United States Department of Labor
Employees' Compensation Appeals Board

JAMES E. DEPOY, Appellant **and** **FEDERAL JUDICIARY, OFFICE OF THE FEDERAL DEFENDER, EASTERN DISTRICT OF CALIFORNIA, Sacramento, CA, Employer**	)	**Docket No. 04-1276** **Issued: November 12, 2004**

Appearances:
Mark S. Coby, Esq., for appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On April 14, 2004 appellant filed a timely appeal of the January 23, 2004 merit decision of the Office of Workers' Compensation Programs, which affirmed the denial of his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.[1]

ISSUE

The issue on appeal is whether appellant established that he sustained an emotional condition in the performance of duty. On appeal, appellant's attorney contends that appellant was subject to a pattern of abuse by Quin Denvir and his subordinates which created unusual or extraordinary pressures which caused his work-related stress condition. Appellant's attorney contends appellant was singled out for a term of probation, punished for failing to properly

[1] The Board notes that the Office had also issued a March 3, 2004 decision approving attorney fees. However, as neither appellant nor his attorney has contested that decision on appeal, the Board will not address any issues pertaining to attorney fees.

complete timesheets, and subject to Mr. Denvir's wrath after taking time off work for a medical condition.

FACTUAL HISTORY

On November 9, 2001 appellant, then a 54-year-old senior investigator, filed an occupational disease claim for an emotional condition attributed to "continued discrimination, harassment, and confrontive behavior by others at [his] place of employment." He first became aware of his condition in May 1999 and realized his condition was caused or aggravated by his employment on May 28, 2001. Appellant was placed on a two-year probation by the employing establishment on March 27, 2001, he stopped work on April 2, 2001 and was terminated on January 22, 2002.

Appellant submitted a 15-page statement in support of his claim. He described the stressful factors involved in his job as a criminal defense investigator and provided background information on Mr. Denvir, the chief administrator, whom he alleged created a hostile environment for the staff investigators. He first developed a feeling of disharmony and fear towards Mr. Denvir following a 1997 meeting.

Appellant became depressed about the probability of a negative performance evaluation in May and June 1999 when he heard that Mr. Denvir and Mary French, his supervisor, were questioning his ability and the amount of work he had been doing. Although his July 1999 performance review was overall excellent, he stated that his July 2000 performance evaluation contained no "excellents" in any of the designated categories. Appellant stated that he had an extreme psychological reaction to the July 2000 performance review and that Ms. French had nothing to offer him in terms of how to improve his performance.

On July 27, 2000 appellant met with Mr. Denvir and Ms. French about his evaluation. Mr. Denvir began the review with negative comments concerning appellant's performance, which devastated him.[2] He stated that no deficiencies or instances of specific cases were mentioned and that nothing in writing had been received from either Mr. Denvir or Ms. French prior to his evaluation which indicated substandard work performance or attitude deficiency. During the evaluation, appellant felt that regardless of the quality and nature of his work, it would be insufficient for Mr. Denvir. He stated that, prior to his July 27, 2000 review, Ms. French told him that he was on Mr. Denvir's "radar screen," a term he indicated was Mr. Denvir's moniker for expressing that an employee was in trouble.

Appellant addressed events leading to his being placed on a probationary status on March 27, 2001 which contributed to his emotional condition. These included taking time off for a dental problem, having to write an activity report on every case since his July 2000 evaluation and an investigation into his timesheet hours.

[2] Appellant stated that the comments were: (1) there were not enough negative comments in the review and that he would have loaded it up with negative comments; (2) appellant was not delivering the goods, working up to par, or working as hard as he should; (3) he had a poor work attitude; and (4) he came in late and left early, etc.

Appellant stated that he took time off for dental problems on Friday, March 2, 2001 and Monday, March 5, 2001 and had informed the receptionist each day that he was not coming into work. When he arrived at the office on March 5, 2001, appellant had a voice mail message from Mr. Denvir pertaining to a particular client. Ms. French told appellant he was back on Mr. Denvir's radar screen and that Mr. Denvir was very angry because appellant had not been available on March 2 and 5, 2001. Appellant contended that he had accounted for his whereabouts and absences at all times.

