

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CHARLES L. BURKES and DEPARTMENT OF DEFENSE,  
DISTRIBUTION DEPOT, Texarkana, TX

*Docket No. 98-1518; Submitted on the Record;  
Issued April 4, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether appellant sustained an emotional condition in the performance of duty.

On March 14, 1996 appellant, then a 45-year-old packer, filed a claim for employment-related emotional stress, which he stated he first became aware of on March 8, 1996. He was treated by Dr. Ravi K. Sreerama, a specialist in internal medicine, who placed him on disability from March 8 to 19, 1996.

Appellant also submitted reports dated March 18 and April 3, 1996 from Dr. Roger D. House, Board-certified in family practice and a specialist in psychiatry, who stated that appellant had pronounced depressive symptoms and required six weeks off from work. In his April 3, 1996 report, Dr. House stated that he was treating appellant for major depression versus adjustment disorder, with depressed mood.

By letter dated May 8, 1996, the Office of Workers' Compensation Programs advised appellant that the evidence he submitted was not sufficient to determine whether he was eligible for compensation benefits and that he needed to submit a detailed description of the specific employment-related conditions or incidents he believed contributed to his illness. The Office also asked appellant to submit a comprehensive medical report from his treating physician describing his symptoms and the medical reasons for his condition and an opinion as to whether factors or incidents, *i.e.*, specific employment factors, at his employing establishment contributed to his condition.

On May 6, 1996 appellant filed a Form CA-7 claim for compensation based on loss of wages for the period March 8 through May 4, 1996.

Appellant submitted a typewritten statement, received by the Office on May 31, 1996, wherein he alleged that his frontline supervisor, Donnie Murphy, engaged in a pattern of harassment and verbal abuse against him. He specifically alleged: (1) Mr. Murphy would wait

for him every morning before he began work at 7:00 a.m. for the sole purpose of intimidating him. He would glance at his watch and look at appellant as if he hated him, would follow him to his work station, beat on the boxes and look all over his desk and would make an obnoxious comment to him every day. Mr. Murphy would also observe appellant's activities all day long, to the extent of following him to the men's room and when he went to get boxes; (2) appellant's coworkers told him that, when he left his work station, Mr. Murphy would go to appellant's desk and go rummage through it; (3) Mr. Murphy told appellant on one occasion that if he did not bend to his wishes, he would not "go anywhere"; every time the employing establishment needed someone to be temporarily reassigned to another division, appellant was the one chosen for the assignment. Appellant was not permitted to drive a forklift and was never left in charge when Mr. Murphy was absent, despite the fact that he had more seniority than some of his coworkers; (4) appellant always received poor in-progress reviews and performance ratings and Mr. Murphy also included a negative remark at the bottom of the reviews, which he did not do to other employees. In his most recent review, Mr. Murphy wrote at the bottom that appellant greatly needed to improve his utilization of time and underlined the statement; (5) Mr. Murphy made negative comments about appellant to his coworkers; (6) on one occasion, Mr. Murphy's clerk charged appellant with 15 minutes of leave when he returned from the bathroom two or three minutes late; (7) Mr. Murphy warned appellant about the manner in which he spoke to his clerk because she went to church with the "commander" and could get him in trouble; (8) Mr. Murphy's clerk would tell him whenever appellant used the telephone, for which Mr. Murphy would constantly chastise appellant and would screen his calls and prevent him from receiving some calls; and (9) Mr. Murphy attempted to prevent appellant from taking his scheduled vacations during Christmas in order to harass him; appellant was forced to have his union representative intervene on his behalf in order to receive requested leave for vacations.

Appellant also submitted signatures from eleven coworkers who allegedly could corroborate Mr. Murphy's pattern of harassment against him.

In response to appellant's allegations, Mr. Murphy submitted a typewritten statement, received by the Office on January 14, 1997, which contradicted appellant's allegations that he was engaged in a daily pattern of harassment against him. The supervisor asserted: (1) he spends approximately 90 percent of his time in his work area and if an employee, such as appellant, for example, is not at his work station when the whistle blows, he looks at his watch when he arrives. Mr. Murphy denied following appellant to get boxes; he stated that he had to pass through a zone adjacent to his work area, where appellant would be talking to one of his friends and he apparently got the mistaken impression that he was following him; (2) Mr. Murphy denied rummaging through appellant's desk when he was absent, stating that appellant may have gotten this impression when he walked over to appellant's desk and returned a new register book to the mail clerk desk; (3) Mr. Murphy denied telling appellant he would not "go anywhere" if he did not cater to his wishes. He also denied appellant's charge that he was always the employee loaned out to other divisions, because he rotated grades so that the same employees would not always be reassigned. Mr. Murphy denied that he forbid appellant from driving a forklift; he asserted that he asked appellant on two occasions if he would like to drive the forklift and both times he claimed he was unable to do so because of back problems; (4) Mr. Murphy denied giving in-progress performance reviews or reviews which were not based entirely on an employee's level of performance and denied talking to other employees about appellant; (5) Mr. Murphy stated that, with regard to appellant's allegation that he was docked 15

