United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 08-646**
	)	**Issued: November 14, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Fort Myers, FL, Employer	)	

Appearances:
William Hackney, for the appellant
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 December 26, 2007 appellant timely appealed merit decisions dated February 15 and December 3, 2007 of the Office of Workers' Compensation Programs 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 appellant met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On November 19, 2003 appellant, then a 41-year-old mail processing clerk, filed a claim alleging that his depression and anxiety were due to factors of his employment. He first became aware of his condition on February 1, 2002 and attributed it to his work on August 24, 2003. Appellant alleged that he endured several weeks of harassment by a coworker and confronted him on two occasions. After the second incident, management conducted an investigation.

Appellant alleged that management erroneously disciplined him despite conflicting information. He stopped work on November 7, 2003 and did not return.

In an August 31, 2003 statement, Michael Sheppard, a coworker, stated that, at approximately 12:15 a.m., appellant approached him and stated "what the fuck is your problem … if you have something to say, why don't you just say it." Appellant also told Mr. Sheppard that he was tired of his "bullshit," called him "a piece of shit supervisor and piece of shit clerk," that his work was "fucking worthless" and advised him that he was going to report him. Mr. Sheppard indicated that appellant went into the manager of distribution operations' (MDO) office and then returned to his case and said "Keep it up, I'll have you fired. Believe it." In an effort to get appellant to leave him alone, Mr. Sheppard stated, "Go back to the flats, you trailer trash piece of shit." He also indicated that a similar incident took place either on Thursday, August 21, 2003 or Friday, August 22, 2003. Mr. Sheppard noticed appellant was staring at him from between the cases and so he waved. Appellant stated that he was "tired of your bullshit," "tired of you looking at me with your homosexual looks," and that he better grow up.

In a September 4, 2003 statement, Sandy Ferguson, a coworker, stated that "either on Thursday August 28 or Friday August 29, [2003]" she, Mr. Sheppard and Kurt Meyering were talking near Mr. Sheppard's case when appellant yelled from two aisles over "what's your problem? Stop acting like a child. Just cut it out!" Mike asked what he was talking about and appellant replied: "Stop giving me those homosexual looks." Appellant continued to yell at Mike while they stood around. Ms. Ferguson noted that Mr. Sheppard never said or did anything to irritate appellant.

In a September 4, 2003 statement, Mr. Meyering addressed the confrontation between appellant and Mr. Sheppard of Thursday August 28 or Friday August 29, 2003. He stated:

> "I was talking to Mike as he was sitting in his case throwing and [appellant] started yelling at him to 'quit acting like a kid' and to 'cut it out right now,' which confused me because Mike was not doing anything to [appellant] or talking about him at that time. Then [appellant] told Mike to 'quit looking at him with those homosexual eyes,' which baffled him even further, because Mike was pretty much ignoring [appellant's] tirade. [Appellant] continued in this vein, and Mike only asked him what his problem was, but got no answer and [appellant] finally left. Mike seemed to have no clue as to what set [appellant] off -- and neither did I."

In a September 5, 2003 statement, Penny Jo English, a coworker, stated that appellant was just saying for Mr. Sheppard to stand up and be a man and say what he had to say. She noted that it was "just a disagreement between two employees who do n[o]t like each other." In a September 6, 2003 statement, Robert Hofer, a coworker, stated that he witnessed an argument between appellant and Mr. Sheppard on August 28, 2003. He stated that he did not hear what was said and noted that both men were a good distance apart.

A September 10, 2003 investigative memorandum prepared by Bob Deslauriers, a supervisor, questioned appellant about his alleged intimidation of Mr. Sheppard. Regarding the first incident, appellant was asked whether he approached Mr. Sheppard and yelled something to

