted as factual by the Office hearing representative, the November 5, 2004 incident constitutes a compensable factor of employment.¹⁴

However, appellant's burden of proof is not discharged by the fact that he has established an employment factor. To establish his emotional condition claim, appellant must also submit rationalized medical evidence establishing that he has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.¹⁵ Appellant submitted the reports from Dr. Hertz. However, Dr. Hertz did not provide a rationalized medical opinion based on a proper factual and medical background, explaining his opinion on causal relationship or otherwise relating his diagnosis to the factor found compensable in this case. The weight of medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.¹⁶ Dr. Hertz did not demonstrate a complete or accurate factual background or provide an opinion relating appellant's November 5, 2004 incident with Mr. Hunt as a causative factor to his diagnosed emotional condition. For these reasons, the Board finds the reports of Dr. Hertz insufficient to establish that appellant sustained an emotional condition causally related to his compensable work factor.

CONCLUSION

The Board finds that the Office properly found that appellant failed to meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

¹⁴ *Mary J. Summers*, 55 ECAB 730 (2004).

¹⁵ *See William P. George*, 43 ECAB 1159, 1168 (1992).

¹⁶ *See Anna C. Leanza*, 48 ECAB 115 (1996).

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2006 and June 15, 2005 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: March 8, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board