United States Department of Labor
Employees' Compensation Appeals Board

ALEXANDER CONRAD, Appellant	)	
and	)	**Docket No. 04-1229**
	)	**Issued: September 3, 2004**
U.S. POSTAL SERVICE, PHILADELPHIA LOGISTIC DISTRIBUTION CENTER, Swedesboro, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On April 7, 2004 appellant, through his attorney, filed a timely appeal of an Office of Workers' Compensation Programs' merit decision dated December 10, 2003, in which an Office hearing representative affirmed the denial of his claim for an emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this emotional condition case.

ISSUE

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

FACTUAL HISTORY

On July 23, 2002 appellant, then a 55-year-old clerk, filed an occupational disease claim alleging that on January 14, 2002 he first became aware of his emotional condition and that on June 29, 2002 he first realized that his condition was caused by factors of his federal employment. He stated that "I have been, abused, harassed and sexually harassed by other

employees also on [sic] the front of the supervisors." Appellant stopped work on June 29, 2002 and did not return to work. Appellant submitted medical evidence from Dr. George L. Danielewski, his treating family practitioner, who noted that he experienced an emotional condition due to harassment and was disabled for work.

The employing establishment controverted appellant's claim on the grounds that his emotional condition was self-generated and not caused by factors of his employment.

By letter dated September 18, 2002, the Office notified appellant that the evidence submitted was insufficient to establish his claim. The Office advised appellant about the type of factual and medical evidence he needed to submit to establish his claim.

The employing establishment submitted interviews it conducted of appellant, his alleged harassers and witnesses as part of an investigation of allegations. Appellant alleged that he was verbally harassed by his coworkers during the period January 2001 through June 2002. He stated that he was subjected to homosexual and racial slurs. Appellant stated that, while he was in a restroom in February 2001, two employees called him a "homo." In March 2001, appellant stated that he was in the lunch room when Conrad Atkinson, a coworker, began to talk loudly about gays and sex among homosexuals. He contended that he was the target of homosexual jokes, noting that, while seated at a table in the lunch room, Mr. Atkinson asked female employees would they have sex with another female. Appellant alleged that, in April 2001, two male employees simulated kissing cheek to cheek. He contended that, in May 2001, at a 5:00 p.m. meeting with Christine Williams, his supervisor, Dublina Mosley, a coworker, stated that she thought she saw him going into the ladies' room. Appellant stated that his coworkers and supervisor laughed. In July 2001, appellant alleged that he was putting placards on the "190" when Jack Creghan, a coworker, told him that he did not have to do this. Appellant stated that Jason Croce, another coworker, responded by using a derogatory term to describe the relationship he had with him while explaining why he placed the placards on the "190." On August 9, 2001 appellant contended that Sunila Nair, a coworker, who had just returned from vacation in India, showed him a picture of a man's naked derriere and everyone laughed at him. Appellant contended that Paul Battista and Steve McColligan, both supervisors, and a male employee whose name was unknown were standing together. He stated that, when he came over, the employee pulled his pants down and bent over. In October 2001, appellant alleged that Joe Sye, a coworker, called him to come over to the desk of Angie Clemente, a supervisor, where he saw surgical gloves that had been shaped into a penis. Appellant stated that everyone was laughing. In a November 2001 meeting, appellant alleged that Tara Morrison, a coworker, offered him a piece of candy and, when he started to swallow the candy, she yelled that it was a penis. Appellant further alleged that in December 2001 he went to the maintenance room a few times to avoid being harassed and a couple of days later John Mechanik, a coworker, used a derogatory word in referring to him as a homosexual. In May 2002, employees screamed louder and louder everyday that he was a homosexual in front of Malinda Wilson, his supervisor. On June 25, 2002 appellant stated that Mike Marino, a coworker, asked whether he wanted him to bend over. Appellant stated that he did not report the above incidents but, there were witnesses to several of them.

Appellant also alleged that he was subjected to violence at the employing establishment. He alleged that, in April 2002, Mr. Atkinson tried to hit him with a tug but he jumped out of the

way. He reported the tug incident to Vicky Kuhn, his supervisor, who replied that until Mr. Atkinson hit him and he was injured, there was nothing she could do. Appellant alleged that, in June 2002, Derek Bernard, a coworker, was driving a tug and tried to hit him. He stated that Mr. Bernard laughed at him. In November 2001, appellant stated that Ivan Mosley, a coworker, tried to hit him while riding a tug. He stated that he did not report any of the tug incidents and there were no witnesses to these incidents.

