

<sup>1</sup> In a subsequent letter, appellant stated that the correct injury date was June 26, 2004.

condition to be grabbed by the neck and choked by a coworker and being subjected to verbal abuse by his manager.<sup>2</sup>

In support of his claim, appellant submitted reports dated November 24 to December 17, 2004 from Dr. Surendra Kelwala, a treating Board-certified psychiatrist, who diagnosed major depression and concluded that appellant was totally disabled. On December 17, 2004 he noted that appellant related that he was subjected to harassment, discrimination and demeaning behavior at his employment. Dr. Kelwala stated that appellant's "depression definitely appears to be related to the stress he is facing at work."

In a December 10, 2004 incident report, appellant alleged that he was assaulted by another employee on or about June 4, 2004 when she grabbed his throat and started to choke him. He also alleged that three coworkers tried "to force [him] to do things on [three] separate occasions. Appellant noted that he was written up for using inappropriate language, which he did not believe was inappropriate. In a second December 10, 2004 incident report, he alleged that his civil rights were violated. Appellant alleged that three supervisors untimely wrote him up for incidents that had occurred months previously that he was threatened by Tom Shivan and was subjected to harassment and a joking comment about misspelling a word by a supervisor. In a third December 10, 2004 incident report, he alleged that on November 17, 2004 a manager, Tyrone Stokes, used "verbal abuse referring to a bag" and telling him to follow instructions by a supervisor. Appellant contended that this incident was harassment which caused him to be embarrassed and humiliated in front of his coworkers. He alleged a hostile work environment. In a November 23, 2004 complaint form, appellant alleged that on November 17, 2004 Chris King, a supervisor, informed him "that everyone has a problem with [him] and that is another reason why this is a very hostile environment."

In a November 16, 2004 memorandum of counseling regarding appellant's work behavior, which appellant refused to sign, it was noted that he was late in returning from a break/lunch, failed to fully comply with the instructions of his supervisor and failed to obtain permission from his supervisor to leave the floor.

In a December 20, 2004 statement, appellant stated that his manager, Mr. Stokes, continued to contact him at home to inform him that his claim was not work related. He alleged that Mr. Stokes threatened to fire him.

In a letter dated January 14, 2005, the Office informed appellant that the evidence was insufficient to support his claim. He was advised of the medical and factual information required to support his claim.

Appellant submitted additional factual and medical information. In a statement, he alleged that "the white skinned employees were in uniform and certified within one month." Appellant stated that his supervisor called the police following an incident with Angela Tippins. He alleged that the incident with Ms. Tippins involved her attempting to trip him, spraying him

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<sup>2</sup> Appellant was terminated by the employing establishment on March 17, 2005.

with alcohol and grabbing him by the throat. Appellant alleged that Mr. Shivnan told him to tell some screeners what to do which appellant stated caused them to be upset with him. He alleged:

“Mr. Shivnan should have been doing his job instead of provoking an incident between other employees. This is a part of Managements (sic) discriminatory harassment because why didnt (sic) he tell them what to do or what was it that he didn’t like about them or me, because Mr. Shivnan threatened to have me arrested on September 8th 2004 for saying something about his hearing.”

Appellant alleged that on August 18, 2004 Tom Lawson picked up a bag after it had been through the scanner and told him to rerun it. He told Mr. Lawson that he should rerun the bag himself and not to tell him what to do. As Mr. Lawson is white and appellant is black, appellant alleged that this incident was discriminatory. Appellant was given a memorandum of conference as a result of this incident. He alleged harassment by Roxanne Cousin, who made jokes about him “saying can we write some one up for misspelling a word.” Appellant alleged that he was treated differently from similarly situated white employees by his supervisors. On December 21, 2004 William Balmer told appellant what to do.

In a February 11, 2005 report, Dr. Kelwala noted that he treated appellant since 1998 for major depression, which resulted from severe racial harassment that he was subjected to at a prior job. On April 9, 2004 appellant informed Dr. Kelwala that he was feeling mildly depressed and anxious as he had just been hired by the employing establishment. He told Dr. Kelwala that he feared “he may get into some kinds of conflicts again” based upon “his personality to stand up for his rights and not tolerate racial injustice.” Dr. Kelwala stated that appellant was extremely disturbed as a result of an October 18, 2004 incident with a coworker, stating:

“[H]e was unable to forget the incidence of a fellow screener grabbing him by the throat, because she was squirting him with alcohol spray cleaner, and in retaliation he called her ‘little girl stop it.’ She is 20 years his junior, but [appellant] is a short and slightly built man, who looks boyish and hence according to him she took the liberty of physically attacking him.”

