U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL A. DEAS and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

Docket No. 00-1090; Submitted on the Record;
Issued November 14, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

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

On July 15, 1994 appellant, then a 32-year-old flat sorting machine operator, filed a claim alleging emotional stress that he attributed to harassment and verbal abuse by his supervisor, Andre Cherigo, during the period 1988 through January 30, 1992. He last worked on January 30, 1992, when he was issued a notice of removal and placed in an off duty status. Appellant's removal was made effective March 27, 1992.

Appellant submitted statements in which he alleged that Mr. Cherigo threatened him by saying that he would "kick [his] butt" in front of other employees. He alleged other incidents of harassment including one in October 1988 and others on December 19 and 24, 1991 and January 28 and 30, 1992 contending either he was falsely accused of threatening or swearing at a supervisor or a supervisor allegedly threatened or harassed him. In October 1988 appellant alleged that Mr. Cherigo "humiliated, embarrassed and disrespected" him in front of Charlie Cooney, a coemployee, by stating to appellant, "I know which way you walk." He stated that this constituted a verbal threat to physically harm him.

Appellant stated that in January 1990 he was transferred back to the Gracie Unit and, several months later, met Mr. Cherigo at the escalator. He alleged that Mr. Cherigo said, "You and I can[no]t work on the first floor, Deas! You should have stayed on the fifth floor."

Appellant alleged that in June 1991 the general supervisor, Luz E. Duchesne, met with him to discuss rumors that he was on "the top of the hit list." He alleged that in a September 6, 1991 conversation with Ms. Duchesne, she said his seniority was not being honored because he did not deserve it. Appellant stated that Ms. Duchesne discussed his seniority status with Ms. Lockley and thereby created a hostile relationship with his coworker.

Appellant alleged that, in the summer of 1991, Ms. Duchesne stated that appellant could not wear tank tops because he "was getting people excited." He asked if he stopped wearing tank tops would the harassment stop to which Ms. Duchesne answered yes, but appellant stated that she lied. Appellant also stated that Ms. Duchesne attempted to create dissension between him and his coworkers by telling them that he was the leader, they were the lambs, and he was going "to lead them to the slaughterhouse."

Appellant stated that, on October 23, 1991, the supervisor of the city section, Mr. Hairston approached him at 4:15 p.m. and said that Mr. Cherigo said he was a "stiff and [he] [is] not for shit." Appellant stated that he was "highly offended and embarrassed" at being discussed by a supervisor this way. He stated that he was a friend of Mr. Hairston, but because Mr. Cherigo spread false rumors that he was involved with a woman Mr. Hairston was seeing, through his "maliciousness and lies," Mr. Cherigo "destroyed" his relationship with Mr. Hairston.

Appellant alleged that, on October 25, 1991, Mr. Cherigo did not let him work his bid assignment telling him that he lost his seniority when he came late but appellant stated that he arrived at work at 6 p.m. with advance time approved. He stated that he filed a grievance. Appellant stated that on October 28, 1991 a shop steward presented his grievance to Mr. Cherigo, who agreed that he would not violate appellant's bid again.

Appellant stated that, on December 19, 1991, when he asked Mr. Cherigo for "a step-off" at 10:35 a.m., he was refused and when he asked if he could call his family, Mr. Cherigo said, "Make it quick." He stated that, when he returned to his station, Mr. Cherigo said "in a loud and disrespecting tone of voice," pointing his finger at him, that he was taking him off the clock for 25 minutes. Appellant stated that he filed a grievance.

Appellant alleged that, on December 24, 1991, Mr. Cherigo approached him and asked him his "whereabouts." When appellant responded that he had been there "all along," Mr. Cherigo responded that he would kick his butt. Mr. Cherigo then refused to let appellant work on his bid assignment at 3:30 p.m. Appellant stated that he was upset by the incident and felt embarrassed and humiliated in front of his coworkers. He stated that on December 26, 1991 he was called into the inspector's office and told that Mr. Cherigo filed a complaint that appellant threatened him on December 19, 1991.

Appellant stated that on December 30, 1991 Mr. Cherigo gave him "a 3971" to sign apparently because he arrived late, but no later than his coworker, Ms. Lockley. Appellant stated that Ms. Lockley did not have to sign a 3971 and it was the fourth time he had to sign one.