Appellant contended that on June 21, 2002 Paul Cristy, a coworker, hit him on the arm with a bulk mail cart. He stated that Mr. Cristy later apologized to him and the incident was witnessed by Ms. Clemente and Mr. Sye. On June 28, 2002 he reported Mr. Cristy to Mr. McColligan, his supervisor, because he almost hit him twice that day while riding a tug. He related that Mr. McColligan's response that he should tell Mr. Cristy to slow down was witnessed by Mr. Croce.

Appellant alleged that he was subjected to racial threats by Mr. Marino who told him that he was not going to work there for a long time and called him a "nigger." He did not report this incident. Appellant stated that in 2001 someone called his house six to eight times making homosexual slurs. Once he installed a special device, the telephone calls stopped. During the winter of 2001, appellant alleged that someone followed him home around 2:00 a.m. or 3:00 a.m. He stated that he could not work, go to the restroom or the lunch room because he did not feel safe. He stated that he attempted suicide three times and he had homicidal thoughts in January, April and July 2002. Appellant related that on June 28, 2002 after being harassed by Mr. Marino all night, he grabbed a pipe and was going to hit him but stopped himself.

Appellant was diagnosed with having a major depressive disorder with psychotic symptoms, reactive depression to sexual harassment, acute hypertension, depression anxiety, insomnia and suicidal ideation and that he was receiving psychiatric treatment. He listed Ms. Clemente, Lori Martinez, Mr. McColligan, Mr. Battista and "Sam" as supervisors perceived as treating the harassment as a joke. Appellant stated that Ms. Williams did not think the harassment was a joke. He noted that sometimes she witnessed the harassment and her reaction was one of embarrassment and she did not know what to do. Appellant went to Robert Armentani, his union representative, about the harassment but it did not stop. He received help from Wendy Pezzi, a workplace intervention specialist, and received sexual harassment training at the employing establishment.

Ms. Wilson, Ms. Williams, Mr. Battista, Ms. Kuhn, Ms. Clemente, Mr. McColligan and Ms. Martinez denied any knowledge of appellant being subjected to homosexual slurs, inappropriate comments and practical jokes, violence or racial slurs during interviews conducted at the employing establishment. They stated that appellant never complained to them about any type of harassment and that all employees had received sexual harassment training.

Ms. Wilson stated that some employees were loud and obnoxious but, nobody took them seriously and their comments were mostly work related. She further stated that she would not have allowed sexual comments or the passing of nude pictures to occur. Ms. Williams noted that a tug driver whose name was unknown was taken off a tug because employees complained about him hitting poles and equipment. She noted that she counseled appellant about sexual harassment when he put his hands around the breasts of a female coworker while they were

taking a group picture and that he subsequently stopped joking around with his female coworkers. Ms. Williams stated that appellant was outspoken about everything and that she could not imagine him not saying anything about someone making racial slurs at him.

Mr. Battista stated that Joe Bake, a contract driver who was not an employing establishment employee, told him and Mr. McColligan a joke and at the end of the joke, Mr. Bake pulled his pants down. Mr. Battista stated that he told Mr. Bake that his actions were inappropriate and he apologized. He did not recall appellant being anywhere near this incident. He stated that appellant could not have witnessed this incident from his work area because containers would have obstructed his view.

Regarding appellant's allegations of physical harm, Ms. Kuhn stated that if appellant had reported such incidents to her she would have addressed them right away. With respect to appellant's allegation of being subjected to racial slurs by Mr. Marino, Ms. Kuhn noted that appellant complained to her about Mr. Marino's poor work habits and she had Mr. Marino moved to another area where she felt he could perform his job. She was not aware of any hostility between appellant and Mr. Marino. Ms. Kuhn described her work area as a close knit relationship where everyone basically got along with one another.

Ms. Clemente noted that workers tied gloves up and threw them on the floor so when the tugs came through they would run them over and make them pop. She stated that she had not been able to catch the person responsible for this action but, noted that there was nothing obscene about it. Ms. Clemente related that she had to speak to tuggers about their handling of the equipment and hitting poles. She stated, however, that no employee had ever complained to her about being hit by one.

Mr. McColligan did not recall an incident where the driver pulled down his pants. He stated that if he had witnessed appellant being hit by a bulk mail cart he would have corrected the situation by going to the employee or the employee's boss.

Ms. Martinez stated that she was not aware of appellant ever being struck by a bulk mail cart or of attempts by tug drivers to hit him. She did recall hearing about an altercation between appellant and a tug driver when appellant blocked the area that the tug drivers went through because he said it made his job easier. Ms. Martinez also had no knowledge of appellant being subjected to a racial slur by Mr. Marino.

