

)	
B.T., Appellant)	
)	
and)	Docket No. 09-355
)	Issued: October 14, 2009
U.S. POSTAL SERVICE, POST OFFICE,)	
Brooklyn, NY, Employer)	
)	

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

On November 17, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 21 and August 27, 2008 merit decisions denying his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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

On June 5, 2007 appellant, then a 55-year-old sales and service clerk, filed a claim alleging that he sustained an emotional condition in the performance of duty due to stress and anxiety “coming from daily verbal and mental abuse by another employee.” He stopped work on May 24, 2007.

In a June 22, 2007 letter, the Office requested that appellant submit additional evidence in support of his claim.

In a July 10, 2007 statement, appellant alleged that he was harassed by Richard Ruggirello, a coworker, which had increased dramatically since Easter 2007. He claimed that Mr. Ruggirello made crude remarks to him and also about him to coworkers. Mr. Ruggirello did things which made appellant's work more difficult, such as closing and locking doors that were to remain open and placing mail and equipment in the wrong area so that he would have to look for it. Appellant advised management at several different levels that he feared for his safety as Mr. Ruggirello's hostile behavior became more severe. He claimed that management was aware of Mr. Ruggirello's propensity to harass but chose to do nothing about the problem. Appellant alleged that, on one occasion, Mr. Ruggirello came up behind him (within about one foot) and jingled keys and coins in his pockets while making strange sounds. Mr. Ruggirello also made a comment about visiting his wife's workplace. Appellant alleged that Mr. Ruggirello called him a "flicking clown" several times loud and clear in front of several coworkers. Mr. Ruggirello also told customers and coworkers that the service lines were long because he had to work with appellant. On May 24, 2007 appellant was treated at an emergency room.

In a June 20, 2007 statement, Pam Elkins, appellant's supervisor, indicated that she had supervised appellant since January 2007 but had "not observed any animosity or verbal abuse towards [him] from [Mr.] Ruggirello or any other clerk." On June 20, 2007 Richard Chin, the acting manager since April 7, 2007, indicated that he had "never observed any animosity or verbal abuse toward [appellant] from Mr. Ruggirello or any other employees." In a June 25, 2007 statement, Eugene Salfelder, a customer service supervisor, indicated that he noticed some tension between appellant and Mr. Ruggirello since March 19, 2007. He stated that remarks had been made about the lines in the lobby, how long it took to break down distribution, handing out the accountables mail and locking the safe and doors. Mr. Salfelder stated that on Good Friday in 2007 appellant extended his hand to shake Mr. Ruggirello's but Mr. Ruggirello ignored him. He noted, "Most of this occurs without mentioning a name or directing these comments to an individual."

In a July 24, 2007 decision, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors.

Appellant submitted medical evidence concerning his emotional condition from Dr. Ilana Reich, an attending clinical psychologist.

In a November 1, 2007 statement, Ms. Elkins indicated that since she produced her June 20, 2007 statement that she had been harassed by Mr. Ruggirello. She indicated that Mr. Ruggirello had made harassing comments to her about work-related and personal matters.

In a February 21, 2008 decision, the Office affirmed its July 24, 2007 decision. It found that Ms. Elkins did not establish in her November 1, 2007 statement that she observed appellant being harassed by Mr. Ruggirello.

In an April 14, 2008 statement, Steven Lau, a coworker, noted that he witnessed Mr. Ruggirello threaten appellant over a radio station. He indicated that Mr. Ruggirello later called appellant a clown and made fun of him. In an undated statement, Scott Simas, a coworker, stated that Mr. Ruggirello harassed appellant on many occasions. He claimed that Mr. Ruggirello stated in front of appellant that someone must have cut their wrist because there was no help at the service window. On another occasion someone called appellant's name and Mr. Ruggirello stated, "fucking clown." Mr. Simas also claimed that Mr. Ruggirello stated that he was going to take a walk that evening around Wagner College because he knew that appellant's wife worked there.

In an undated statement, Anthony Nuzzi, a coworker, asserted that Mr. Ruggirello would make comments about appellant because he had such an easygoing nature. On one occasion Mr. Ruggirello turned off the lights in a break room while appellant was inside. Mr. Nuzzi suggested that Mr. Ruggirello would move newspapers and other articles just to frustrate appellant. He asserted that Mr. Ruggirello referred to appellant as a clown to coworkers and customers, threw out a rack that appellant used in order to frustrate him and found a way to annoy appellant with respect to the radio. Mr. Ruggirello also gave away donated baked goods such that appellant was not able to eat any of the goods.