Appellant stated that on January 9, 1992 Mr. Cherigo placed him on restriction because he had given him three oral discussions on attendance but when appellant asked to see the second oral discussion in writing, Mr. Cherigo presented him with a buckslip with the number two on it. Appellant stated that, on January 30, 1992, Mr. Cherigo and Ms. Duschesne presented him with a notice of removal.

Appellant alleged in general that Mr. Cherigo shouted at him, spread rumors "designed to foster bad relationships" with his coworkers, and lied to other supervisors about him. He stated

that Mr. Cherigo initiated the removal action against him and prevented him from carrying out his duties.

The employing establishment submitted evidence refuting appellant's allegations. In a February 8, 1995 response, Mr. Cherigo noted that appellant had generally poor work habits, performed his job assignments at a minimal rate, and required constant supervision. Mr. Cherigo noted that appellant would become disrespectful and abusive, and that he had been threatened by appellant on three occasions. He generally denied appellant's allegations, noting that appellant had never reported having any conflict with his coworkers to any supervisors.

In a February 18, 1992 statement, Ms. Duchesne denied appellant's allegations. She noted that, upon her arrival at the employing establishment, in May 1990, Henry Beisell was the supervisor in charge and that Mr. Cherigo did not have direct contact with appellant or speak negatively about appellant to her. On July 8, 1991 appellant approached her to discuss rumors that he was on a "hit list" but she had no such knowledge of any such list and so informed appellant. With regard to appellant's allegations regarding threats to his seniority, Ms. Duchesne denied the statements attributed to her on September 6, 1991. She stated that she did not tell appellant that he did not deserve to work on the flat case but that his seniority was only in the area of his bid assignment. She noted that, after all manual bid-assignments were made on a seniority basis, any additional openings were assigned on a first come basis. Ms. Duchesne noted that Ms. Lockley was given an assignment that day because she had arrived before appellant for work on a flat assignment prior to him.

Ms. Duchesne denied that she ever described appellant as the leader of his coworkers or that they were lambs and had no desire to instigate any altercation between appellant and his coworkers. She denied any retaliation alleged by appellant in response to complaints he filed. Ms. Duchesne noted that, on January 30, 1992, Mr. Cherigo telephoned to meet with appellant and asked her to be present when he presented appellant with formal charges for removal. She noted that, after his arrival at the meeting, appellant refused to accept the papers from Mr. Cherigo and requested a union delegate be present. Mr. Duchesne indicated that, after her arrival, the union delegate instructed appellant to accept receipt of the notice. Appellant told the delegate she could leave and, after her departure, raised his voice and loudly stated that he would not sign the receipt. Ms. Duchesne stated that appellant repeated that he would not sign for the receipt and she asked the supervisor of mail to be a witness. She concluded by noting that she was unaware of any discrimination against appellant based on race.

In the attached January 29, 1992 notice of removal, appellant was informed that she would be removed from the employing establishment on March 6, 1992 for being disrespectful and threatening to a supervisor on December 19, 1991. It was noted that appellant had been issued prior letters of warning on November 28, 1990 for being disrespectful and making verbal threats on November 3, 1990. In a notice of removal dated February 7, 1992, which superseded the January 29, 1992 notice of removal, appellant was charged with being disrespectful and threatening a supervisor. It was noted that, on January 30, 1992, appellant refused to follow an instruction to perform his job, which was to sweep along the flat sorter machine. When Mr. Cherigo asked appellant to move a second time, appellant jumped out of his chair and came towards him in a threatening manner, "shouting loud and pointing [his] finger [him]," stating that Mr. Cherigo better show him "some respect." Mr. Cherigo stated that he left the area fearing for

his safety, called security and advised them that appellant had verbally threatened him with physical harm. Further, appellant was suspended from the latter portion of his tour that day. The notice of removal also charged appellant with being disrespectful to supervisor Luis Melendez on January 28, 1992. On that date, the notice stated that while he was working, Mr. Melendez observed appellant talking to his coworkers and not casing the mail, and went up to him and told him to box the mail. Appellant said he was boxing the mail and when Mr. Melendez repeated his instruction, he heard appellant call him a "fucking punk" as he was walking away. Also submitted were statements of several coemployees noting that they did not hear Mr. Cherigo make any threatening remarks towards appellant.

