

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

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| C.T., Appellant |) | |
| |) | |
| and |) | Docket No. 09-1557 |
| |) | Issued: August 12, 2010 |
| U.S. POSTAL SERVICE, MAIN PROCESSING & DISTRIBUTION CENTER, Reno, NV, |) | |
| Employer |) | |
| |) | |

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 1, 2009 appellant filed a timely appeal of the August 29, 2008 and May 14, 2009 merit decisions of the Office of Workers' Compensation Programs, finding that he did not sustain an emotional condition in the performance of duty. Pursuant to 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 sustained an emotional condition in the performance of duty.

On appeal, appellant contends that he sustained an emotional condition causally related to his federal employment.

FACTUAL HISTORY

On February 21, 2008 appellant, then a 59-year-old custodian, filed an occupational disease claim. On September 25, 2007 he first realized that his diabetes, high blood pressure and

cholesterol, paranoia, permanent anxiety and unusual behavior were caused by his federal employment. Appellant attributed his conditions to constant harassment by his coworkers and local management and ongoing stresses and frustration he experienced during the past 14 years while working at the employing establishment.

In narrative statements dated February 21, 2008, appellant reiterated that his hypertension was caused by stress, frustration and anxiety at work which rendered him totally disabled. In a February 21, 2008 medical report, Dr. Karen M. Stover, an attending Board-certified family practitioner, advised that his hypertension was caused by a stressful work environment. In a February 22, 2008 disability certificate, Dr. Stover placed appellant off work from March 5 to April 13, 2008 under the Family and Medical Leave Act (FMLA).

By letter dated March 24, 2008, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It requested additional factual and medical evidence.

In narrative statements dated March 11, 2005 to July 28, 2008, appellant attributed his emotional condition to several work incidents. He was terminated by the employing establishment effective January 1994 without just cause within 90 days of his November 1993 start date. After appealing the termination decision, appellant was recalled to work in February 1994. He contended that during the 90-day probationary period his immediate supervisors and coworkers picked on him and spied on his activities. On March 11 and September 30, 2005 employees complained to appellant about his loud singing, laughing and spitting while he cleaned restrooms. On August 12, 2007 an employee accused him of using chemicals which caused a restroom to smell like urine. During a meeting on that date, an employee told appellant that he talked too much and he did not know what he was talking about. On August 30, 2007 Dave McKee, an employee, became upset when appellant told another employee about his dating plans. Dorothy Hill, a maintenance operations supervisor, requested that he write a statement regarding the incident.

On January 27, 2006 and August 26, 2007 Mr. Talley, a supervisor, and Lee Solerno, an employee, monitored appellant's work performance throughout the workday by looking into his trash can and instructing him to stop prematurely replacing toilet paper and paper towels in restrooms. On August 30, 2007 Ms. Hill granted his request to use three weeks of leave regarding his emotional condition while Tom Gray, a maintenance operations manager, needed to speak to an occupational health nurse to determine the type of leave to be used to cover his absence. On September 19, 2007 appellant denied Mr. Gray's accusation that he was gambling because he brought football betting cards to work. He did not distribute the cards or take money from any employees as wagers. Mr. Gray instructed appellant not to bring them to work again. A similar incident occurred six years prior and appellant continued to bring the cards to work because he never received a response from Mr. McBride, a former plant manager, as to whether the activity constituted gambling. On November 13, 2007 appellant went to the employing establishment while he was on sick leave to sign up for annual leave for the next year. He showed photographs of a trip to China to employees in the break room when Ms. Hill advised him that he should not be there since he was off duty. On January 21, 2008 appellant discovered that he had been scheduled to return to his regular work duties on January 23, 2008 without first obtaining a medical clearance from Dr. Stover. He disagreed with this assignment and, on

January 22, 2008, Ms. Hill placed him on leave for six weeks under FMLA based on Dr. Stover's instructions.

On February 13, 2008 appellant filed an Equal Employment Opportunity (EEO) complaint alleging discrimination based on race, color, religion, gender, national origin, disability due to medications he took for his high blood pressure, anxiety and diabetes, age and retaliation. He also alleged harassment by his coworkers and managers regarding the August 12, 26, 30, September 19, November 13, 2007 and January 21, 2008 incidents and at an August 22, 2007 meeting during which an employee accused him of not knowing what he was talking about. In a February 29, 2008 decision, the employer dismissed appellant's complaint, finding that he failed to establish a hostile work environment discrimination or harassment. He contended that his December 2007 EEO complaint was also dismissed without sufficient grounds. Appellant also alleged that the employing establishment retaliated against him for filing a September 20, 1994 EEO harassment complaint which it dismissed on March 13, 1995.