Dr. Kelwala obtained a history of other work incidents. One incident involved Tom Lawson, a white coworker, ordering appellant to rerun a bag, which appellant interpreted as directing him to perform a menial job. Appellant responded by telling Mr. Lawson “‘If you see a ‘mother fucking’ bag needing rerun, do it yourself, don’t order me around.” As a result of this incident appellant was written up and nothing was done to the coworker. Appellant related that William Balmer, a screener who trained with him, made complaints that appellant was not following his orders. As Mr. Balmer was not a supervisor, appellant did not believe he was required to follow his orders, but noted that he was written up for this. Dr. Kelwala noted that appellant was “totally preoccupied with the humiliations and harassments he has been subjected to at work.” Appellant believed that he was very good at his job, but that the department was trying to break him down. Dr. Kelwala diagnosed major depression and recurrent post-traumatic stress disorder, which was caused or at least aggravated by his hostile work environment.

The employing establishment submitted a November 16, 2004 memorandum of counseling; a February 3, 2005 response by Tyrone Stokes, screening manager; a February 4,

2005 incident report by Roxanne Kosier, lead screener; a position description and a January 7, 2005 termination letter. In a November 16, 2004 shift summary report, appellant stated that he felt harassed and singled out when Mary insisted only he run a bag. In a February 3, 2005 response, Mr. Stokes denied knowing anything about the incident with Ms. Tippins until discussing appellant's behavior. He also denied any friendship with Ms. Tippins. Mr. Stokes denied telling appellant to obey orders from his supervisors or he would be fired. He had a conversation with appellant about following the policies and procedures of the employing establishment. Mr. Stokes denied that he harassed appellant by walking out on the floor and telling him not to lean on a pole. He noted that appellant seemed to have authority issues with accepting discipline and constructive criticism. Mr. Stokes contended that appellant's behavior and comments caused a hostile work environment, was disruptive and adversely impacted on morale. Ms. Kosier stated that appellant became defensive whenever a problem arose. She noted that appellant stated that he was not liked by his coworkers, had no friends and everyone was against him. As to the incident with Ms. Tippins, Ms. Kosier noted that she was not on duty that day. Ms. Kosier also denied the alleged incident at a bar on December 21, 2005 as she was not present. She did not recall any incidents that appellant alleged with other screeners ordering him to recheck bags. In a November 16, 2004 incident report, Mary L. Berbolla, lead screener, noted that appellant left his station without telling anyone and noted excessive restroom breaks.

In a February 14, 2005 report, Dr. Kelwala diagnosed severe anxiety and concluded that appellant could not perform his screening duties, but was capable of working.

In a February 14, 2005 statement, appellant alleged being treated differently based upon race. He contended that he was "singled out and forced to do bag checks" which he attributed to Shawn telling Stephanie he would not do bag checks because he was mad at appellant. Appellant stated that he was informed by Stephanie that "everybody is complaining that [he is] not doing enough bag checks."

Appellant was terminated from employment on March 17, 2005 based on his inability to perform the essential functions of his job." The report noted that he provided a January 6, 2005 note from his physician requiring that he be placed in a nonstressful position. The January 7, 2005 termination letter also related a July 3, 2004 incident where he threatened a coworker with violence.

Appellant submitted additional reports from Dr. Kelwala who released appellant to work on March 5, 2005. He recommended a nonstressful position due to "his past history of strongly reacting to stress and discrimination." On March 9, 2005 Dr. Kelwala noted that appellant believed that he continued to be subjected to harassment and humiliation by coworkers and was treated differently due to his race. In a March 17, 2005 report, Dr. Kelwala released appellant to work with no restrictions and noted that appellant no longer felt depressed.

In a March 28, 2005 statement, appellant reiterated his contention of discrimination based upon his race and disability. He alleged that he had been fired while on medical leave for his disability.<sup>3</sup>

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<sup>3</sup> The record contains evidence that appellant filed a formal complaint of employment discrimination on May 20, 2005.

By decision dated July 28, 2005, the Office denied appellant's emotional condition claim as he failed to establish a compensable factor of employment.

On August 2, 2005 appellant requested an oral hearing before an Office hearing representative, which was held on April 24, 2006. At the hearing appellant testified that he was grabbed by the throat by Ms. Tippins who then kicked him, sprayed his face with alcohol and choked him. He alleged that Ms. Tippins "provide[d] a very hostile work environment for me."

On August 8, 2005 appellant submitted a May 19, 2005 delayed assault and battery complaint. Corporal Billy Willis, the investigator, noted that appellant came into the Wayne County Airport Authority Airport Police station wishing to make an assault complaint. Appellant alleged that on June 3, 2004 Ms. Tippins grabbed him by the throat and began to choke him. The June 3, 2004 date was subsequently changed to June 26, 2004 and then to June 29, 2004. Appellant listed Tiffany Haygood, Ms. Cousins and Kara Robb as witnesses of the event. As to the 11-month delay in filing the complaint, appellant noted that he was blamed and fired on March 17, 2005.