Appellant's coworkers, Donna Stout, Mr. Creghan, Ms. Morrison, Damon Allen, Ms. Mosley, Mr. Mosley, Mr. Croce, Mr. Sye, Mr. Bernard, Ms. Nair, Ms. Pezzi, Mr. Cristy and Mr. Marino all denied any knowledge of appellant being subjected to homosexual slurs, inappropriate comments and practical jokes, violence or racial slurs. They noted that appellant did not mention that he was subjected to any type of harassment or racial slurs to them. With the exception of Ms. Mosley and Mr. Sye, the employees stated that they had received sexual harassment training at the employing establishment.

Ms. Stout stated that inappropriate joking did not take place around appellant.

Mr. Creghan stated that he asked appellant why he placed placards on the 190 cells and did not recall any derogatory remark alleged to have been made about appellant by Mr. Croce.

Mr. Creghan addressed derogatory phrases that were used among employees but stated that such phrases were not directed at appellant. He did not know whether anyone hit appellant with a tug, noting that appellant worked in a high activity area and he did not believe that an employee would hit him on purpose. Mr. Creghan noted how a former employee, Butch, almost hit appellant with a tug.

Mr. Allen recalled Ms. Morrison passing out candy penises. He stated that everyone was laughing, but did not recall Ms. Morrison telling appellant that he had swallowed a penis. Further, he did not recall telling appellant that swallowing the candy was disgusting but, it was possible. Mr. Allen also did not recall that the incident occurred on February 14, 2002.

Ms. Mosley stated that, if homosexual comments had been directed towards appellant, he would have told the person if he was being harassed. She denied stating that she saw appellant going into the ladies' room. Ms. Mosley did not remember candy shaped like penises being passed around during a meeting in November 2001. She noted that she had seen employees get hit by the bulk mail cart and there was never a time an employee did not sustain an injury. Ms. Mosley noted that if appellant had been hit he would have been out of work. She described an incident in which appellant grabbed two balloons and placed them in front of his coworker, Brenda Galloway, while a picture was being taken. Ms. Mosley reported that appellant squeezed the balloons as if he were squeezing Ms. Galloway's breasts. She also stated that appellant told sex stories at work. Ms. Mosely believed appellant made allegations of harassment in order to leave the employing establishment on disability.

Mr. Mosley related that appellant was a big part of the meetings regarding safety but, that he would look at the tug drivers and still walk in front of them. Mr. Mosley noted that appellant would hear the horn but, still walk in front of the drivers. He denied ever hitting appellant with a tug. However, he noted that he almost hit appellant when he walked in front of him while crossing Main Street and he requested that Ms. Kuhn talk to appellant about his actions.

Mr. Croce denied appellant's allegation that he made a derogatory comment about him in reply to Mr. Creghan's question of why he was putting 190 placards on the 190 cell area. Mr. Croce stated that appellant made a sexual comment to him and Rich Watson, a coworker, about the size of his penis and that appellant cursed.

Mr. Sye denied calling appellant over to his work area to see a glove shaped like a penis. He stated that he and appellant only talked to each other about football.

Mr. Bernard stated that he did not recall almost hitting appellant with a tug. He noted that appellant had walked out in front of him on several occasions and that he warned appellant to watch where he was going. Mr. Bernard further noted that one month prior to making his harassment allegations, appellant asked a coworker, Larry Barber, why he and Dave Bear, another coworker, acted like they were black. Mr. Bernard stated that he thought appellant's question was weird.

Ms. Nair denied showing appellant a picture of a man's naked derriere. She noted that appellant made a sexual comment to her, which caused her to stop speaking to him.

Mr. Cristy did not recall hitting appellant in the arm with a bulk mail cart. He also did not recall almost hitting appellant while riding a tug. Mr. Cristy noted that he was a careful driver and that he always blew his horn to warn people that he was coming through the area.

Mr. Marino denied asking appellant if he wanted him to bend over. He did not recall working in the area on the date he allegedly made the comment. Mr. Marino also denied making any racial slur to appellant.

Ms. Morrison stated that on February 14, 2002 she offered her coworkers and appellant candy shaped like a penis. She stated that appellant was the only person to ask for another piece.