In a January 4, 1994 letter received by the Office on April 11, 2008, Norman Vincent, a maintenance operations manager, stated that appellant's employment had been terminated effective February 4, 1994 due to his failure to meet his work requirements.

In an undated letter, Ms. Hill stated that, based on the employing establishment's policy on unauthorized access to the workroom floor, she advised appellant that any employee entering onto the premises while in a nonduty status without proper supervisory authorization was subject to administrative and or disciplinary action.

In an April 21, 2008 report, Dr. Stover stated that she could not determine whether appellant's hypertension, diabetes, hyperlipidemia and anxiety disorder were caused by his federal employment. A July 16, 2008 disability certificate from Wendy Hershey, a physician's assistant, advised that appellant was unable to work through August 29, 2008.

In an August 29, 2008 decision, the Office denied appellant's claim, finding that he did not sustain an emotional condition in the performance of duty as he failed to establish a compensable factor of his employment.

On September 8, 2008 appellant requested a telephonic hearing with an Office hearing representative.

In narrative statements dated November 22, 1993 to February 17, 2009, appellant attributed his emotional condition to additional actions and statements by his supervisors. On August 14, 1994 Wayne Pratt loudly reprimanded appellant for failing to use a high-speed buffer to polish the floor. On August 17, 1994 Ms. Flackus grabbed his chest and pointed her fingers at his face. She told him to mind his own business and walked away. On March 9, 1995 Mr. Pratt reprimanded appellant as he failed to sweep dust up from the floor. Appellant stated that Mr. Helmrich and Diane Flores, coemployees, agreed with him that Mr. Pratt should have assisted him with sweeping up the dust with his giant sweeper. On January 17, 1996 Mr. Smith accused appellant of walking around instead of working. He was actually conducting a final check of his work. On February 28, 1998 Ralph Ferguson advised appellant that Kevin Cobb, an employee, complained about his talking too much in the break room and treatment of women.

On August 6, 1998 appellant was denied a performance award although his work performance was better than that of the award recipients. On December 9, 2001 he was advised by Mr. Massetti that his work performance was going to be inspected on a daily basis. Appellant was the only custodian whose work was subjected to such inspection. On December 22, 2004 Mr. Ferguson informed appellant that Mr. Salipidis, an employee, became very upset with appellant following their December 19, 2004 conversation regarding prearranged marriages in the Chinese culture. Mr. Salipidis discussed such an arrangement for his daughter with Mrs. Salipidis, his wife, who became extremely angry and wanted the employing establishment to file a complaint against appellant.

On June 10, 1994 the employer issued a letter of warning to appellant for failing to timely complete a task. Appellant was unhappy with the agreement reached between his union representative and the employing establishment, as the letter would be kept in his personnel file for one year rather than the standard two-year period based on his timely work performance. He wanted the letter to be removed immediately. In March 2008, the employing establishment issued a letter of warning for unauthorized access to the workroom floor on January 21, 2008. In October 2008, it denied his request to return to work under medical restrictions or to be placed on leave without pay until his appeal of the Office's August 29, 2008 decision.¹ Appellant's request for a transfer to a different craft due to harassment from his supervisor and coworkers was denied. He alleged overworked due to a staff shortage. Notes were placed in his personnel folder regarding his poor work performance. Appellant did not receive adequate training when he first started work at the employing establishment and had difficulty with completing his work duties which required him to work overtime. Mr. Vincent, a supervisor, advised appellant to listen to work instructions given by his coworkers. A group leader dug through his trash can and rearranged items on his cleaning cart on several occasions without justification.

