

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ERNEST C. ORTEGA and U.S. POSTAL SERVICE,
BOULDER POST OFFICE, Boulder, Colo.

*Docket No. 96-2540; Submitted on the Record;
Issued September 14, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

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

On June 6, 1994 appellant, then a 49-year-old supervisor of customer service, filed a claim for depression which he related to a series of events which began in 1990. He stated that his conditions of migraine headaches, tinnitus, and allergies seemed to have been aggravated by the events while other conditions, such as depression, heart palpitations, depression and adjustment disorder and sleep disruptions were the direct result of the events. In an October 14, 1994 decision, the Office of Workers' Compensation Programs found that the evidence of record failed to establish that appellant's claimed injury occurred in the performance of duty. In a May 13, 1996 decision, an Office hearing representative found that appellant had not established the existence of one compensable factor of employment. He therefore affirmed the Office's December 14, 1994 decision.

The Board finds that the case is not in posture for decision.

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are distinctions as to the type of situation giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. 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 with the coverage of the Act. 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. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning

of the Act.¹ When the evidence demonstrates feelings of job insecurity and nothing more, coverage will not be afforded because such feelings are not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of the Act.² In these cases the feelings are considered to be self-generated by the employee as they arise in situations not related to his assigned duties. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse cannot be considered self-generated by the employee but caused by the employing establishment.³

In his initial statement appellant contended that he had a poor relationship with a superior, Linda Medina, which he believed caused his failure to be selected for a diversity development position within the employing establishment. He stated that the Denver city area manager agreed to place him in an acting manager position but that assignment was canceled by the Denver postmaster who selected someone else for the position. Appellant indicated that the city area manager then placed him as an acting station manager at another employing establishment. Appellant indicated that he held the position for a year and received a rating of "very good." The city area manager was then removed from his position and appellant was ordered to move by the new Officer in Charge, Mr. Ruben Gonzales, to his former position as supervisor of customer service. Appellant contended that he was informed that he would be moved to his original assignment which was the day shift but Mr. Gonzales indicated that appellant would be working on the night shift. All these matters relate appellant's efforts to receiving a promotion or a different position within the employing establishment. These matters cannot be considered compensable factors of employment because they do not relate to appellant's performance of his assigned duties. Appellant filed an equal employment opportunity grievance on the selection process for the diversity development position but reported that he had not received a decision on the grievance. There is no evidence of record that any of the actions taken by the employing establishment in these matters were in error or abusive of appellant or his rights.

Mr. Gonzales eventually offered appellant a position as manager of the main office. Appellant assumed the position on April 2, 1994. He indicated that his position involved managing 120 employees, including 52 letter carrier routes and an 8 position window operation, which was a larger and more complex operation than he had managed previously. He commented that one of his duties was to reduce overtime which, during one week, actually rose from 35 to 136 hours due to annual leave and vacant positions. In his testimony at the hearing, appellant indicated that he was also instructed to solve a parking lot problem and correct a shortage in the financial accounts that existed before he assumed the position. He stated that Mr. Gonzales wanted him to personally audit the window accounts while still supervising the supervisors of the employing establishment. Appellant indicated that there was not enough time

¹ *Lillian Cutler*, 28 ECAB 125 (1976).

² *Artice Dotson*, 41 ECAB 754 (1990); *Allen C. Godfrey*, 37 ECAB 334 (1986); *Buck Green*, 37 ECAB 374 (1985); *Peter Sammarco*, 35 ECAB 631 (1984); *Dario G. Gonzalez*, 33 ECAB 119 (1982); *Raymond S. Cordova*, 32 ECAB 1005 (1981); *John Robert Wilson*, 30 ECAB 384 (1979).

³ *Thomas D. McEuen*, 41 ECAB 387 (1990) *reaff'd on recon.*, 42 ECAB 566 (1991).

in the day to accomplish all the assignments. Appellant's statement that he had many duties in his position, both regular duties and specially assigned duties, which added to his burden of work would be considered a factor of employment.⁴