minutes of leave on a day when he reported at 9:02, appellant reported to work late and instead of logging in to work, proceeded to play dominoes with his friends until 9:15, when he first reported to his work station; (6) Mr. Murphy related that his clerk, Leslie C. Smith, stated that appellant made several threatening remarks to her and that he consequently ordered appellant not to speak with her because she was afraid of him. Ms. Smith submitted a statement, which accompanied that of Mr. Murphy, confirming that appellant did in fact threaten her, that she had several verbal altercations with him and that she is scared of him. Mr. Murphy claimed that he was ordered by his supervisor to screen appellant's calls and confront his visitors because appellant was constantly receiving calls and visits from employees in other work areas. He also suspected that appellant was running a private business from his work station; (8) Mr. Murphy stated that, with regard to Christmas vacations, it is his practice to check with employees and persuade them to voluntarily alter schedules, but that the union never challenged him on this point; and (9) With regard to the recommendation he made on appellant's performance review that he improve his utilization of time, Mr. Murphy explained that he was attempting to persuade appellant that if he did not lose so much time from excessive breaks, lunch time and visits to and from coworkers, his packing percentage would increase.

By decision dated May 31, 1996, the Office found that fact of injury was not established, as the evidence of record did not establish that an injury was sustained in the performance of duty. The Office found that several of the allegations appellant cited were factual, but did not constitute compensable factors of employment. These included: Mr. Murphy checking his watch upon his arrival at work; Mr. Murphy observing his behavior and movements throughout the workday; appellant was the only employee "loaned out" to other operations; Mr. Murphy denying appellant the chance to drive a forklift or be left in charge when Mr. Murphy was absent; appellant being unfairly charged with 15 minutes of leave; Mr. Murphy attempting to have appellant change his vacation time; Mr. Murphy giving appellant unsatisfactory performance evaluations which contained negative comments; Mr. Murphy asking him not to speak with his clerk; and Mr. Murphy approaching appellant about his excessive telephone calls during work hours. The Office found that the other charges made by appellant were not accepted as factual, as appellant failed to provide corroborating evidence in support of them.

In a letter received by the Office on March 6, 1998, appellant requested reconsideration. In support of his request, he submitted new evidence from Dr. House, including a March 18, 1996 psychiatric evaluation, a May 29, 1996 report and an undated psychiatric treatment summary. In his May 29, 1996 report, Dr. House related that appellant came to him in March 1996 describing a series of stressful events which had occurred on the job and advised that he had been experiencing vegetative symptoms of depression, with extreme attendant anxiety.

In his undated psychiatry treatment summary, Dr. House stated:

"I first saw [appellant] on March 18, 1996, ... [when] he came to me complaining of depression and stress related to his work. He had complained of difficulties over the last two to three years while working at [the employing establishment].... [Appellant] had [experienced] sleep disturbances with nightmares and had also experienced crying spells. His concentration was decreased as was his energy level. [Appellant] had become quite forgetful.... My diagnosis at that time was major depression."

Appellant also submitted an August 27, 1996 psychological evaluation from John L. Delk, Ph.D. in psychology, who diagnosed post-traumatic stress disorder of moderate to severe intensity. He related that appellant told him that about three years ago, he began working for a new supervisor who harassed him unmercifully to the point where he was no longer able to work for the company. Dr. Delk stated that appellant felt unduly harassed and persecuted by his supervisor for no justifiable cause and as a result he was forced to take leave from his work.

In addition, appellant submitted statements from four coworkers, including his union representative, Randy Brown, which corroborated his allegations that Mr. Murphy was engaged in a general pattern of harassment against him. In his February 23, 1998 statement, Mr. Brown asserted that appellant spoke to him on several occasions in 1995 and 1996 regarding his being passed over for promotions, despite having more seniority than most of his coworkers. He also recalled that appellant contacted him in March 1996 and asked him to consult with him and Mr. Murphy because he had cancelled his vacation the day before it was slated to begin. Mr. Brown related that appellant appeared very upset and angry at that time, to the extent that he checked into the job site health clinic for two weeks.

By decision dated March 18, 1998, the Office denied the claim, finding that appellant did not submit evidence sufficient to warrant modification.

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty.

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.<sup>1</sup> There must be evidence that implicated acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.<sup>2</sup>

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 Federal Employees' Compensation Act.<sup>3</sup> 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.<sup>4</sup>

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<sup>1</sup> See *Debbie J. Hobbs*, 43 ECAB 135 (1991).

<sup>2</sup> See *Ruth C. Borden*, 43 ECAB 146 (1991).

<sup>3</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>4</sup> *Id.*

To the extent that appellant alleges a reaction to negative performance appraisals, this is an administrative action of the employing establishment and is not compensable absent a showing of error or abuse by the employing establishment.<sup>5</sup> Mr. Murphy explained the ratings given appellant and no evidence of error or abuse was submitted.