Appellant's attorney argued that the November 1, 2007 statement of Ms. Elkins and the three statements by Mr. Lau, Mr. Simas and Mr. Nuzzi established appellant's allegations. In an August 27, 2008 decision, the Office affirmed its February 21, 2008 decision. It found that the additional witness statements submitted by appellant were not sufficient to establish the existence of any employment factor.

LEGAL PRECEDENT

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.¹ 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.²

A claimant 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 employment factors.³ This burden includes the submission of a detailed

¹ 5 U.S.C. §§ 8101-8193.

² See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

³ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

description of the employment factors or conditions which the employee believes caused or adversely affected the condition or conditions for which compensation is claimed.⁴

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, 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 factors of employment and may not be considered.⁵ If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. 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.⁶

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. The Office denied his emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that he was harassed by Mr. Ruggirello, a coworker, on numerous occasions. To the extent that disputes and incidents alleged as constituting harassment 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 or discrimination did in fact occur. Mere perceptions of harassment are not compensable under the Act.⁸

The employing establishment denied that appellant was subjected to harassment and he has not submitted sufficient evidence to establish that he was harassed by Mr. Ruggirello, as alleged. Appellant alleged that Mr. Ruggirello made statements and engaged in actions which he believed constituted harassment, but he did not provide sufficient corroborating evidence to establish his allegations.⁹ The Board has recognized the compensability of verbal abuse in

⁴ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁵ *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

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

certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.¹⁰

Appellant's attorney argued that the November 1, 2007 statement of Ms. Elkins, a supervisor and three statements by appellant's coworkers, Mr. Lau, Mr. Simas and Mr. Nuzzi, supported appellant's claim. The Board has reviewed these statements and notes that although Mr. Ruggirello might have made some untoward comments it has not been shown that his actions arose to the level of harassment.

In a November 1, 2007 statement, Ms. Elkins indicated that since she produced her June 20, 2007 statement she had been harassed by Mr. Ruggirello. She indicated that he had made harassing comments to her about work-related and personal matters. However, Ms. Elkins did not address whether she witnessed appellant being harassed by Mr. Ruggirello. With respect to the statements of the three coworkers, many of the assertions contained in the statements are so vague with regard to the context of Mr. Ruggirello's actions such that it would not be possible to determine his intent. For example, Mr. Lau indicated that he witnessed Mr. Ruggirello threaten appellant over a radio station, but he did not provide the details of this encounter. He indicated that Mr. Ruggirello later called appellant a clown, but he did not explain the context of this comment. Mr. Simas asserted that Mr. Ruggirello stated in front of appellant that someone must have cut their wrist because there was no help at the service window. It is not clear that this comment was intended towards appellant. Mr. Simas indicated that on another occasion someone had called out appellant's name and Mr. Ruggirello stated, "fucking clown," but it is unclear whether appellant was present at the time.¹¹ Mr. Nuzzi mentioned actions committed by Mr. Ruggirello such as turning off lights, moving items and giving away baked goods, but without further detail the circumstances surrounding these incidents are vague. He asserted that Mr. Ruggirello referred to appellant as a clown to coworkers and customers, but he did not claim that the comments were made to appellant.¹² The evidence of record does not establish a compensable employment factor under the Act with respect to the claimed harassment.

Appellant claimed that the employing establishment knew about Mr. Ruggirello's harassment and chose to do nothing. The handling of disciplinary actions relates 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.¹³ Although the handling of disciplinary actions is generally related to the employment, it is an administrative function of the employer and not a duty of the employee.¹⁴ The Board has also found that an administrative or

¹⁰ See *Leroy Thomas, III*, 46 ECAB 946, 954 (1995); *Alton L. White*, 42 ECAB 666, 669-70 (1991).

¹¹ Mr. Simas also claimed that Mr. Ruggirello stated that he was going to take a walk that evening around Wagner College because he knew that appellant's wife worked there. However, it is not clear that this comment was made to intimidate appellant.

¹² In a June 25, 2007 statement, Mr. Salfelder, a customer service supervisor, indicated that he noticed some tension between appellant and Mr. Ruggirello since March 19, 2007. However, the incidents he described do not clearly show harassment.

¹³ See *Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

¹⁴ *Id.*

personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁵ Appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to this matter. Thus, he has not established a compensable employment factor under the Act with respect to administrative matters.

The Board finds that appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.¹⁶

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

¹⁵ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁶ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

ORDER

IT IS HEREBY ORDERED THAT the August 27 and February 21, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 14, 2009
Washington, DC

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

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

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