On March 5, 2001 appellant stated that Ms. French instructed him to prepare a written report for his activities on each case since his July 2000 review and indicated that the report was due on March 7, 2001 by noon. Appellant stated that he was the only investigator given this assignment and that he viewed it as disciplinary and discriminatory. On March 6, 2001 appellant left a message for Ms. French requesting additional time and went home sick. He stated that he feared retaliatory behavior by Mr. Denvir and Ms. French for not completing the report and for asking for additional time. On March 7, 2001 an email bulletin came out which indicated that all investigators would be required to do a two-month status report. He stated that he received a separate email from Ms. French which advised that he did not have to do the two-month status report since he was doing the big report. His report was submitted to Ms. French on Friday, March 9, 2001 at 3:00 p.m. Appellant indicated that he was not penalized for submitting the report on March 9, 2001.

On March 8, 2001 appellant met with the chief assistant federal defender, Daniel Broderick, and the chief investigator, Philip Oliver. He alleged that Mr. Broderick stated that appellant's head was on the chopping block with the ax poised to fall, but apparently that had changed. Mr. Broderick also indicated that Mr. Denvir had spent about a half-hour insulting appellant for not being available in the morning on March 2 and 5, 2001 and that Mr. Denvir had a perception that both appellant and Mr. Oliver did not show respect to him.

On March 23, 2001 appellant stated that he learned that Mr. Denvir started an investigation of his hours in connection with his timesheet entries. The investigators had been told by a prior federal defender, Arthur Ruthenbeck, to put down as many hours as seemed reasonable as the timesheets were used to ascertain how much time was being spent on the allocation of resources. Appellant stated that there was never a suggestion that the sheets would be used as billable hours or accountability and that two staff attorneys had told him that Mr. Ruthenbeck had made it clear that timekeeping sheets were not to be used for disciplinary purposes. Appellant stated that he experienced a general psychological breakdown as he felt that the inquiry into his hours was a witch hunt.

On March 28, 2001 appellant met with Mr. Denvir, Ms. French and Mr. Broderick in Mr. Denvir's office and was handed a memorandum dated March 27, 2001, which placed him on a two-year period of strict supervision. Appellant did not have time to read the contents of the memorandum but was told that his hours on the timesheets were exaggerations. Appellant admitted to Mr. Denvir that the hours on his timesheets were lies. Mr. Denvir reiterated a litany of appellant's deficiencies, such as his poor attitude, substandard work performance, that he did not complete assignments on time, and failed to display initiative. Appellant stated that he experienced anxiety during this meeting.

On March 29, 2001 Mr. Broderick explained to appellant how the timesheets were to be filled out as per Mr. Denvir's instructions. Appellant additionally related several remarks that he has heard which led him to believe that there was no good faith intent to accommodate him should he return to the employing establishment,[3] which had a negative effect on him.

In a December 22, 2001 statement, appellant noted that he filed a complaint under the Employee Dispute Resolution (EDR) process with regard to the working conditions in connection with this claim, but advised it was dismissed with prejudice on December 21, 2001.

In an August 23, 2001 declaration, Marjorie J. Kennedy, a former paralegal at the employing establishment, stated that Mr. Denvir had demonstrated hostility and discrimination against many of the long-term employees who were hired by the previous administrations. She stated that Chief Assistant Dennis Waks had informed both appellant and herself in 1996 that the place would be cleaned up when Mr. Denvir assumed his position. She was unaware of anyone being disciplined for so-called inaccuracies on timesheets. She stated that everyone knew that timekeeping was considered an illusion, no one paid adherence to it, and it was not required that the timekeeping sheets be accurate.

Mr. Oliver submitted an April 25, 2001 statement relating to his occupational disease claim, which referenced Mr. Denvir's hostility and negativity towards the investigators. He indicated that Mr. Denvir introduced the word "radar" into the workplace vocabulary and that it was office rumor that appellant and he were frequently on Mr. Denvir's radar screen. Mr. Oliver also discussed the events during March 2001 which targeted appellant and opined that the confrontational manner in which Mr. Denvir dealt with appellant during March 2001 seemed calculated to cause him to suffer a medical disability. Mr. Oliver opined that the incidents involving appellant in March 2001 stemmed from Mr. Denvir's anger in being unable to immediately contact appellant when he had taken sick leave for a dental problem.

In an April 2, 2001 note, Dr. Louis James Fisher, a Board-certified internist, opined that appellant had depression/anxiety and should not work for 30 days. Numerous reports were received from Dr. Marietta A.N. Almazan, a psychiatrist, who diagnosed a treatment-resistant mood disorder; major depression; unspecified mental disorder; and possible cyclothymic disorder from issues concerning appellant's supervisor. She found appellant totally disabled for work. In an August 20, 2001 report, Dr. Clifford E. Lewis, a clinical psychologist, diagnosed a severe major depressive disorder, which was activated by stressors of appellant's work environment, principally created by working with his administrator, Mr. Denvir.