The principal incident which appellant cited as the cause of his condition arose from Mr. Gonzales' instructions to appellant to investigate a claim from a city carrier that a postal clerk had grabbed her breasts and buttocks. Mr. Gonzales indicated that the complaint was brought to him by Ms. Jerri Martinez, the supervisor of the city carrier. Appellant stated that he conducted the investigation when he had time in his schedule of meetings and talked to Ms. Martinez, the city carrier and the postal clerk. Mr. Gonzales stated that Ms. Martinez told him that appellant never talked to her in the course of the investigation. On May 12, 1994 Mr. Gonzales met with appellant and brought Ms. Martinez into the meeting. Mr. Gonzales stated that he asked appellant to review the course of his investigation. When appellant stated that he talked with Ms. Martinez, Mr. Gonzales stated that he called appellant a "bald-faced liar." Appellant indicated that he was called a "bald-faced liar" by Mr. Gonzales and then was verbally abused, reprimanded and humiliated. He stated that Mr. Gonzales called him a liar because he had stated the clerk denied the charge of sexual harassment when Ms. Martinez had reported that the clerk had laughed when confronted with the charge. He indicated that he had discussed the matter with Ms. Martinez. In an October 20, 1995 statement, Ms. Martinez stated that she was under the supervision of appellant at the time in question and noted that there were some problems at the employing establishment. She indicated that there was one incident in which she was present but felt she should have been excused at one point prior to Mr. Gonzales talking to appellant. She related that Mr. Gonzales called appellant a liar and was yelling at appellant. At that point, Ms. Martinez excused herself. She did not discuss further her role in the investigation of the sexual harassment complaint.

The evidence of record shows that appellant's supervisor yelled at him, called him a liar and verbally abused him in front of a witness. The supervisor admitted he called appellant a liar. Ms. Martinez indicated that Mr. Gonzales began yelling at appellant at which point she left the room. The Board has held that such verbal altercations, when sufficiently detailed by the claimant and supported by the evidence of record, may constitute a factor of employment.⁵

⁴ The Office hearing representative found that appellant had declined a position at an employing establishment with a smaller work load because he wanted a more challenging position. He concluded that appellant therefore had not established that the work load of the position he accepted was a causal factor of his emotional condition. The fact that appellant declined another position is irrelevant to the issue of whether the work load of the position he assumed caused or contributed to his emotional condition. The latter question is a medical question to be resolved by the medical evidence of record.

⁵ *Mildred D. Thomas*, 42 ECAB 888 (1991).

There is sufficient detail to indicate the incident of May 12, 1994 occurred as alleged by appellant.⁶ This incident would be considered a factor of appellant's employment.

Appellant also indicated that after this incident, he received two telephone calls, one at midnight and one at 6:00 a.m. in which the caller hung up when appellant answered the telephone. Appellant stated that he had caller identification which showed that these telephone calls came from Mr. Gonzales' telephone. Mr. Gonzales stated that on May 6 he woke at 3:30 a.m. and could not go back to sleep. He therefore went to work. He indicated that he called appellant at 6:30 a.m. from work to look into the sexual harassment complaint. The record does not indicate whether the employing establishment investigated appellant's complaint to determine whether Mr. Gonzales was engaging in harassing telephone calls to appellant. If Mr. Gonzales were making such telephone calls to appellant with such an intent, this aspect of appellant's case would be considered a factor of employment because it would demonstrate error or abuse by appellant's supervisor. The Office concluded that, because no conversation took place in these telephone calls, no harassment occurred. However, the fact that no conversation took place is not dispositive of the question of whether harassment occurred. The Office must further consider the frequency of the telephone calls, the times and place where the calls originated and the context in which the telephone calls occurred before it can determine whether these telephone calls constituted administrative abuse or error.

On remand, therefore, the Office must develop the record further to determine whether the telephone calls in question constituted administrative abuse or error and therefore would be considered a compensable factor of employment. The Office should then prepare a statement of accepted facts, describing in detail those factors of employment that constitute compensable factors of employment and the factors that are not compensable factors of employment. The Office should then refer appellant, together with the statement of accepted facts and the case record, to an appropriate specialist for an opinion on whether appellant's disability was causally related to his compensable factors of employment. After further development as it may find necessary, the Office should issue a *de novo* decision.

⁶ The evidence of record is ambiguous on whether appellant actually met with Ms. Martinez in the course of his investigation of the sexual harassment complaint. Therefore, it cannot be determined from the record whether Mr. Gonzales was correct in calling appellant a liar.

The decision of the Office of Workers' Compensation Programs, dated May 13, 1996, is hereby set aside and the case remanded for further action in accordance with this decision.

Dated, Washington, D.C.
September 14, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member