U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL P. BATTLE and U.S. POSTAL SERVICE,
POST OFFICE, Bell, CA

Docket No. 03-861; Submitted on the Record;
Issued July 24, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant established that he sustained an emotional condition arising from his employment.

This case is on appeal to the Board for the second time. In the first appeal,[1] the Board found that the Office erred in finding that appellant's request for reconsideration, dated November 1, 2000, of the Office's January 4, 1984 decision was untimely because the Office failed to provide the requisite notice of the one-year time limitation for filing a request for reconsideration pursuant to FECA Bulletin No. 87-40 and 20 C.F.R. § 10.607(a) for claims adjudicated prior to June 1, 1987. The Board therefore reversed the Office's December 3, 2001 decision and remanded the case for further reconsideration of the claim.

Appellant contended that his problems began at work approximately in June 1979 when he went to the home of a former coworker, Wayne Thomas, to collect $10.00 he had loaned him for lunch at work prior to Mr. Thomas' being fired. Mr. Thomas was subsequently murdered on June 4, 1979 and a coworker, Richard Howard, who had been Mr. Thomas' roommate, accused appellant of murder. Appellant was arrested, detained for 72 hours, then released but was not charged with the murder. He testified at the hearing held on May 23, 1983 that, when he got out of jail, Mr. Howard and his brother got out of their car and were going to jump him and Mr. Howard threatened to kill him. Appellant stated that he was scared and that Mr. Howard's brother was a known murderer who was serving time in the state correctional facility for murder. He stated that when he returned to work, Mr. Howard told everyone at the employing establishment that appellant had murdered Mr. Thomas and that he had seen him do it. Appellant testified that when he got back to work, nobody wanted to work with him and

[1] Docket No. 02-634 (issued September 19, 2002). On November 13, 1979 appellant, then a 24-year-old mailhandler, filed a claim alleging that he had sustained an employment-related emotional condition. The Office of Workers' Compensation Programs denied his claim on the grounds that he did not establish any compensable employment factors. The facts and history surrounding the prior appeal are set forth in the initial decision and are hereby incorporated by reference.

everybody said he was a murderer. He stated, "So they isolated me and everybody looked and pointed and called me murderer and -- my name." Appellant also stated that, due to his being implicated in the murder, management, while he was working under David M. Leija, took a special detail he had away from him and returned him to his regular job. He stated that Mr. Leija steadily pressured him by assigning him to the heaviest dock and made remarks that he was going to be the one to fire appellant.

A letter dated August 28, 1981 from the injury compensation specialist, Patricia A. Clever, stated that Mr. Howard resigned effective June 2, 1980 and it was unknown whether he accused appellant of Mr. Thomas' murder.

Appellant also contended that two letters of warning he received on September 10 and 25, 1979 for failure to maintain a regular work schedule contributed to his nervous condition. Appellant stated that one letter of warning stated that he was in the cafeteria when he was not in the cafeteria and that the supervisor "was just steadily picking on" him. The letter of warning dated September 10, 1979 cited three instances, on August 24, 27 and 28, 1979, where appellant failed to work the required overtime without a valid excuse. The letter of warning dated September 25, 1979 stated that appellant failed to maintain a regular work schedule and cited five dates, August 29 and September 14, 1979 two instances on September 18 and 21, 1979 when appellant was absent without leave. Appellant stated that on October 16, 1979 he received a notice of suspension for 14 days from his supervisor. He regarded these letters of warning and notice of suspension as unfair and evidence of harassment.

The record indicates that on November 20, 1979 appellant filed a formal discrimination complaint with the Equal Employment Opportunity (EEO) for suspension from duty. In an EEO investigative affidavit dated October 9, 1980, appellant's supervisor, Gwen Hoxey, stated that she suspended appellant on October 16, 1979 for failure to maintain a regular work schedule but subsequently rescinded the suspension when she learned that appellant had been admitted to the hospital and had called the office and informed the office of the situation. She stated that she also rescinded the letter of warning dated September 25, 1979 because appellant provided her with acceptable substantiation for his absence on August 29, 1979. Ms. Hoxey stated that she issued the September 10, 1979 letter of warning because appellant failed to follow her instructions to work the mandatory overtime citing that he had a foot problem but provided no "acceptable substantiation." She stated that she had other employees who did not want to work the mandatory overtime and left without permission, and she took similar action against them. She stated that she was unaware that appellant had any physical or mental problems until after the incidents occurred. A note from Ms. Hoxey dated September 22, 1979 stated that she rescinded the letter of warning citing appellant for being in the cafeteria as the acting general foreman, Al Iniguez, said that appellant was not there. A note dated September 1979 from the support director indicated that the September 7, 1979 letter of warning was rescinded and would be removed from all official records.