In a December 28, 2001 statement, Mr. Denvir advised that the Standing Committee on Federal Public Defenders of the Ninth Circuit dismissed appellant's EDR complaint with prejudice on December 20, 2001. He indicated that unless appellant could provide full medical

[3] He stated that he was informed that: Mr. Denvir mentioned to Ms. French that all the investigators should be fired immediately and, if not, that appellant should be fired immediately on March 5, 2001; that, during the month of March 2002, three staff attorneys made remarks about Mr. Denvir trying to "kill" him, meaning Mr. Denvir was putting him on probation for two years in hopes that it would lead to his death; that a staff attorney had indicated that Mr. Denvir did not want or would not allow appellant to return; and that Mr. Broderick said "don't hitch your wagon too closely to [appellant] when he returns."

clearance for his return to work on a full-time basis, subject to all the terms of his probation and his supervision, his employment would be terminated by January 20, 2002.

By decision dated January 8, 2002, the Office denied the claim for failure to establish fact of injury.

In a January 29, 2002 letter, appellant, through his attorney, requested an oral hearing. The Office received additional medical evidence from appellant's physicians.

By decision dated May 24, 2002, an Office hearing representative found that the Office did not consider appellant's narrative statements outlining the work factors he associated with his medical condition and remanded the case for further development of the claim. By letter dated June 12, 2002, the Office requested additional factual and medical information from appellant.

In a July 1, 2002 statement, Mr. Denvir described the general duties of an investigator noting that appellant's caseload was generally less than the other investigators, he seldom traveled outside of the Sacramento area or was away overnight, and did relatively little field work. He stated that the deadlines for investigators were flexible. With regard to the July 2000 meeting pertaining to appellant's annual performance review, Mr. Denvir stated that appellant was told that he was not working a full workweek, failed to carry out investigative assignments, failed to demonstrate initiative on cases, failed to timely complete investigative assignments and had a lackadaisical attitude towards his job. Mr. Denvir indicated that, in March 2001, he and Ms. French again reviewed appellant's performance and determined that he failed to correct the problems previously outlined for him. In reviewing appellant's time records, appellant had repeatedly submitted false time reports, claiming hours of work on cases that he did not perform. Mr. Denvir indicated that although the pattern of falsifying official time records would have justified terminating appellant, he was placed on two years probation with specific conditions. He indicated that the Standing Committee on Defender Services agreed that the employing establishment did not have to adhere to appellant's grievance demands, which were that Mr. Denvir not be appellant's supervisor and that appellant not be placed on probation. As appellant refused to return to work unless the accommodations were granted, his employment was terminated.

Appellant submitted additional medical evidence along with a statement dated July 8, 2002 concerning prior medical conditions.

By decision dated July 15, 2002, the Office denied appellant's claim finding that he did not establish a compensable employment factor.

By letter dated July 23, 2002, appellant's attorney requested an oral hearing, which was held on November 18, 2003. Appellant testified that some of the negative comments on his July 2000 review came from the staff attorneys and Mr. Denvir, but there was no way for him to discern who made what comments. He stated that there was no pending deadline for him to have been in the Office on March 5, 2001 or that any specific letters of reprimand or anything else was done as a result of the incident. Appellant did not know he was in trouble with Mr. Denvir until March 8, 2001, and stated that he did not know anything was wrong with his timesheets before he was put on formal probation on March 27, 2001.

Mr. Oliver testified that he had noticed that Mr. Denvir was irritated with appellant's absence when he sought dental treatment and stated that Ms. French told him that Mr. Denvir was on the warpath. He checked the reception desk and that appellant had called in. Mr. Oliver testified that no timesheets other than appellant's were ever reviewed noting that, when the timesheets were introduced, the investigators were told that the information would not be used for evaluation purposes. He testified that no change in the reporting of time was ever relayed to them. Mr. Oliver also stated that when performance was unsatisfactory, the issues were reviewed with the employee and remedial efforts are discussed on ways to improve performance. He stated that appellant's memorandum was not specific and did not offer remedies.

Newly submitted evidence included a medical report from Dr. Lewis concerning appellant's emotional condition. In a December 22, 2003 statement, Mr. Denvir advised that appellant made false and inaccurate statements at the hearing along with omissions in his testimony. He emphasized that "to the degree that [appellant] was singled out, it was soley because of his inadequate performance as an investigator."