In a January 13, 1994 decision, an arbitrator found appellant's removal from the employing establishment was for just cause. The arbitrator reviewed the three charges brought against appellant for being disrespectful and making threats against supervisors and found ample evidence supporting the removal action. He found that appellant failed to follow appropriate instruction from his supervisors, was warned of the consequences of his actions and repeatedly failed to comply with supervisory direction.

In a March 24, 1995 decision, the Office denied appellant's claim, finding that the evidence failed to substantiate appellant's allegations of harassment or verbal abuse by personnel at the employing establishment.

On April 8, 1995 appellant requested an oral hearing before an Office hearing representative, which was held on February 29, 1996. At the hearing, he reiterated his allegations that Mr. Cherigo harassed him from 1988 through 1992 and asserted that he never threatened Mr. Cherigo. Appellant generally denied poor work habits or that he threatened his supervisors.

Appellant submitted a copy of a June 8, 1992 New York State Department of Labor Administrative Law Judge determination that appellant was not disqualified from unemployment insurance benefits because of loss of employment through misconduct. The judge noted that, "in this case, there has not been substantial evidence that claimant indisputably committed the acts that he was accused of."[1] This determination was subsequently affirmed by the State of New York Unemployment Insurance Appeals Board on June 15, 1993.

In a report dated September 30, 1994, an Equal Employment Opportunity Commission (EEOC) administrative judge found that appellant did not establish that he was discriminated against based on his race, color, national origin, sex or in reprisal for prior EEOC activity. The EEOC judge addressed the three incidents upon which appellant's removal was based as well whether the responsible management officials had engaged in a pattern of harassment prior to appellant's termination. The EEOC judge found that the evidence of record, including testimony from supervisors and coworkers, did not establish discrimination or disparate treatment of appellant based on race, color, national origin or sex. While the judge found appellant made a *prima facie* finding of reprisal for being issued the notice of removal within approximately four months of informal discussions concerning a grievance, he ruled that the employing establishment established a legitimate, non-discriminatory reason for its actions "based on

[1] Appellant submitted evidence and testimony at the before the unemployment compensation agency.

independent and credible evidence." The judge concluded that appellant failed to meet his burden of establishing that the employing establishment's reasons for removal were a pretext for intentional discrimination. Appellant testified at the hearing that he was in the process of appealing the EEOC's decision.

By decision dated June 6, 1996, the Office hearing representative affirmed the Office's March 24, 1995 decision.

On July 17, 1996 appellant filed an appeal before the Board, which was docketed as No. 96-2327. In response to a motion submitted from the Director of the Office of Workers' Compensation Programs, the Board issued an order on December 24, 1997 remanding the case to the Branch of Hearings and Review to make additional findings of fact regarding appellant's allegations.

By decision dated July 17, 1998, the Office hearing representative affirmed the Office's March 24, 1995 decision. Addressing Mr. Cooney's statement that in October 1988 Mr. Cherigo approached appellant on several occasions and chastised him in a loud voice, the Office hearing representative found that Mr. Cherigo's talking in a loud voice was not sufficient to constitute harassment. He also found that Mr. Cherigo's statement, "I know which way you walk," was too vague to be considered a verbal threat. Regarding the incident on December 24, 1991 in which Mr. Cherigo allegedly told appellant that he would kick his butt, the Office hearing representative noted that the matter was investigated by the postal inspector and appellant's allegation of harassment was not substantiated by the evidence of record. The hearing representative noted that the factual allegations made by appellant to the EEOC and the state unemployment compensation appeals agencies were similar and that the EEOC had made a finding that appellant was not discriminated or harassed. He found that the EEOC decision was entitled to more weight than the unemployment compensation decision because the state administrative law judge's decision consisted of only one page and presented little discussion of the factual allegations whereas the EEOC administrative judge provided a substantial discussion of the factual evidence. The Office hearing representative noted that the administrative law judge was a state official who ruled on the ancillary issue of appellant's entitlement to unemployment benefits following his removal from employment. He noted that, in contrast, the arbitrator and EEOC administrative judge were both federal officials who reviewed the evidence and found the agency's removal action to be valid. He noted that the EEOC judge found that appellant did not deny making threatening statements on December 19, 1991 and, regarding the January 30, 1992 incident, found that claimant was disrespectful to his supervisors. The Office hearing representative concluded that appellant failed to demonstrate that he was subjected to harassment and discrimination as alleged.