the effect of "I'm tired of your bullshit. Stop acting like a kid. Just cut it out right now. Stop looking at me with those homosexual looks." Appellant replied: "I don't recall that. The statement I recall is that I was tired of his childish behavior. On more occasions than I care to count when I walked by Mr. Sheppard, he regularly and frequently coughed, saying 'bullshit' and 'asshole.'" Regarding the August 31, 2003 incident, appellant was asked whether he approached Mr. Sheppard at his work area and began yelling to him something to the effect of "'[w]hat the fuck is your problem? If you have something to say, why don't you just say it? I've had it up to here with your bullshit. You were a piece of shit supervisor and you're a piece of shit clerk." Appellant replied: "I never cursed because I was very careful with the words I chose, and you're only getting part of the story. I did not approach him initially. I did approach him from about ten feet away as he coughed 'asshole.' I did ask him what his problem with me was. I never said he was a piece of shit supervisor and a piece of shit clerk. I did say he was a useless supervisor and clerk." He stated that Mr. Sheppard told him to go to the MDO office and see Guy Lyday, a supervisor, which he did. After appellant reported the incident to Mr. Lyday, Mr. Sheppard made a very obvious crying gesture. He indicated that Mr. Sheppard's response was "what did I do, cry baby?" and that he made the crying gesture. Mr. Deslauriers noted that Mr. Sheppard denied saying "bullshit" or "asshole" under the cover of a cough to appellant. He denied using a crying gesture to appellant or ever provoking him.

In an undated statement, Mr. Deslauriers concluded that two confrontations between appellant and Mr. Sheppard had occurred but the date of the first incident was unclear. He noted that there were witnesses to the first confrontation but not the second. Mr. Deslauriers noted that the witness statements from Ms. English and Mr. Hofer were neutral and that they were at a greater distance from the incident. However, the witness statements from Mr. Meyering and Ms. Ferguson were consistent with that of Mr. Sheppard and substantiated that appellant initiated the confrontation. As to the second incident, Mr. Deslauriers noted there were no witnesses. However, since Mr. Sheppard was in his assigned work area, appellant was probably the initiator as well. There were no witnesses who could substantiate appellant's allegation that Mr. Sheppard used gestures or said epithets under fake coughs. Dr. Deslauriers concluded that Mr. Sheppard had not provoked appellant.

On September 25, 2003 the employing establishment issued appellant a letter of warning for improper conduct for instigating the confrontations. On October 23, 2003 the employing establishment denied appellant's grievance. In a December 4, 2003 settlement, it was agreed that the letter of warning would be expunged from appellant's record and that lost sick leave or leave without pay would be adjudicated through the Office.

Appellant submitted copies of disparaging notes allegedly left in his work area regarding sensitivity training.

In a June 10, 2004 statement, Mr. Lyday stated that the threat assessment process showed that Mr. Sheppard was in his assigned work area when the first incident occurred. Appellant stated that he confronted Mr. Sheppard because he was laughing and pointing at him. However, for appellant to have seen something like that he would have to stop in the aisle and look between equipment to see Mr. Sheppard. Mr. Lyday stated that appellant went out of his way to go to Mr. Sheppard's case and initiate the confrontation. The investigation into the second

incident revealed that appellant was at fault in initiating the confrontation and a letter of warning was issued. Mr. Lyday stated that appellant was set to attend sensitivity training.

In a May 25, 2004 medical report, Dr. Brenda L. Keefer, a Board-certified psychiatrist, stated that she first saw appellant on April 11, 2002. Appellant was under considerable work stress and going through a separation from his wife. He was diagnosed with recurrent major depression. Dr. Keefer stated that he reported impossible situations at work, that stress became unbearable, and that his mood waxed and waned with situations that occurred at work. She opined that appellant's continued anxiety and depression were work related. On June 8, 2004 Kelleen M. Linden, Ph.D., a mental health counselor and marriage and family therapist, noted seeing appellant since February 4, 2002 for his employment and marital situations. She advised that appellant's condition had stabilized until recent problems with some coworkers.

By decision dated August 23, 2004, the Office denied appellant's claim finding that he failed to establish a compensable factor of employment.

Appellant requested an oral hearing, which was held on July 14, 2005. In an August 29, 2004 letter, he claimed that the witness statements concerning first incident were inconsistent. Appellant asserted that management did nothing about the situation with Mr. Sheppard until after the August 31, 2003 incident. He alleged that management's inaction caused stress and harassment as did the subsequent discipline and requirement that he attend sensitivity training. Appellant filed grievances and EEO complaints in the matter and resolved many of the issues in mediation. He subsequently addressed the denial of wages, overtime and night differential pay. Appellant left work on April 13, 2004 due to a Family Medical Leave Act (FMLA) condition which was caused by a conversation he had with Mr. Lyday. He claimed that his employer wrongly prevented him from returning to work. At the July 14, 2005 hearing, appellant reiterated his allegations. He noted receiving $6,000.00 in overtime and premium pay which, he contended, established error on management's part.