By decision dated January 23, 2004, the Office hearing representative affirmed the July 15, 2002 decision, finding that appellant had not established any compensable factors of employment.

LEGAL PRECEDENT

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to a claimant's employment with the federal government. When an employee experiences emotional stress in carrying out her employment duties or has fear and anxiety regarding her ability to carry out her duties, and the medical evidence establishes that the disability resulted from her emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. The same result is reached when the emotional disability resulted from the employee's emotional reaction to a special assignment or requirement imposed by the employment or by the nature of the work.[4] The disability is not covered when it results from such factors as an employee's frustration from not being permitted to work in a particular environment or to hold a particular position. Disability resulting from an employee's feelings of job insecurity or the desire for a different position, promotion, or job transfer does not constitute personal injury sustained in the performance of duty within the meaning of the Federal Employees' Compensation Act.[5]

Actions of a claimant's supervisors or coworkers, which are characterized as discrimination or harassment may constitute a compensable factor of employment. However, for discrimination or harassment to give rise to a compensable disability under the Act, there must be evidence that the harassment or discrimination alleged did, in fact, occur.[6] Mere perceptions

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[4] *See Lillian Cutler*, 28 ECAB 125 (1976).

[5] *Id.; see also Anthony A. Zarcone*, 44 ECAB 751 (1993).

[6] *Shelia Arbour (Vincent E. Arbour)*, 43 ECAB 779 (1992).

or feelings of harassment do not constitute a compensable factor of employment.[7] An employee's allegation that she was harassed or discriminated against is not determinative of whether or not the alleged incident of harassment or discrimination occurred.[8] To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting her allegations with probative and reliable evidence.[9]

ANALYSIS

Appellant attributed his emotional condition to his performance evaluations, having to prepare a lengthy report concerning his case work activities from July 2000 and completing it by March 7, 2001, an investigation into his timesheets, being placed on a two-year period of strict probation in March 2001 and being subjected to a pattern of harassment from Mr. Denvir. Thus, the Board must look to the evidence of record to determine whether appellant's allegations are substantiated by probative and substantial evidence.[10]

Appellant's allegations that the employing establishment had issued unfair performance evaluations and engaged in improper disciplinary actions by placing him on a two-year period of strict probation relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[11] Although the handling of disciplinary actions and evaluations are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[12] As a general rule, an employee's emotional reaction to an administrative or personnel matter is not covered under the Act. But error or abuse by the employing establishment in what would otherwise be an administrative or personnel matter, or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[13]

Appellant alleged that his July 27, 2000 evaluation was unfair as he never received anything in writing from his supervisors indicating a substandard work performance or attitude deficiency. However, he submitted no evidence that the employing establishment acted unreasonably in either the issuance of his July 27, 2000 evaluation or by placing him on a two-

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[7] *See Lorraine E. Schroeder*, 44 ECAB 323 (1992).

[8] *See William P. George*, 43 ECAB 1159 (1992).

[9] *See Frank A. McDowell*, 44 ECAB 522 (1993).

[10] *See Beverly R. Jones*, 55 ECAB ___ (Docket No. 03-1210, issued March 26, 2004) (the primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board).

[11] *See Janet I. Jones,* 47 ECAB 345, 347 (1996); *Jimmy Gilbreath,* 44 ECAB 555, 558 (1993).

[12] *Id.*

[13] *Martha L. Watson,* 46 ECAB 407 (1995).

year probationary status. Mr. Denvir stated that appellant was told during his June 27, 2000 evaluation that he was not working a full workweek, had failed to carry out investigative assignments, failed to demonstrate initiative on cases, failed to timely complete investigative assignments and had a lackadaisical attitude towards his job. Mr. Denvir further indicated that, in March 2001, he and Ms. French reviewed appellant's performance and determined that he had failed to correct the problems previously outlined for him. He further found that, in reviewing appellant's time records, appellant had repeatedly submitted false time reports, claiming hours of work on cases that he did not perform. The record, thus, establishes that appellant's performance leading to his July 2000 evaluation resulted in a performance evaluation which appellant was not used to. The record further reflects that appellant was placed on probation for issues involving work performance and attitude problems in addition to falsification of timesheets. Complaints about the manner in which a supervisor performs his or her duties or the manner in which a supervisor exercises his or her discretion fall, as a rule, outside the scope of coverage provided by the Act.[14] This principle recognizes that a supervisor or manager in general must be allowed to perform his or her duties and employees will, at times, dislike the actions taken, but mere disagreement or dislike of a supervisory or managerial action will not be actionable, absent evidence of error or abuse.[15] As appellant presented no evidence that his supervisors acted erroneously or abusively, his emotional reaction to his performance evaluations and placement on a probationary status are considered self-generated in nature and are not compensable factors of his employment.

