

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

R.C., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION HEALTH)
CENTER, El Paso, TX, Employer)

**Docket No. 07-63
Issued: March 22, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 6, 2006 appellant timely appealed the August 28, 2006 merit decision of the Office of Workers' Compensation Programs which denied his claim for an employment-related emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

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

FACTUAL HISTORY

On June 28, 2006 appellant, a 52-year-old supervisory diagnostic radiologic technologist, filed an occupational disease claim for an employment-related depressive disorder. He identified June 19, 2006 as the date he first realized his condition was employment related. Appellant also stopped working on June 19, 2006.

Appellant indicated that he had been retaliated against for reporting the theft of office equipment. On June 13, 2006 an employee noticed a cabinet missing from the front desk in radiology service. Appellant stated that an employee admitted to opening the department door to allow a former radiology service employee to remove the cabinet.¹ He subsequently reported the incident to the Human Resources department. The “disgruntled” former employee reportedly accused appellant of inappropriate behavior and making sexual remarks.² Similar accusations were made by four current female employees in radiology service. Appellant stated that the five employees had not previously filed a complaint or grievance against him. He also noted that the disgruntled former employee waited until she was caught stealing before accusing appellant of improper behavior.

According to appellant, the Chief of Staff, Dr. Stephen R. Shapiro, immediately retaliated against him without first investigating the radiology service department staff. On June 19, 2006 Pam Hillers, head of Human Resources, and Dr. Shapiro reportedly placed appellant on a detail outside the radiology service department pending further investigation of the alleged sexual misconduct. Appellant stated that he totally lost his composure when Dr. Shapiro asked him to sign an unspecified document. He immediately requested four weeks of emergency medical leave and access to an employing establishment psychiatrist. Appellant stated that he sought counseling through the Employee Assistance Program (EAP). The EAP counselor, a clinical psychologist, diagnosed adjustment disorder with mixed anxiety and depressed mood. However, he reported seeing appellant on June 16, 2006 rather than June 19, 2006, as appellant claimed.³

The document appellant refused to sign was a June 16, 2006 memorandum from Dr. Shapiro advising him that he was immediately being detailed to another department. The memorandum explained that Dr. Shapiro had recently met with five female employees -- four current radiology service employees and one former department employee -- at their request to discuss allegations concerning appellant’s conduct as supervisor of radiology service. Appellant was accused of “inappropriate behavior and sexual comments.” Dr. Shapiro further explained that the immediate transfer was to ensure that there was no disruption to “patients” services or disruption of the work environment for the other employees in radiology service. He also advised appellant not to enter the radiology service department until the pending matter was resolved.

In an August 22, 2006 letter to the Office, Dr. Shapiro explained the circumstances that gave rise to appellant’s June 16, 2006 transfer. He noted that he met with five female employees on June 15, 2006 at their request to discuss allegations of inappropriate behavior and sexual comments by appellant. Dr. Shapiro further stated that he informed appellant on June 16, 2006 that the allegations were being reviewed and that, in the interim, he would be detailed to another department. Appellant became extremely emotional and stormed out of Dr. Shapiro’s office

¹ Appellant stated that the former radiology service employee had been transferred to another department within the same facility approximately seven months earlier.

² Appellant would later identify Zelda Lord as the disgruntled former radiology service employee. He once counseled Ms. Lord for, among other things, tardiness. Appellant also claimed that she had made inappropriate sexual comments to him and that she was always very forward and sexually explicit when around him.

³ Appellant would later clarify that the meeting with Dr. Shapiro occurred June 16, 2006.

without signing the June 16, 2006 memorandum. Dr. Shapiro explained that his actions that day were consistent with the employing establishment's policy regarding immediate and appropriate corrective action where incidents of sexual harassment have been alleged.

A copy of the employing establishment's sexual harassment policy was also submitted into the record. The policy states, in part, that "[s]upervisory officials must be able to show that immediate and corrective action was taken in instances where sexual harassment has been alleged."

In a decision dated August 28, 2006, the Office denied appellant's claim because he failed to establish a compensable employment factor as the cause of his emotional condition.