In a June 24, 2003 memorandum, the employing establishment stated that under a February 13, 2003 settlement agreement appellant received payment for overtime and penalty overtime. The settlement stated that the agreement should not be construed as an admission of discrimination or wrongdoing on the part of any official at the employing establishment. In a December 5, 2003 settlement, the employing establishment agreed to pay eight hours of overtime and eight hours of penalty overtime and to expunge a letter of warning from appellant's record. In a May 27, 2004 grievance settlement, the employing establishment agreed to pay overtime, night differential, and Sunday premium pay. The December 5, 2003 and May 27, 2004 settlement agreements do not contain any admission of discrimination or wrongdoing.

By decision dated November 2, 2005, an Office hearing representative affirmed the August 23, 2004 decision finding that appellant did not establish any compensable factors of employment.

In an October 5, 2006 letter, appellant requested reconsideration. His representative contended that appellant was constantly harassed while at the employing establishment. The fact that appellant's complaints were resolved in his favor supported a finding of harassment. Copies

of grievances and EEO documents covering the period 2001 to 2006 were submitted. The documents provide no findings of error by employing establishment officials.

In a June 5, 2005 medical report, Dr. Gary K. Arthur, a Board-certified psychiatrist, advised that appellant experienced increasing depression and anxiety with panic attacks related to his work situation. The fact that appellant filed over 100 grievances and EEO complaints was proof that the manner in which he had been treated while at work was perceived as severely detrimental by him. In a January 19, 2007 report, Dr. Linden stated that appellant applied for a disability retirement and could never return to work at the employing establishment.

In a February 15, 2007 decision, the Office denied modification of the November 2, 2005 decision

On September 12, 2007 appellant requested reconsideration, contending that the medical evidence established that his disabling emotional reaction was precipitated or aggravated by his employment. On August 29, 2007 Dr. Linden opined that appellant's job had a direct impact on his depression and anxiety disorder which caused him to become.

By decision dated December 3, 2007, the Office denied modification of the February 15, 2007 decision.

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 illness has some connection with employment but nevertheless does not come within the concept or coverage of workers compensation. Where the medical evidence establishes that the disability results from an employee's emotional reaction to her regular or specially assigned employment duties or to a requirement imposed by the employing establishment, the disability comes within coverage of the Federal Employees' Compensation Act. The same result is reached when the emotional disability resulted from the employee's emotional reaction to the nature of her work or her fear and anxiety regarding her ability to carry out her work duties.[1] By contrast, there are disabilities having some kind of causal connection with the employment that are not covered under workers compensation law because they are not found to have arisen out of employment, such as when disability results from an employee's fear of reduction-in-force or frustration from not being permitted to work in a particular environment or hold a particular position.[2]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.[3] Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its

[1] *Ronald J. Jablanski*, 56 ECAB 616 (2005); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

[2] *Id.*

[3] *Charles D. Edwards*, 55 ECAB 258 (2004).

administrative or personnel responsibilities, such action will be considered a compensable employment factor.[4]

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 or her allegations with probative and reliable evidence.[5]

In cases involving emotional conditions, the Board has held that, 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.[6] 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.[7]

ANALYSIS

Appellant alleged that he was harassed by Mr. Sheppard and confronted him on two separate occasions. He alleged that Mr. Sheppard had said "bullshit" and called him "asshole" while feigning a cough on and used a crying gesture to provoke him. Appellant also alleged that he was erroneously disciplined and received a letter of warning and required to attend sensitivity training. He also alleged the employing establishment did not properly investigate these incidents.

The Board finds that the evidence of record does not substantiate appellant's allegations. As noted, mere perceptions of harassment are not compensable and unsubstantiated allegations of harassment are not determinative of whether such harassment occurred. Appellant provided insufficient evidence such as witness statements, to establish that Mr. Sheppard harassed him on the two occasions alleged.[8] The employing establishment investigated the matter and was unable to confirm appellant's allegations. Rather, the investigation determined that appellant instigated

[4] *Kim Nguyen*, 53 ECAB 127 (2001).

