

**United States Department of Labor
Employees' Compensation Appeals Board**

ROBERT LOMBARDO, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Brooklyn, NY, Employer**

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**Docket No. 05-1921
Issued: March 13, 2006**

Appearances:
Robert Lombardo, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 15, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated May 10, 2005. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

Appellant, a 48-year-old postal supervisor, filed a Form CA-2 claim for benefits based on an emotional condition on February 23, 2004. He became upset and developed hypertension and nervousness due to a confrontation with an employee on February 8, 2004.

By letter dated March 5, 2004, the Office advised appellant to submit additional information in support of his claim. The Office asked appellant to describe in detail the employment-related conditions or incidents which he believed contributed to his emotional

condition and to provide specific descriptions of all practices, incidents or confrontations to which he attributed his condition.

Appellant submitted a February 8, 2004 statement, as follows:

“On Sunday February 8, 2004 at approximately 4:05 p.m. regular mail handler [DeSean M.] Joshua had an argument with regular mail handler [Phillip] Blassenheim in the 180 operation. Then at 4:10 p.m. I observed regular mail handler Cohen slamming the postcon repeatedly. I asked her what was the matter and she said, ‘I can[no]t take that radio anymore. It is so loud’ -- I then approached regular mail handler [Mr.] Joshua and asked him to turn off the radio. He replied, ‘you better not touch my radio.’ From the 180 operation postcon. I approached the radio and pulled the plug. He came over and pushed me by my right shoulder. I walked away over to the 180 operation desk and called [management official Reghuvaran M. Nair] on the loud speaker. Regular mail handler walked over to the desk and came within a few inches from my face stating: ‘If I get suspended and fired I will kill you, I [wi]ll be waiting for you outside so help me God. You understand that fagot, punk’.... At that moment the tone of his voice became stronger. I was getting worried of what might happen next. I walked away and went to look for [management official Nair] by the 185 operation and met her and supervisor Blue by the 185. I explained the situation and went to the office. At that moment I was very upset and nervous with a headaches and dizziness. Regular mail handler Delarosa (union shop steward) had responded to the office and told me that he observed me sweating. My eyes were dilating and I had trouble standing still. He advised me to go to the hospital. The New York Police called the ambulance. I felt threatened by him at that moment and now that [Mr. Joshua] was placed under emergency suspension.”

In a February 8, 2004 handwritten statement, coworker Ms. Cohen asserted:

“I slammed a postcon and [appellant] asked me why I did it. I told him the music was too high. I heard [appellant] asked mail handler [Mr.] Joshua to shut off the music and whatever else happened I did not hear.”

In a February 8, 2004 statement, coworker Mr. Blassenheim alleged:

“At about 4:05 p.m. [employee] Joshua took my small black briefcase off the 180 postcon set-up desk [and threw it] on the supervisor’s starting clock-in desk without my permission. This behavior will not be tolerated.”

In a report dated April 21, 2004, Dr. Alexander Heisman, a psychiatrist, stated:

“[Appellant] was involved in an incident at work during which time his life was threatened. He became severely anxious and required hospital emergency room care. As a result of this incident, he is unable to work and has [become] severely anxious, depressed, irritable and obsessive. So serious is his impairment that he had to temporarily separate from his wife and sent her back to her family in Europe until such time as he feels his behavior is under better control. He is fearful,

displaying signs of agitation, distress, autonomic [responsiveness] to trauma related stressors, depression, crying (even publicly in front of his supervisor and other staff), loss of appetite and intrusive thoughts. It is my medical opinion that there is causality between the work-related incident and this man's present psychiatric condition."

By letter dated May 23, 2004, the employing establishment controverted the claim. Based on an investigation, appellant failed to prove that Mr. Joshua threatened to kill him. The employing establishment stated that Mr. Joshua was initially placed on emergency suspension.¹ However, it found based on its investigation that appellant was unable to prove that Mr. Joshua threatened to kill him.² The employing establishment therefore challenged appellant's contention that his claimed stress condition was related to his employment duties.

By decision dated June 9, 2004, the Office denied appellant compensation for an emotional condition, finding that appellant failed to establish fact of injury. The Office determined that, based on the evidence presented, appellant failed to provide sufficient support for his allegation that Mr. Joshua threatened him in the manner alleged.

On June 18, 2004 appellant requested an oral hearing, which was held on March 1, 2005. At the hearing, appellant reiterated his allegations that Mr. Joshua pushed him and threatened him with bodily harm when he asked him to lower the volume on his radio on February 8, 2004, resulting in severe anxiety, his removal from the worksite and his admission to the hospital emergency room. Appellant acknowledged at the hearing, however, that "it was his word against mine" and that he told the postal inspector he could not prove his allegations.