LEGAL PRECEDENT

To establish that he sustained an emotional condition causally related to factors of his federal employment, appellant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his condition; (2) rationalized medical evidence establishing that he has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that his emotional condition is causally related to the identified compensable employment factors.⁴

Workers' compensation law does not apply to each and every injury or illness that is somehow related to one's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless, does not come within the purview of workers' compensation. When disability results from an emotional reaction to regular or specially-assigned work duties or a requirement imposed by the employment, the disability is deemed compensable. Disability is not compensable, however, when it results from factors such as 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.⁵ Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a basis in fact for the claim by supporting his allegations with probative and reliable evidence.⁶ When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.⁷

ANALYSIS

Appellant's primary complaint is that the Chief of Staff, Dr. Shapiro, improperly removed him from his supervisory position in radiology service without fully investigating the allegations of sexual harassment levied against him by, among others, a disgruntled former

⁴ See *Kathleen D. Walker*, 42 ECAB 603 (1991).

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

⁶ *Kathleen D. Walker*, *supra* note 4. Unless a claimant establishes a compensable factor of employment, it is unnecessary to address the medical evidence of record. *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

⁷ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

subordinate employee, who appellant had recently accused of theft. He characterized his reassignment as a “drastic action” by Dr. Shapiro that “caused [him] great emotional stress and depression.” Appellant’s desire to continue working in radiology service is, by itself, not compensable.⁸

Dr. Shapiro’s decision to transfer appellant to another department pending further investigation of the alleged sexual misconduct is an administrative matter that would normally fall outside the Act’s protective umbrella.⁹ However, an employee’s emotional reaction to a personnel or administrative matter is compensable if the record demonstrates that the employing establishment either erred or acted abusively in discharging its responsibilities.¹⁰

Appellant believed that the alleged sexual misconduct should have been more thoroughly investigated before any corrective action was taken. Dr. Shapiro’s actions on June 16, 2006 comply with the employing establishment’s policy regarding sexual harassment. As a supervisory official, he was obligated to take “immediate and corrective action” in response to allegations of sexual harassment. The policy does not dictate that implementation of corrective measures must await a full and complete investigation of the alleged misconduct, as appellant would have preferred.

While Dr. Shapiro’s actions may have seemed premature to appellant, he, in fact, acted in accordance with the employing establishment’s policy of promptly responding to allegations of sexual harassment. Given that four of the complaining employees continued to work under appellant’s direct supervision, Dr. Shapiro’s decision to transfer appellant out of radiology service was neither erroneous nor abusive. He explained that his intention was to avoid disrupting patients’ services and to avoid disrupting the work environment of the other radiology service employees. Accordingly, the Board finds that appellant did not establish error or abuse on Dr. Shapiro’s part in transferring appellant effective June 16, 2006.

There is also no evidence establishing that the sexual harassment accusations levied against appellant were a form of harassment or retaliation. For harassment to give rise to a compensable disability there must be evidence that harassment occurred.¹¹ A claimant’s mere perception of harassment is not compensable.¹² The allegations of harassment must be substantiated by reliable and probative evidence.¹³ The record in the instant case does not contain any reliable and probative evidence of harassment.

⁸ An employee’s frustration from not being permitted to work in a particular environment or hold a particular position is not compensable. *Lillian Cutler, supra* note 5.

⁹ *Ruthie M. Evans*, 41 ECAB 416 (1990).

¹⁰ *Id.*

¹¹ *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

¹² *Id.*

¹³ *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991).

Appellant failed to establish that he was harassed by a “disgruntled” former subordinate. He also failed to demonstrate that the June 16, 2006 transfer from radiology service was either erroneous or abusive. Because appellant failed to establish a compensable employment factor, the Office properly denied his claim for an emotional condition.

CONCLUSION

Appellant failed to establish that he sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the August 28, 2006 decision of the Office of Workers’ Compensation Programs is affirmed.

Issued: March 22, 2007
Washington, DC

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

David S. Gerson, Judge
Employees’ Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees’ Compensation Appeals Board