[5] *James E. Norris*, 52 ECAB 93 (2000); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[6] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[7] *Id.*

[8] *See William P. George*, 43 ECAB 1159, 1167 (1992) (claimed employment incidents not established where appellant did not submit evidence substantiating that such incidents actually occurred).

the incidents in question. Mr. Sheppard denied appellant's allegations but did admit referring to appellant as "trailer trash." To the extent that appellant alleged verbal abuse by Mr. Sheppard, the Board has recognized the compensability of verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace would give rise to coverage under the Act.[9] While this comment may have engendered offensive feelings, it does not sufficiently affect the conditions of employment to constitute verbal abuse.[10] The statements from witnesses do not confirm appellant's allegations.

Regarding the investigation by the employing establishment the issuance of a letter of warning and the requirement that appellant attend sensitivity training, the Board finds that these matters relate to administrative or personnel actions. The Board has held that investigations are an administrative function of the employing establishment that do not involve an employee's regularly or specially assigned employment duties and are not considered employment factors.[11] However, administrative or personnel matters will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining if the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[12] The Board finds that appellant has not shown that the employing establishment's actions in connection with its investigation or discipline were in error or unreasonable. Appellant alleged confrontations with Mr. Sheppard on or about August 24 or 28, 2003 and on August 31, 2003. The employing establishment conducted a timely investigation into the matter on September 10, 2003. Appellant has not established administrative error or abuse in the employing establishment's initiation of the investigation. Statements were obtained from him, Mr. Sheppard and several witnesses. The September 10, 2003 investigative memorandum, prepared by Mr. Deslauriers, set forth findings which did not substantiate appellant's allegations. Mr. Deslauriers concluded that appellant was the initiator in both instances. Due to his conduct, the employing establishment issued appellant a letter of warning for improper conduct and required that he attend sensitivity training. There is no evidence that the employing establishment's investigation or disciplinary actions were abusive or unreasonable. On October 23, 2003 the employing establishment denied appellant's grievance but, on December 4, 2003, agreed to expunge the letter of warning from his record. The fact that the letter of warning was expunged from appellant's record does not establish that it was issued in error.[13] There was no finding that the letter of warning was issued in error by any reviewing authority. Appellant has not established administrative error or abuse in these matters and they are not compensable employment factors.

Appellant also alleged a general pattern of harassment against him while at work. His allegations pertain to disciplinary and personnel actions covering the period 2001 to 2006 and

[9] *Charles D. Edwards*, 55 ECAB 258 (2004).

[10] *See Denis M. Dupor*, 51 ECAB 482 (2000).

[11] *Jimmy B. Copeland*, 43 ECAB 339, 345 (1991).

[12] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[13] *See Linda K. Mitchell*, 54 ECAB 748 (2003) (the mere fact that the employing establishment lessened a disciplinary action did not establish that the employing establishment erred or acted in an abusive manner).

concern issues of harassment, pay, leave, FMLA, discrimination, hostile work environment, suspension and overtime. As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of the Act.[14] However, as noted, 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. An employee's complaints concerning the manner in which a supervisor performs his duties as a supervisor; or the manner in which a supervisor exercises his supervisory discretion;[15] or mere disagreement of supervisory or management action,[16] as a rule, fall outside the scope of coverage provided by the Act. An employee's frustration from not being permitted to work in a particular environment is not compensable.[17] Reactions to disciplinary matters, such as a letter of reprimand also pertain to actions taken in an administrative capacity and are not compensable unless it is established that the employing establishment erred or acted abusively.[18] Appellant has not submitted evidence to substantiate error or abuse with respect to any of the disciplinary or personnel matters alleged. Although the record contains his grievances and EEO complaints with respect to certain personnel matters, the Board has held that grievances and EEO complaints, by themselves, do not establish harassment or unfair treatment.[19] The settlements of record did not provide any finding of error or abuse by either party. Appellant has not submitted sufficient evidence to support his allegations. Consequently, he has not established his emotional condition claim.[20]

CONCLUSION

The Board finds that appellant did not sustain an emotional condition in the performance of duty.

[14] *Roger Williams*, 52 ECAB 468 (2001).

[15] *Margaret J. Toland*, 52 ECAB 294 (2001).

[16] *Christophe Jolicoeur*, 49 ECAB 553 (1998).

[17] *Roy E. Shotwell, Jr.*, 51 ECAB 656 (2000).

[18] *See Sherry L. McFall*, 51 ECAB 436 (2000).

[19] *James E. Norris*, 52 ECAB 93 (2000).

[20] As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record. *Marlon Vera*, 54 ECAB 834 (2003).

ORDER

IT IS HEREBY ORDERED THAT the December 3 and February 15, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 14, 2008
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