On September 18, 1998 appellant requested reconsideration of the Office's decision and submitted evidence including an excerpt from a book, "Out in the Open. The Abuse of the Injured Postal Workers." Appellant also submitted a page from his affidavit stating that Mr. Cherigo's statements that appellant threatened Mr. Cherigo or acted disrespectfully towards him were untrue and that his coworkers supported his allegations. In his request, appellant contended that the Office erred by failing to consider that the disciplinary actions taken against appellant were based on false accusations and referred to the state unemployment compensation decision as supporting his allegation that the accusations were false. Appellant contended that

the Office hearing representative erred in assigning greater weight to the EEOC decision rather than the state unemployment compensation decision. He also noted that he was appealing the EEOC decision.

By decision dated October 8, 1999, the Office denied modification of the July 17, 1998 decision.

The Board finds that appellant has not established that he sustained an emotional condition causally related to his federal employment.

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 her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.[2] 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.[3]

To the extent that disputes and incidents alleged as constituting harassment by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[4] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[5] Where an employee alleges harassment and cites to specific incidents or working conditions and the employer denies that harassment occurred, the Office as part of its adjudicatory function must make findings of fact regarding whether the alleged factors are factually established and constitute compensable factors of employment.[6] In such cases, the issue is not whether the claimant has established harassment or discrimination under EEOC standards. Rather the issue is whether the claimant under the Act has submitted evidence sufficient to establish an injury arising in the performance of duty.[7] To establish entitlement to benefits, the claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.[8] In assessing the evidence submitted, the Board has held that grievances and EEOC

[2] 5 U.S.C. §§ 8101-8193.

[3] *Clara T. Norga*, 46 ECAB 473, 480 (1995); *see Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[4] *Clara T. Noga*, *supra* note 3 at 481; *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

[5] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[6] *Elizabeth W. Esnil*, 46 ECAB 606 (1995).

[7] *See Martha L. Cook*, 47 ECAB 226, 231 (1995).

[8] *Barbara E. Hamm*, 45 ECAB 843, 851 (1994).

complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.

Appellant has alleged harassment and discrimination that he attributes primarily to actions taken by Mr. Cherigo in his supervisory capacity. Appellant has alleged humiliation in front of coworkers and contends that the actions taken to remove him from his employment were based on false accusations and insubstantial evidence. After a review of the evidence of record, the Board finds that appellant has not submitted sufficient evidence to establish his allegations of harassment or discrimination at the employing establishment.

The record reflects that Mr. Cherigo became appellant's supervisor 1988, prior to appellant's successful bid on a position assignment under another supervisor. Appellant alleged that, during this period, he was humiliated in front of a coworker when Mr. Cherigo stated, "I know which way you walk." Appellant contends that he perceived this remark as a threat by Mr. Cherigo. Similarly, appellant alleged that, on December 24, 1991, Mr. Cherigo threatened him by stating he would kick his butt. While the Board has recognized the compensability of threats in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to compensability under the Act.[9] The evidence of record does not establish that the statements of Mr. Cherigo constituted any threat of physical harm or verbal abuse of appellant. As noted by the arbitrator decision, even assuming substance to the accusation, it does not explain or otherwise mitigate against appellant's prior misconduct.

The other allegations of verbal abuse and harassment by Mr. Cherigo relate to instances arising between October 1991 to January 30, 1992. Appellant alleged that Mr. Cherigo spread false rumors and lies to Mr. Hairston, the supervisor of the city section. He alleged that, on October 23, 1991, Mr. Hairston stated to him that Mr. Cherigo said that appellant was stiff and not "for shit." Mr. Cherigo denied appellant's allegations. The Board finds that there is insufficient evidence to establish appellant's allegation that Mr. Cherigo made the alleged comments to Mr. Hairston or otherwise spread rumors in the workplace.