Mr. Armentani stated that appellant reported incidents of being subjected to homosexual remarks and physical harassment but he did not witness any of these incidents. Mr. Armentani further stated that he had no information regarding appellant being subjected to racial slurs. He noted that there was a lot of joking of a sexual nature by employees but that no one other than appellant had ever approached him about being sexually harassed. Mr. Armentani advised appellant to report the incidents of harassment to his supervisors and noted appellant's response that he was not going to do so because they stuck together. Mr. Armentani recalled a conversation he had with appellant about the stress he felt was associated with harassment. He advised appellant that he had a right to file an occupational disease claim but did not recall discussing disability with appellant.

The Office received copies of Equal Employment Opportunity (EEO) complaints filed by appellant against the employing establishment for sexual harassment and discrimination and correspondence between appellant and his social workers excusing him from work due to his emotional condition. The Office also received medical evidence concerning appellant's emotional condition.

Appellant submitted two statements reiterating his contentions that he was verbally and physically harassed and subjected to racial slurs during the period January 2001 through June 2002. He noted that he did not report the alleged harassment to his supervisors.

In a February 7, 2003 decision, the Office found that the evidence of record was insufficient to establish that appellant sustained an emotional condition while in the performance of duty. The Office found that appellant failed to substantiate his allegations.

By letter dated February 21, 2003, appellant, through his attorney, requested an oral hearing before an Office hearing representative. He submitted medical evidence regarding his emotional condition.

In a December 10, 2003 decision, the hearing representative found that the evidence of record was insufficient to establish that appellant sustained an emotional condition while in the performance of duty. The hearing representative determined that appellant failed to establish that the alleged incidents of harassment occurred. Regarding the sex candy incident, the hearing representative found that this did not constitute a compensable employment factor as it was unrelated to appellant's regularly or specially assigned duties. Accordingly, the hearing representative affirmed the Office's February 7, 2003 decision.

LEGAL PRECEDENT

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by factors of his federal employment.[1] To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[2]

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 the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[3]

In emotional condition cases, the Office 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 to be factors of employment and may not be considered.[4] Therefore, the initial question is whether appellant has alleged compensable factors of employment that are substantiated by the record.[5]

Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[6] To establish entitlement, appellant is required to establish a factual basis for the claim by supporting his allegations with probative and reliable evidence.

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[1] *Pamela R. Rice*, 38 ECAB 838 (1987).

[2] *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

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

[4] *Margaret S. Kryzcki*, 43 ECAB 496, 502 (1992).

[5] *Donald E. Ewals*, 45 ECAB 111, 122 (1993).

[6] *Sherry L. McFall*, 51 ECAB 436 (2000); *Sherman Howard*, 51 ECAB 387 (2000).

ANALYSIS

Appellant attributed his emotional condition to various incidents that he alleged constituted harassment. He provided statements of the actions attributed to his coworkers and supervisors. Appellant contended that he was subjected to sexual slurs, inappropriate comments and practical jokes regarding homosexuality, threats of violence and racial slurs. Disputes and incidents alleged as constituting harassment or discrimination by supervisors and coworkers, if established as occurring and arising from the employee's performance of his or her regular duties, could constitute employment factors.[7] However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be probative and reliable evidence that harassment or discrimination did in fact occur.[8] Mere perceptions of harassment or discrimination are not compensable under the Act.[9]

The Board finds that appellant has not submitted sufficient evidence to establish as factual the alleged homosexual comments, racial slurs and threats of physical harm. Employing establishment supervisors, Ms. Wilson, Ms. Williams, Mr. Battista, Ms. Kuhn, Ms. Clemente, Mr. McColligan and Ms. Martinez denied any knowledge of appellant being subjected to homosexual slurs, inappropriate comments and practical jokes, violence and racial slurs.

Ms. Wilson noted that she counseled appellant about sexual harassment after he put his hands around the breasts of a female coworker while they were taking a group picture. Mr. Battista stated that Mr. Bake was not an employing establishment employee and appellant was not in the area when Mr. Bake pulled his pants down after telling him and Mr. McColligan a joke. Ms. Kuhn noted that appellant complained to her about Mr. Marino's poor work habits and that she subsequently moved Mr. Marino to another work area. She, however, stated that she was not aware of any hostility between appellant and Mr. Marino and that the people in her work area had a close knit relationship. Ms. Clemente stated that there was nothing obscene about the tied up gloves on the floor and that although she spoke to tuggers about their handling of the equipment and hitting poles, no employee had complained to her about being hit by one. Mr. McColligan stated that he did not remember the incident involving Mr. Bake. He also stated that if he had seen appellant being hit by a bulk mail cart he would have corrected the situation on the spot by going to the employee or the employee's supervisor. Ms. Martinez was not aware of appellant being struck by a bulk mail cart or tug drivers who twice attempted to hit appellant. She could only recall hearing about an incident where appellant blocked the area used by tug drivers.