Appellant's attorney contends that appellant was singled out in his two-year term of probation, as no such status had been used before, and for failing to properly complete timesheets, which had not previously been identified as a punishable offense. Counsel contends that appellant was subjected to a pattern of abuse in March 2001 which created an unusual or extraordinary pressures and stressors. In this case, there is no showing that management actions taken which resulted in appellant's probation were in error or constituted harassment. The record indicates that appellant had a substandard performance evaluation in July 2000 which eventually resulted in his being placed on probation. Although Mr. Denvir may have been angry at appellant for not being present on March 5, 2001 because of dental problems, appellant testified that the employing establishment did not take any action against him as a result of that incident. Moreover, there is no showing that the term of appellant's probationary period or the fact that the falsification of timesheets was listed as a factor to justify appellant's probationary status constituted a pattern of abuse towards appellant. Appellant's legal contention, thus, lacks any reasonable color of validity.[16]

Appellant has also submitted insufficient evidence of error or abuse on the part of the employing establishment with respect to either the probation terms or subsequent termination. Appellant indicated that he could not perform his job without certain accommodations pertaining to terms of his probation and his supervision. Mr. Denvir indicated that in a December 20, 2001 decision, the Standing Committee on Federal Public Defenders of the Ninth Circuit found

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[14] *Marguerite J. Toland*, 52 ECAB 294, 298 (2001).

[15] *Id.*

[16] *See John F. Critz*, 44 ECAB 788, 794 (1993).

appellant's requested accommodations were not reasonable. Mr. Denvir indicated that, unless appellant could provide full medical clearance for his return to work on a full-time basis, subject to all the terms of his probation and supervision, he would be terminated by January 20, 2002. Appellant has not established a compensable employment factor under the Act with respect to these administrative matters.

Appellant indicated that he developed a feeling of disharmony and fear towards Mr. Denvir following a 1997 meeting with Mr. Denvir and the investigators and alleged that Mr. Denvir created a hostile environment through his demeanor and attitude and there were rumors that Mr. Denvir did not like investigators. Although Ms. Kennedy's August 23, 2001 declaration and Mr. Oliver's April 25, 2001 statement and testimony mirrored appellant's own belief of the office environment, they offered no substantiated examples supported by concrete evidence. Although Mr. Oliver testified that Ms. French told him that Mr. Denvir was on the warpath when appellant was absent due to dental problems, this fact does not, by itself, establish that Mr. Denvir targeted appellant or engaged in harassment. As noted above, disability is not covered when it results from an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or hold a particular position.[17] Moreover, under the circumstances of this case, the Board finds that appellant has not shown how the isolated comment of Mr. Denvir rises to a level of verbal abuse or harassment to fall within coverage under the Act. While it may have engendered offensive feelings in appellant, the record does not established how this affected the conditions of his employment to rise to a compensable factor.[18] Thus, any disability resulting from appellant's perceived environment is not compensable.

Appellant also alleged harassment from Mr. Denvir's comments at his July 27, 2000 meeting concerning his work performance; that he never received specifics regarding his work performance or attitude deficiencies; that during the March 8, 2001 meeting with Mr. Oliver and Mr. Broderick, Mr. Broderick stated that Mr. Denvir spent a half hour insulting appellant and that Mr. Denvir had a perception of Mr. Oliver and appellant not showing enough respect to him; that, during March 2001, numerous comments were made from the Office staff which led him to believe that the employing establishment had no good faith attempt to accommodate him should he return. Appellant, however, failed to submit any evidence to establish a factual basis for his allegations and the record contains no probative evidence establishing that either of these alleged incidents occurred. Accordingly, appellant has not established harassment.

Appellant alleged that the requirement that he prepare a written report on all his case activities since his July 2000 review constituted retaliation by Mr. Denvir and Ms. French. There is no evidence to establish that the supervisors harassed appellant or erred in their instructions that he complete a report on his assigned cases, nor has appellant established administrative error in the inquiry into how timekeeping records maintained at the employing establishment, based on the evidence of record the Board finds that appellant has not substantiated his allegations of discrimination or administrative error.

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[17] *Lillian Cultler, supra* note 6.

[18] *See Paul Trotman-Hall*, *supra* note 2.

CONCLUSION

The Board finds that appellant has not established any compensable factors of employment.

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 12, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member