The evidence of record does reflect that appellant had a contentious personality conflict with Mr. Cherigo. However, a claimant's own feeling or perception that a form of criticism by or disagreement with a supervisor is unjustified, inconvenient or embarrassing is self-generated and does not give rise to coverage under the Act absent evidence that the interaction was, in fact, erroneous or abusive.[10] As noted by the EEOC judge, the evidence of record indicates that appellant's supervisor had a general reputation among employees for being loud and aggressive in manner. However, this does not establish harassment or discrimination as alleged. The evidence establishes that appellant was uncooperative with his supervisors, used profanity and made verbal threats, failed to follow instructions and as a result was terminated from his federal employment. While most of his allegations pertain to Mr. Cherigo, appellant's removal was based on his conduct and comments made to Mr. Cherigo on December 19, 1991 and January 30,

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

[10] *See Daniel B. Arroyo*, 48 ECAB 204 (1996) This principle recognizes that a supervisor or manager must be allowed to perform his or her duties and that, in performing such duties, employees will at times dislike actions taken.

1992, supervisor Luis Melendez on January 28, 1992, and prior discipline in November 1990 involving threatening statements made to a third supervisor. Further, Ms. Duchesne denied appellant's allegations regarding statements that he attributed to her and she explained the process of assigning work based on appellant's seniority in the area of his bid assignment. Appellant has not submitted sufficient evidence to establish error or abuse by employing establishment management in these personnel and administrative matters.

Appellant's primary argument on appeal is that that the decision of the New York State unemployment agencies support his allegations of harassment and discrimination and that the hearing representative erred in giving greater weight to the findings of the EEOC administrative judge. The Board notes that the findings of other administrative agencies are not dispositive of proceedings under the Federal Employees' Compensation Act, which is administered by the Office and under Board review, where such findings are made pursuant to different standards of proof.[11] The finding of appellant's entitlement to state unemployment compensation is not determinative of his eligibility for benefits under the FECA as entitlement under other benefit or statutory programs does not establish disability as defined under the FECA.[12] The determination of appellant's eligibility for benefits under the New York unemployment compensation laws is not dispositive of appellant's disability under the Act. Under the FECA, appellant's disability for work must be shown to be causally related to an accepted employment-related injury or accepted factors of his federal employment.[13] While the findings of other federal agencies are not dispositive with regard to questions arising under the Act, such evidence may be given weight by the Board.[14]

In this case, the EEOC found that appellant's allegations of harassment and discrimination pertaining to his removal from federal employment were not substantiated as factual and that he failed to establish that the employing establishment's reasons for terminating him were a pretext for intentional discrimination or reprisal.[15] The Board notes that the EEOC decision constitutes evidence that is relevant and instructive as it provides a substantive review of the allegations made by appellant. The EEOC judge set forth his factual findings pertaining to appellant's allegations, held evidentiary proceedings, and evaluated the credibility of the testimony provided by witnesses. In proceeding with appellant's compensation claim, the Office hearing representative made his own findings pertaining to appellant's allegations and the evidence submitted to the record. In so doing, he noted that the decision of the EEOC was more probative on the issue of discrimination and harassment as the EEOC judge ruled directly on appellant's allegations and on the question of his removal from federal employment. In contrast, the state unemployment agencies ruled on the issue of appellant's eligibility for unemployment compensation, an ancillary issue. In that case, the state administrative judge noted that there was

[11] *See Wayne E. Boyd*, 49 ECAB 202 (1997).

[12] *See Daniel Deparini*, 44 ECAB 657 (1993).

[13] *Id.*

[14] *See Shelby J. Rycroft*, 44 ECAB 795 (1993).

[15] The Board notes that the EEOC decision followed three days of evidentiary proceedings with testimony obtained by appellant and other employing establishment personnel.

a personality conflict between appellant and his supervisor and that the testimony of the witnesses was in conflict. The Board finds that the Office hearing representative did not abuse his discretion in weighing the relative findings of the various federal and state agencies or in giving probative value to the findings of the EEOC judge.

The decision of the Office of Workers' Compensation Programs dated October 8, 1999 is hereby affirmed.

Dated, Washington, DC
November 14, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member