On September 19, 2005 the Office received a July 3, 2004 incident report involving appellant and Ms. Tippins. In the first report, appellant alleged that he had previously been assaulted and threatened by Ms. Tippins, but did not inform a supervisor as there was no time. He told Ms. Tippins to "get away from me before someone hurts you." Appellant stated that this statement was made in self-defense and to protect his safety. In the second incident report, he alleged that on June 29, 2004 Ms. Tippins grabbed him by the throat, he "pulled her hand away and said wait a minute." On July 3, 2005 appellant alleged that he told Ms. Tippins to move, which she refused to do and he put a box on the table. Ms. Tippins still refused to move so appellant swore at her. Appellant alleged that Ms. Tippins then grabbed him by the neck, tried to trip him as he walked by and sprayed him with alcohol twice in the face.

Appellant submitted evidence from his EEO complaint which included shift summary reports, affidavits by appellant, Alonzo Nether, Assistant Federal Security Director for Operations, Ms. Tippins and Mr. Stokes, and an Equal Employment Opportunity (EEO) investigative report. Mr. Nether was the deciding official on appellant's termination. He stated that appellant was terminated because of his inability to work in a stressful environment, "could not maintain focus and attention in a busy environment" and responded with anger to the situations arising between coworkers and passengers. Mr. Nether stated that he had no knowledge of appellant's allegations of a hostile work environment. Mr. Stokes stated that he was appellant's third-line supervisor and had no direct knowledge of the alleged incident on June 4, 2004 when a coworker grabbed appellant by the neck and choked him. He noted that Ms. Tippins "acknowledged having grabbed" appellant in the neck/throat area and that he was "compelled to offer some support for the complaint's assertion that this created a hostile work environment for him." Mr. Stokes stated that "management failed to respond timely and appropriately to the matter" when appellant "brought the incident to management's attention on July 3, 2004." As to the other incidents alleged by appellant, Mr. Stokes denied direct knowledge of them or stated that the actions taken by the individuals involved were appropriate.

In a January 13, 2006 affidavit, Ms. Tippins stated that on June 29, 2004 she grabbed appellant in the neck area after he threw a paper towel at her on which he had sprayed and wiped

his hands. She informed him not to throw things in her face as it was disrespectful. Ms. Tippins alleged that appellant stated that he was just playing, and told him not to play with her like that. She related both of them were counseled on July 3, 2004 regarding this incident and that she was suspended in July 2005 for reasons that included my participation in this incident. Ms. Tippins denied knowledge of any of the alleged incidents which occurred on August 17, November 17 and December 10, 2004.

In a January 25, 2006 statement, appellant alleged that “Mr. Nether neglected to handle the matter properly knowing it was job related.” He also alleged that Ms. Kosier’s pattern of harassment followed me with her. Appellant contended that his “resistance in working at certain tasks or in certain areas” was due to African Americans being “placed in the heaviest work areas.” He alleged that the employing establishment failed to properly accommodate the work restrictions recommended by his physician. Appellant alleged that the wording of the termination letter he received was discriminatory due to his disability.

In a February 11, 2005 report, Dr. Kelwala attributed appellant’s depression to a hostile work environment at the employing establishment.

By decision dated July 31, 2006, the Office hearing representative affirmed the denial of appellant’s emotional condition claim.

### **LEGAL PRECEDENT**

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.<sup>4</sup>

Workers’ compensation law does not apply to each and every injury or illness that is somehow related to an employee’s employment. In the case of *Lillian Cutler*,<sup>5</sup> the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees’ Compensation Act.<sup>6</sup> There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.<sup>7</sup> When an employee experiences emotional stress in carrying out his employment duties, and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee’s disability results from an emotional reaction to a special assignment or other

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<sup>4</sup> *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>5</sup> 28 ECAB 125 (1976).

<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> *See Robert W. Johns*, 51 ECAB 137 (1999).

requirement imposed by the employing establishment or by the nature of the work.<sup>8</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>9</sup>

In emotional condition claims, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.<sup>10</sup>

As a general rule, an employee's emotional reaction to administrative or personnel actions taken by the employing establishment is not covered because such matters pertain to procedures and requirements of the employer and are not directly related to the work required of the employee.<sup>11</sup> An administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.<sup>12</sup> An employee's frustration from not being permitted to work in a particular environment or to hold a particular position is not compensable.<sup>13</sup> Similarly, an employee's dissatisfaction with perceived poor management is not compensable under the Act.<sup>14</sup>

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. Rather, the issue is whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his allegations with probative and reliable evidence.<sup>15</sup>

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<sup>8</sup> *Lillian Cutler*, *supra* note 5.

<sup>9</sup> *Kim Nguyen*, 53 ECAB 127 (2001).