On December 7, 1995 Mr. Sidas screamed and yelled at appellant. He also threatened to physically harm appellant and filed a complaint against him for allegedly spreading a rumor that he did not perform his job correctly. Appellant stated that the December 7, 1995 incident was witnessed by employees. On March 20, 1998 Karen Koon filed a complaint against him for using the phrase "ding t'ong." On March 26 and 27, 1999 Carl Schweinsthal yelled at appellant for asking him whether he was planning to change his career. Appellant stated that the March 26 and 27, 1999 incidents were witnessed by an employee. On April 11, 1999 Mr. Woolsey called him stupid because he continued to talk about a sexual harassment allegation Ms. Flores made against him on April 9, 1999. Although he apologized to him, he still accused him of insulting Ms. Flores. On July 28, 1999 Bob Chavez witnessed Peter O'Loughlin angrily ask appellant to stop spreading rumors about him. On April 2, 2003 Mr. Cobb interrupted his conversation with Linda Cross, an employee, regarding the Iraq war by loudly stating that he did not know what he was talking about. Appellant contended that Mr. Cobb sexually harassed women at the employing establishment and borrowed money from him and other employees.

In an October 9, 2008 letter, Ms. Hill advised appellant that no work was available within his physical restrictions. She related that on September 18, 2007 Mr. Gray advised her that an

¹ In a December 12, 2008 narrative statement, appellant related that on October 9, 2008 the Office of Personnel Management approved his application for disability retirement. He retired from the employing establishment on October 17, 2008.

employee had given him a huge pile of Parley cards that were allegedly brought to work by appellant. During a September 19, 2007 meeting appellant admitted to bringing the cards to work. Ms. Hill advised him as to the employer's policy regarding gambling on its premises. Appellant responded that he was not gambling rather, he was only making his picks. Ms. Hill showed appellant the policy regarding gambling and he agreed not to bring the cards to work again.

In a September 20, 2007 narrative statement, Mr. Gray related that on August 28, 2007 Ms. Hill gave him two letters from appellant. In an August 26, 2007 letter, appellant described the incident involving his verbal exchange with Ms. Solerno on that date. Mr. Gray stated that Ms. Hill had instructed Ms. Solerno not to tell an employee what to do. Appellant's August 28, 2007 letter indicated that his request for an extension of his scheduled vacation was granted by Ms. Hill. Mr. Gray stated that, on September 17, 2007 Pat Bisesi, a plant manager, advised him that an anonymous source told her that appellant brought betting slips to the employee break room. He addressed appellant's admission at the September 19, 2007 meeting. Mr. Gray advised appellant that he was not in trouble during the meeting. He noted appellant's statement that other employees engaged in the same activity to pass the time away during their break and his claim that no gambling took place. Mr. Gray instructed appellant not to bring the betting slips to work again. In a February 10, 2009 narrative statement, he provided a copy of the rules of conduct which prohibited betting slips. Appellant became very argumentative and defensive and contended that he was harassed by the employees who turned him into management. Mr. Gray informed appellant that he had to follow up on the tip that he was engaged in improper conduct to which he admitted. He noted that previous complaints and allegations against appellant had been established. Mr. Gray counseled appellant about changing the paper towel rolls prematurely and loitering in the employee break room when he was not on duty. Appellant stated that he wished everyone would mind their own business and quit tattling on him and he would allege harassment if employees did not abide by his wish. During a January 2008 redress meeting, he could not specifically tell Mr. Gray or his supervisor what they could do either personally or as management to help him.

By decision dated May 14, 2009, an Office hearing representative affirmed the August 29, 2008 decision, finding that the evidence failed to establish a compensable factor of appellant's employment.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every 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 concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.² On the other hand the disability is not covered where it results from such factors as an employee's fear

² 5 U.S.C. §§ 8101-8193.

of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.³

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.⁴ This burden includes the submission of a detailed description of the employment factors or conditions, which the employee believes caused or adversely affected the condition or conditions, for which compensation is claimed.⁵

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 the physician when providing an opinion on causal relationship and, which working conditions are not deemed factors of employment and may not be considered.⁶ 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 the matter establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.⁷

ANALYSIS

Appellant alleged that he sustained an emotional condition due to several incidents at the employing establishment. The Board must review whether the alleged incidents are compensable under the terms of the Act.

Appellant made several allegations related to administrative or personnel matters. These allegations are unrelated to his regular or specially assigned work duties and do not generally fall within the coverage of the Act.⁸ The Board has held, however, that an administrative or personnel action may be considered an employment factor where the evidence discloses error or abuse. In determining whether the employing establishment erred or acted abusively, the Board has examined whether management acted reasonably.⁹

³ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 126 (1976).

⁴ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁵ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁶ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁷ *Id.*

⁸ An employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. *Sandra Davis*, 50 ECAB 450 (1999).