With regard to his allegations of harassment, it is well established that for harassment to give rise to a compensable disability under the Act there must be some evidence that the implicated incidents of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable.<sup>6</sup> The Board finds that appellant has failed to submit sufficient evidence to establish his allegations that Mr. Murphy engaged in a pattern of harassment. He has alleged, in general terms, harassment from Mr. Murphy, but has not provided a description of specific incidents or sufficient supporting evidence to substantiate the allegations. Verbal altercations, when sufficiently detailed and supported by the evidence of record, may constitute a factor of employment.<sup>7</sup> However, appellant did not provide details of specific verbal altercations, as he made only general allegations. In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination, and appellant has not submitted any evidence specifically corroborating that he was harassed or discriminated against by the employing establishment, with regard to promotions, assignments or disciplinary actions.<sup>8</sup>

With regard to appellant's allegation that he was always reassigned to another work station whenever the employing establishment needed someone temporarily transferred, the Board notes that the assignment of a work schedule is an administrative function and is not considered a compensable factor of employment absent demonstrated error or abuse.<sup>9</sup> The evidence of record does not establish any error or abuse on the part of Mr. Murphy with regard to assignment of appellant's work schedule. The Board finds that this amounts to frustration at not being permitted to work in a particular environment and is not a compensable factor under the circumstances of this case. Further, the evaluation of appellant's performance, checking to determine whether he reported to work in a timely fashion and monitoring the number of telephone calls and personal visits will not give rise to a compensable disability absent error or abuse in these administrative matters.<sup>10</sup> Mr. Murphy acknowledged that he checked on appellant's conduct relating to these activities, but this is an administrative function of the employer.<sup>11</sup> In addition, appellant's dissatisfaction with failure to receive promotions is not a

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<sup>5</sup> *Arthur F. Hougens*, 432 ECAB 455 (1991).

<sup>6</sup> *See Ruth C. Borden*, *supra* note 2.

<sup>7</sup> *See David W. Shirey*, 42 ECAB 783 (1991).

<sup>8</sup> *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.)

<sup>9</sup> *Alice M. Washington*, 46 ECAB 382 (1994); *see also Peggy R. Lee*, 46 ECAB 527 (1995).

<sup>10</sup> *See Helen Casillas*, 46 ECAB 1044 (1995).

<sup>11</sup> *Id.*

factor of employment. Determinations by the employing establishment concerning promotions and are administrative in nature and not a duty of the employee.<sup>12</sup>

The occurrence of other incidents cited by appellant was denied by the employing establishment, and appellant has not substantiated that such incidents actually occurred.<sup>13</sup> These included appellant's allegation that Mr. Murphy constantly stared at him with hatred when he arrived at work, that he followed him to the bathroom and when he went to pick up boxes on a daily basis, that he rummaged through his desk when he was not there, that he denied his requests to operate a forklift and that he made negative comments to appellant in order to harass and intimidate him.

The Board notes that matters pertaining to use of leave are generally not covered under the Act as they pertain to administrative actions of the employing establishment and not to the regular or specially assigned duties the employee was hired to perform.<sup>14</sup> However, error or abuse by the employing establishment in an administrative or personnel matter or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage.<sup>15</sup> In the present case, there is no evidence of record to substantiate appellant's allegations of error or irregularity when he was charged with 15 minutes of leave after arriving at work two minutes late or when Mr. Murphy allegedly cancelled a two-week vacation the day before it was scheduled to begin in March 1996.<sup>16</sup> With regard to this latter incident, appellant stated that when he was told by Mr. Murphy that he was denying leave for his vacation, he became so emotionally distraught that he subsequently took two weeks of sick leave and had psychiatric counseling. However, appellant has submitted no evidence indicating that Mr. Murphy committed error or abuse or that his actions in this instance were unreasonable. Similarly, he has produced no evidence to substantiate his allegation that Mr. Murphy deliberately denied his annual requests for leave during the Christmas holiday season in order to harass him.<sup>17</sup>

Accordingly, a reaction to such factors did not constitute an injury arising within the performance of duty. The Office properly concluded that in the absence of agency error such personnel matters were not compensable factors of employment.

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<sup>12</sup> *George A. Ross*, 43 ECAB 346 (1991).

<sup>13</sup> To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his allegations with probative reliable evidence. *Ruthie M. Evans*, 41 ECAB 416 (1990).

<sup>14</sup> *Elizabeth Pinero*, 46 ECAB 123 (1994).

<sup>15</sup> *Margreate Lublin*, 44 ECAB 945 (1993).

<sup>16</sup> *Drew A. Weismuller*, 43 ECAB 745 (1992); *Kathi A. Scarnato*, 43 ECAB 220 (1991).

<sup>17</sup> *Id.*

The decision of the Office of Workers' Compensation Programs March 13, 1998 is hereby affirmed.

Dated, Washington, DC  
April 4, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member