By letter dated March 10, 1981, Ms. Hoxey explained why she issued the September 7 and 25, 1979 letters of warning. She stated that she issued the September 7, 1979 letter for appellant going to the cafeteria because the tour superintendent told her Mr. Iniguez indicated that appellant was in the cafeteria at break time, but later rescinded the letter when Mr. Iniguez told her it was not appellant in the cafeteria. Ms. Hoxey stated that she issued the September 25,

1979 letter of warning because appellant refused to work overtime, stating that his foot was hurting him, but he did not prove he was disabled at the time. Regarding appellant's suspension, Ms. Hoxey stated that appellant did not report for work nor did she receive information that appellant had called in, so she disciplined him with the suspension. She stated that a subsequent investigation showed that appellant had called the employing establishment to explain that he was in the hospital but the timekeeper did not record the call. She stated that appellant then produced a telephone bill showing he called the employing establishment and she rescinded the suspension. Ms. Hoxey stated that the EEO charged her with discriminating against appellant who was mentally ill but she stated that she took "corrective action on all employees when warranted, not just certain individuals."

A Board of Veterans' Appeal decision dated November 23, 1999 stated that appellant's service connection for a schizoaffective disorder, bipolar type was warranted. Medical evidence of record documents that appellant had emotional problems prior to his problems at work.

By decision dated January 28, 2003, the Office denied appellant's request for modification, stating that appellant did not establish any factor of employment in the performance of duty as alleged.

The Board finds that appellant failed to establish that he sustained an emotional condition causally related to factors of 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 his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation 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 his 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] The issue is not whether the claimant has established harassment or discrimination under standards applied

[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. Norga, supra* note 3 at 481; *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

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

by EEO. Rather the issue is whether the claimant under the Act has submitted evidence sufficient to establish an injury arising in the performance of duty.[6]

Regarding appellant's contention that Mr. Howard told everyone he was a murderer, that he felt isolated by his coworkers' reaction to that accusation, that no one would work with him and that his coworkers called him a murderer, appellant did not provide evidence corroborating that Mr. Howard actually acted in such a manner or that his coworkers consequently shunned him or called him "murderer," nor did appellant show that he complained to management of this problem and management did not respond appropriately. The August 28, 1981 letter from the injury compensation specialist stated that it was "unknown" whether Mr. Howard accused appellant of murder. Appellant has therefore not established a compensable factor of employment in this regard.[7] Further, appellant did not provide any evidence corroborating that due to the stigma of his being considered a murderer in the workplace, management took a special detail away from him and returned him to regular work. He did not establish that his supervisor, Mr. Leija, harassed him by assigning him to the heavy-duty dock work and threatening to fire him.

Regarding his being issued letters of warning dated September 10 and 25, 1979 and notice of suspension on October 16, 1979, the Board has held that disciplinary matters such as letters of warning and notices of suspension are administrative actions and are not compensable unless it is established that the employing establishment erred or acted abusively in its administrative capacity.[8] The fact that the personnel action is lessened or modified does not, in and of itself, establish that the employing establishment's actions were either erroneous or unreasonable.[9] According to appellant's supervisor, Ms. Hoxey, she issued the September 10, 1979 letter of warning for appellant's failing to work the required overtime. He had stated that his foot hurt him but did not document his disability. Subsequently, he documented the disability and she rescinded the letter of warning. Similarly, with the September 25, 1979 letter of warning, Ms. Hoxey stated that she had been told that appellant was in the cafeteria during his break but Mr. Iniguez subsequently told her it was not appellant he had seen, and she rescinded the letter of warning. Regarding the issuance of the suspension in October 1979, Ms. Hoxey indicated that at the time she issued the suspension, appellant had not called to tell her he was hospitalized, and after the EEO investigation and appellant's submission of telephone bills indicating he called the employing establishment, she rescinded the suspension. In each case, in issuing the letters of warning and the suspension, Ms. Hoxey acted reasonably in issuing them at the time believing either that appellant was absent without leave or in a place, *i.e.*, the cafeteria, where he should not be, but once she had evidence she was wrong, she rescinded the disciplinary action. The record therefore does not show that she acted erroneously or abusively in taking those disciplinary measures.

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

[7] *See Robert W. Johns*, 51 ECAB 137, 143-44 (1999); *John Polito*, 50 ECAB 347, 348-49 (1999).

[8] *See Sherry L. McFall*, 51 ECAB 436, 440 (2000); *Sharon R. Bowman*, 45 ECAB 187, 194 (1993).

[9] *See Sherry L. McFall*, *supra* note 8 at 440; *Garry M. Carlo*, 47 ECAB 299, 304 (1996).

Appellant has therefore failed to establish compensable factors of employment and that he sustained an emotional claim arising from factors of his federal employment. Since appellant has not established a compensable factor of employment, it is not necessary to address the medical evidence.[10]

The January 28, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 24, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[10] *See Diane C. Bernard*, 45 ECAB 223, 228 (1993).