⁹ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

Appellant contended that, in response to his August 30, 2007 request for leave, Ms. Hill stated that he could take three weeks off work while Mr. Gray had to speak to an occupational health nurse before making a determination. He alleged that on January 22, 2008 Ms. Hill placed him on leave for six weeks under FMLA after the employing establishment had scheduled him to return to work on January 23, 2008 without obtaining medical clearance from Dr. Stover. Appellant further alleged that the employing establishment denied his October 2008 request to return to work with restrictions. He contended that he was denied a performance award on August 6, 1998 even though his work performance was better than that of the award recipients. Appellant's request to transfer to a different craft was denied. The employing establishment planned to rotate custodians to a new daily assignment. The Board finds that appellant's allegations regarding the handling of leave requests,¹⁰ the scheduling of work,¹¹ frustration from not being able to work in a particular environment,¹² denial of request for transfer¹³ and a performance award relate to noncompensable administrative or personnel matters. Appellant did not submit any witness statements establishing that the employing establishment erred or acted abusively in handling these matters. Ms. Hill stated that no work was available at the employing establishment within his physical restrictions. The Board finds that appellant did not establish a compensable employment factor.

Appellant contended that he was terminated from the employing establishment in February 1994 without cause. The Board has held that termination of employment is an administrative or personnel matter, unrelated to the employee's regular or specially assigned work duties and does not fall within the coverage of the Act.¹⁴ Appellant was recalled to work as a result of a complaint he filed against the employing establishment. The Board has held that, the mere fact that, personnel actions are later modified or rescinded, does not, in and of itself, establish error or abuse.¹⁵ The record does not contain a finding that the employing establishment erred or acted abusively in terminating appellant's employment. Mr. Vincent stated that appellant was terminated due to his failure to meet the requirements of his position. The Board finds that appellant has not established a compensable employment factor.

Appellant alleged that Mr. Massetti monitored his work on a daily basis. He stated that he was the only custodian whose work was monitored in this manner. Appellant contended that Mr. Talley and Ms. Solerno inspected his work and accused him of prematurely replacing toilet paper and paper towels in the restroom dispensers. He further contended that Mr. Talley and a group leader looked through his trash can throughout the workday. Appellant stated that the group leader rearranged items on his cleaning cart. He alleged that Mr. Smith accused him of walking around the building when he was actually conducting a final check of his work. The

¹⁰ See *Beverly R. Jones*, 55 ECAB 411 (2004).

¹¹ 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).

¹² See *Lillian Cutler*, *supra* note 3.

¹³ *Ernest J. Malagrida*, 51 ECAB 287 (2000).

¹⁴ See *Jimmy Gilbreath*, 44 ECAB 555 (1993).

¹⁵ *Dennis J. Balogh*, 52 ECAB 232 (2001).

Board finds that appellant's allegations regarding the inspection and monitoring of his work relate to a noncompensable administrative or personnel matter.¹⁶ Mr. Gray acknowledged that appellant was counseled for changing paper towel rolls prematurely and loitering in the break room when he was not on duty. However, after appellant complained to him about Ms. Solerno's action, Mr. Gray told Ms. Solerno not to instruct employees on what to do at work. The Board finds that Mr. Gray's statements establish that he did not act unreasonably in monitoring appellant's work. Appellant has not shown that Mr. Massetti, Mr. Talley and the group leader acted abusively in monitoring his work. The Board finds that appellant has not established a compensable employment factor.