<sup>10</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

<sup>11</sup> *Felix Flecha*, 52 ECAB 268 (2001).

<sup>12</sup> *Kim Nguyen*, 53 ECAB 127 (2001).

<sup>13</sup> *Barbara J. Latham*, 53 ECAB 316 (2002).

<sup>14</sup> *Id.*

<sup>15</sup> *James E. Norris*, 52 ECAB 93 (2000).

## ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. By decisions dated July 28, 2005 and July 31, 2006, 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.

Appellant alleged that he was subjected to harassment and discrimination by coworkers and management based on race. He contended that he was humiliated when Mr. Stokes, a supervisor, used "verbal abuse referring to a bag" and told him to follow instructions by a supervisor. Appellant alleged that Mr. Stokes called him at home and threatened to fire him. He alleged that black employees were treated differently than white employees. Appellant alleged that Mr. Lawson, a white employee, told him to rerun a bag which was discriminatory. With respect to a claim based on harassment or discrimination, the Board has held that actions of an employee's supervisors or coworkers which the employee characterizes as harassment may constitute a factor of employment giving rise to a compensable disability under the Act. A claimant must, however, establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.<sup>16</sup> An employee's allegation that he was harassed or discriminated against is not determinative of whether or not such incidents occurred.<sup>17</sup> The record contains a copy of appellant's EEO claim for harassment and discrimination. However, the Board notes that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.<sup>18</sup> The record contains evidence compiled during the EEO investigation including a summary of interviews with coworkers, appellant and management officials. None of the information submitted establishes improper action by the employing establishment personnel. The evidence of record does not substantiate appellant's allegations of racial discrimination or disparate treatment based on race. For this reason, these allegations are not established as compensable factors.

Appellant alleged that he was assaulted by Ms. Tippins. Although, he provided several differing dates for the assault, the affidavit of Mr. Nether acknowledged that on or about June 3, 2004, Ms. Tippins grabbed appellant by the neck. Ms. Tippins and appellant disagreed with regard to the circumstances leading to the incident and whether appellant was choked by Ms. Tippins.

In determining whether an assault arises out of employment, the Board has relied on Larson's treatise on workers' compensation law. Larson states:

"Assaults arise out of the employment either if the risk of assault is increased because of the nature or setting of the work or if the reason for the assault was a

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<sup>16</sup> *Gregory N. Waite*, 46 ECAB 662 (1995); *Barbara J. Nicholson*, 45 ECAB 803 (1994).

<sup>17</sup> *Helen P. Allen*, 47 ECAB 141 (1995).

<sup>18</sup> *Id.*



quarrel having its origin in the work.... Assaults for private reasons do not arise out of the employment unless, by facilitating an assault which would not otherwise be made, the employment becomes a contributing factor.”<sup>19</sup>

The Board has held that, when animosity or dispute which culminates in an assault is imported into the employment from a claimant’s domestic or private life, the assault does not arise out of employment.<sup>20</sup> The record reflects that appellant was performing his assigned duties and an altercation arose with Ms. Tippins. There is no evidence that this was a personal dispute arising outside the employment that was carried into the workplace or that appellant and Ms. Tippins had any relationship outside of work.<sup>21</sup> At the time of the altercation, appellant was in a place he was reasonably expected to be working and was engaged in an activity incidental to his employment. While there is some dispute as to whether he was the aggressor or the initiator in the altercation would not preclude recovery or act as a bar to his claim.<sup>22</sup> Therefore, whether or not appellant had assaulted Ms. Tippins would not act as a bar to his claim for compensation benefits for an emotional condition.

As the altercation arose in the performance of duty under *Cutler*.<sup>23</sup> The Board finds that the altercation in June 2004 arose within the performance of duty and constitutes a compensable employment factor. On return of the case record, the Office should evaluate the medical evidence and make a determination of whether an emotional condition resulted from the June 3, 2004 incident.

### **CONCLUSION**

The Board finds that appellant has established a compensable factor of employment with respect to the June 3, 2004 altercation. The case is remanded for the Office for further development of the medical evidence.

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<sup>19</sup> A. Larson, *The Law of Workers’ Compensation* § 8.00 (2000).

<sup>20</sup> See *Agnes V. Blackwell*, 44 ECAB 200 (1992); *Jean A. Kolinchak*, 43 ECAB 1138 (1992).

<sup>21</sup> See *Arlene F. Stidham*, 46 ECAB 674 (1995).

<sup>22</sup> *Id.*; see also *Eric J. Kike*, 43 ECAB 638, 641 (1992).

<sup>23</sup> *Lillian Cutler*, *supra* note 5.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 31, 2006 is affirmed, in part and set aside in part and remanded for further proceedings consistent with the above opinion.

Issued: March 12, 2007  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

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

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