Although Mr. Armentani, appellant's union representative, noted that appellant reported incidents of being subjected to homosexual slurs and physical harm to him, he stated that he did not witness any of the incidents. He also stated that appellant refused to report these incidents to his supervisors because he believed they would stick together.

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[7] *Janice I. Moore*, 53 ECAB ___ (Docket No. 01-2066, issued September 11, 2002). *See David W. Shirey*, 42 ECAB 783 (1991).

[8] *Marlon Vera*, 54 ECAB ___ (Docket No. 03-907, issued September 29, 2003).

[9] *Kim Nguyen*, 53 ECAB ___ (Docket No. 01-505, issued October 1, 2001).

Appellant's coworkers provided statements that they did not have any knowledge of appellant being subjected to homosexual slurs, inappropriate comments and practical jokes, threats of violence or racial slurs. Ms. Stout stated that inappropriate joking did not take place around appellant. Mr. Creghan did not recall a derogatory remark by Mr. Croce regarding why appellant was placing placards on the 190 cells. Further, he did not believe that anyone would purposely hit appellant with a tug.

Ms. Morrison acknowledged that she offered her coworkers, including appellant, candies shaped like a penis on February 14, 2002. She stated that appellant was the only person to ask for another piece. She did not address appellant's allegation that she yelled that he had swallowed a penis. Mr. Allen recalled Ms. Morrison passing out candy shaped like penises but he did not recall Ms. Morrison telling appellant that he had swallowed a penis. Further, although he said it was possible, he did not recall telling appellant that swallowing the candy was disgusting. The Board notes that, while bringing candy shaped like a penis to work and offering it to coworkers may be in poor taste, there is no evidence of record establishing that such action constituted harassment directed at appellant.

Ms. Mosley denied stating that she saw appellant going into the ladies' room. She stated that if appellant had been hit by a bulk mail cart he would have been out of work. In addition, she noted that the sexual gestures made by appellant towards a coworker when he squeezed two balloons as if he was squeezing her breasts. Although Mr. Mosley stated that he almost hit appellant when he walked in front of him while crossing Main Street, he noted that appellant would walk in front of the tug drivers even after hearing the horn warn him of their presence. This evidence does not support the threat of violence against appellant. Mr. Croce denied making a derogatory comment to appellant and noted that appellant made a sexual comment to him and Mr. Watson regarding the size of his penis. Mr. Sye denied calling appellant over to his work area to see a glove shaped like a penis. He stated that he and appellant only talked to each other about football. Mr. Bernard did not remember almost hitting appellant with a tug. Ms. Nair denied showing appellant a picture of a man's naked derriere and stated that appellant made a sexual comment to her which caused her to stop speaking to him. Mr. Cristy did not recall hitting appellant in the arm with a bulk mail cart or with a tug. He noted that he always blew his horn to warn people that he was coming through the work area. Further, Mr. Marino denied asking appellant if he wanted him to bend over and directing a racial slur towards appellant.

Based on the foregoing, the Board finds that appellant has not submitted factual evidence supporting his allegations of harassment. Thus, he has failed to establish this compensable factor of employment.

Appellant's filing of EEO complaints against the employing establishment for sexual harassment and discrimination falls within the category of administrative or personnel matters.[10] It is well established that administrative or personnel matters, although generally related to employment, are primarily administrative functions of the employer rather than duties of the employee.[11] The Board has also found, however, that an administrative or personnel matter may

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

[11] *Anne L. Livermore*, 46 ECAB 425 (1955); *Richard J. Dube*, 42 ECAB 916 (1991).

be a factor of employment where the evidence discloses error or abuse by the employing establishment.[12] In this case, the record does not contain any findings of harassment or discrimination by the EEO. Thus, appellant has failed to establish a compensable factor of employment.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained an emotional condition while in the performance of duty.[13]

ORDER

IT IS HEREBY ORDERED THAT the December 10, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 3, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[12] *See Michael Thomas Plante*, 44 ECAB 510 (1993); *Kathleen D. Walker*, 42 ECAB 603 (1991).

[13] Unless appellant alleges a compensable factor of employment substantiated by the record, it is unnecessary to address the medical evidence. *Roger Williams*, 52 ECAB 468 (2001); *Margaret S. Kryzcki*, 43 ECAB 496 (1992).