In an undated, handwritten statement received by the Office on July 2, 2004, Mr. Joshua denied appellant's allegations.

By decision dated May 10, 2005, an Office hearing representative affirmed the August 14, 2003 Office decision.

LEGAL PRECEDENT

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition and rationalized medical opinion establishing that compensable

¹ The employing establishment submitted a copy of the February 26, 2004 Notice of Removal, addressed to Mr. Joshua, which provided as reasons for the removal: (1) Violation of Last Chance Settlement Agreement dated May 31, 2003; and (2) Conduct Unbecoming of a Postal Employee, which cited Mr. Joshua for playing his radio too loud, refusing to lower the volume of the radio when appellant asked him and accosting appellant in a menacing manner and threatening him bodily harm if he were to cause him to be suspended.

² Mr. Joshua was subsequently restored to work in a "Last Chance Settlement and Agreement. This agreement, dated March 10, 2004 and signed by appellant, a management representative and a union representative, withdrew the Notice of Removal in return for appellant's acceptance of a 14-day suspension, his agreement to abide by the terms of an August 20, 2003 settlement agreement and to withdraw whatever grievances he had filed in connection with appellant's claim.

employment factors are causally related to the claimed emotional condition.³ There must be evidence that implicated acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.⁴

The first issue to be addressed is whether appellant has cited factors of employment that contributed to her alleged emotional condition or disability. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.⁵ On the other hand, disability is not covered where it results from an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position or to secure a promotion. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute a personal injury sustained while in the performance of duty within the meaning of the Act.⁶

ANALYSIS

Appellant has alleged that harassment and intimidation on the part of his coworker Mr. Joshua contributed to his claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and intimidation by coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.⁷ 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.⁸ In this case, the employing establishment denied that appellant was subjected to harassment and intimidation and appellant has not submitted sufficient evidence to establish that he was harassed or intimidated, with a threat to kill, during the alleged incident, which occurred between appellant and Mr. Joshua on February 8, 2004.⁹

Appellant alleged that Mr. Joshua engaged him in a verbal altercation and threatened bodily harm against him in order to intimidate him from taking adverse formal action against Mr. Joshua. The employing establishment investigated appellant's allegations but appellant, by his own acknowledgment, was unable to produce any corroborating factual evidence, such as witness statements, to establish that the statements actually were made or that the actions alleged actually occurred.¹⁰ Employees Cohen and Blassenheim were present at the worksite at the time

³ See *Debbie J. Hobbs*, 43 ECAB 135 (1991).

⁴ See *Ruth C. Borden*, 43 ECAB 146 (1991).

⁵ *Lillian Cutler*, 28 ECAB 125 (1976).

⁶ *Id.*

⁷ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

⁸ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

⁹ See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

¹⁰ See *William P. George*, 43 ECAB 1159, 1167 (1992).

the alleged incident took place but could not support appellant's allegations that Mr. Joshua pushed him and verbally threatened him. Mr. Cohen concurred with appellant that Mr. Joshua had been playing his radio at an excessively high level and heard him ask Mr. Joshua to turn it off, but was unable to corroborate that anything else had transpired between these coworkers. Mr. Blassenheim stated that he saw Mr. Joshua take his briefcase off a desk and throw it on appellant's clock-in desk; however, he did not discuss whether any altercation had taken place between appellant and Mr. Joshua. Appellant acknowledged at the hearing that it was a matter of his word against Mr. Joshua's and Mr. Joshua denied appellant's allegations that he had ever made physical contact with appellant or threatened him with bodily harm.

In addition, although the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.¹¹ While the instant record indicates that appellant and Mr. Joshua may have exchanged words in regard to the volume level on Mr. Joshua's radio on February 8, 2004, appellant has not shown how such isolated comments would rise to the level of verbal abuse or otherwise fall within the coverage of the Act. Appellant has therefore failed to substantiate that the alleged February 8, 2004 incident constituted a factor of employment.¹²

The Board notes that, since appellant has not established a compensable work factor, the medical evidence will not be considered.¹³

CONCLUSION

The Board finds that the Office properly found that appellant failed to meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

¹¹ *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

¹² The Board notes that appellant submitted additional evidence to the record following the October 26, 2004 Office decision. The Board's jurisdiction is limited to a review of evidence which was before the Office at the time of its final review. 20 C.F.R. § 501.2(c).

¹³ *See Margaret S. Krzycki*, 43 ECAB 496 (1992).

ORDER

IT IS HEREBY ORDERED THAT the May 10, 2005 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: March 13, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board