Appellant contended that Mr. Gray and Ms. Hill advised him that the football betting cards he admittedly brought to work were prohibited by the employing establishment's policy on gambling. He denied distributing the cards to employees or taking bets from them. Appellant contended that, while showing photographs of his trip to China to employees in the break room, Ms. Hill advised him that he should not be there since he was off duty. He was given a letter of warning in March 2008 for unauthorized access to the workroom floor on January 21, 2008 when he went to check his work schedule. Appellant was also given a letter of warning on June 10, 1994 because he failed to complete a task in a timely manner. He was frustrated by the agreement reached between his union representative and the employing establishment regarding the June 10, 1994 letter of warning wherein the letter would be kept in his personnel file for one year rather than the standard two-year period. Appellant was reprimanded by Mr. Pratt on March 9, 1995 as he failed to sweep dust up from the floor. He stated that notes were placed in his folder documenting his poor work performance. Appellant's allegations pertain to noncompensable administrative and personnel matters involving the discipline of employees.¹⁷ Although he stated that Mr. Helmrich and Ms. Flores agreed with him that Mr. Pratt should have helped him sweep the dust with his giant sweeper, he did not submit any witness statements from them regarding this incident. Ms. Hill and Mr. Gray stated that appellant admitted to bringing the football cards to work. Mr. Gray stated that appellant was advised that he was not in trouble. He and Ms. Hill stated that they advised him about the employing establishment's policy on gambling. Mr. Gray related that appellant became very argumentative and defensive during their discussion and alleged that he was being harassed by employees who turned him into management. Mr. Gray and Ms. Hill stated that he agreed not to bring the football cards to work again. Ms. Hill provided appellant with a letter and a memorandum regarding the employing establishment's policy prohibiting employees' unauthorized presence on its premises. Based on the statements of Ms. Hill and Mr. Gray, the Board finds that appellant has failed to establish that the employing establishment erred or acted abusively in counseling him and issuing letters of warning in the above-noted incidents. Accordingly, appellant has failed to establish a compensable employment factor.

Appellant filed EEO complaints against the employing establishment in February 1994, on September 20, 1994, in December 2007 and on February 13, 2008 alleging discrimination based on his race, color, religion, gender, national origin, disability, age, retaliation and harassment. He disagreed with the dismissal of his grievances on the grounds that they did not

¹⁶ See *Lori A. Facey*, 55 ECAB 217, 224 (2004).

¹⁷ *Janice I. Moore*, 53 ECAB 777 (2002).

establish a hostile work environment, discriminatory harassment or were untimely filed. Appellant's filing of grievances relates to a noncompensable administrative and personnel matter.¹⁸ The record does not contain a final decision finding that the employing establishment committed error or abuse regarding appellant's allegations. The Board finds that appellant did not establish a compensable employment factor.

Appellant alleged that he was overworked due to a staff shortage. The Board has held that while overwork may be a compensable factor of employment it must be established on a factual basis to be a compensable employment factor.¹⁹ He did not submit any evidence to substantiate his allegation. The Board finds that appellant has failed to establish that he was overworked and, thus, he has not established a compensable employment factor.

Appellant alleged that he did not receive adequate training and had difficulty with finishing his work duties which required him to work overtime. The Board has held that an employee's emotional reaction to being made to perform duties without adequate training is compensable.²⁰ However, appellant's unsupported allegation that he did not receive adequate training alone is insufficient to establish a factual basis for this incident as he acknowledged that Mr. Vincent advised him to listen to work instructions from his coworkers. The Board finds that appellant's statement is sufficient to establish that he had adequate job training. Accordingly, appellant has not established a compensable factor of employment.

Appellant contended that he was verbally and physically abused and harassed at the employing establishment. He cited a myriad of incidents, outlined in grave detail above, involving coworkers and supervisors. The Board notes that verbal abuse or harassment may give rise to coverage under the Act. However, there must be evidence that the implicated acts of harassment did, in fact, occur. A claimant must substantiate a factual basis for his allegation with probative and reliable evidence.²¹ Appellant stated that, several witnesses including, Mr. O'Loughlin observed the incidents involving Mr. Chavez, Mr. Schweinsthal and Mr. Sidas. However, he did not submit any witness statements to support his allegations of harassment against them or any of the other employees noted above. Appellant stated that Mr. Woolsey apologized for calling him stupid. His allegations that Mr. Cobb sexually harassed female employees and he was indebted to employees does not relate to whether appellant was harassed by Mr. Cobb. Mr. Gray stated that he and appellant's supervisor offered to provide appellant with personal or professional help but appellant could not identify what they could do for him. The Board finds that appellant has failed to establish that he was verbally and physically abused and harassed by the employing establishment.²²

¹⁸ *Michael A. Salvato*, 53 ECAB 666, 668 (2002).

¹⁹ *Sherry L. McFall*, 51 ECAB 436 (2000).

²⁰ *Donna J. Dibernardo*, 47 ECAB 700 (1996).

²¹ *See Ronald K. Jablanski*, 56 ECAB 616 (2005).

²² As appellant has not substantiated a compensable factor of employment as the cause of his emotional condition, the medical evidence regarding his emotional condition need not be addressed. *Karen K. Levene*, 54 ECAB 671 (2003).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 14, 2009 and August 29, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 12, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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