

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ERNEST J. MALAGRIDA and DEPARTMENT OF TREASURY,  
INTERNAL REVENUE SERVICE, Richmond, VA

*Docket No. 98-238; Submitted on the Record;  
Issued January 19, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty.

In the present case, appellant, then a 46-year old internal revenue agent, filed a claim on May 20, 1996 alleging that he had sustained an emotional condition due to actions taken by his supervisor.<sup>1</sup> The Office of Workers' Compensation Programs denied the claim by decision dated November 4, 1996. An Office hearing representative affirmed the denial of the claim on September 5, 1997, on the grounds that appellant had not established that he sustained an emotional condition in the performance of duty.

The Board has duly reviewed the case record and finds that appellant has not met his burden of proof in this case.

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. When an employee experiences emotional stress in carrying out his employment duties or has fear and anxiety regarding his ability to carry out his duties, and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of the employment. The same result is reached when the emotional disability resulted from the employee's emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of the work. The disability is not covered when it results from such factors as an employee's frustration from not being permitted to work in a particular environment or to hold a particular position. Disabling conditions resulting from an employee's feelings of job insecurity or the desire for a different

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<sup>1</sup> The record reflects that appellant resigned his employment on February 10, 1997.

job, promotion or transfer do not constitute personal injury sustained in the performance of duty within the meaning of the Federal Employees' Compensation Act.<sup>2</sup>

Rather than the work itself, appellant has attributed his emotional condition to alleged administrative actions by his supervisor, and actions of his supervisor which appellant alleges constitute harassment. Appellant has not, however, established the compensability of these allegations.

Although administrative and personnel matters are generally related to the employment, they are functions of the employer and not duties of the employee.<sup>3</sup> Thus, the Board has held that reactions to actions taken in an administrative capacity are not compensable unless it is shown that the employing establishment erred or acted abusively in its administrative capacity.<sup>4</sup>

In the present case, appellant has alleged that he had not felt comfortable working for his supervisor, Mr. Kennedy, since October 1995. He stated that at that time Mr. Kennedy returned a case to him with an evaluation stating that his performance was substandard, without any prior informal conversation or phone call. Appellant stated that he requested a meeting with Mr. Kennedy to discuss goals and expectations, which took place on October 11, 1995. He stated that the meeting went well, but he still wanted a transfer from Mr. Kennedy's group. In November 1995, Mr. Kennedy informed appellant that his request for a transfer was denied, and that "he would do things to me" if appellant did not withdraw his request for transfer. A meeting was then held with appellant, Mr. Kennedy, an upline supervisor and a union vice president, at which Mr. Kennedy stated that if appellant had thought he was threatening him, "it was not so," but he apologized anyway. Appellant stated that he was not granted a transfer and that after an investigation, he received a letter from the district Director stating that there had been no ethics violation in denying the transfer.

Essentially, appellant is alleging that he sustained an emotional condition because he was denied a transfer and was given an unfavorable performance evaluation. The denial by an employing establishment of a request for a different job, promotion or transfer is an administrative decision, which does not directly involve an employee's ability to perform his work duties, but rather constitutes an employee's desire to work in a different position.<sup>5</sup> As the denial of a transfer is an administrative decision, absent error or abuse in the decision making process, this allegation is not compensable. While appellant has indicated that this matter had been investigated, the investigation did not reveal any irregularity in the denial of the transfer. Appellant did not submit any evidence that the denial of his transfer was in fact made in error or with abuse, and appellant therefore has not established the compensability of this allegation.

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<sup>2</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>3</sup> *Gregory N. Waite*, 46 ECAB 662 (1995).

<sup>4</sup> *Id.*

<sup>5</sup> *See Donna J. DiBernardo*, 47 ECAB 700 (1996).

Appellant has also stated that his performance had been “downgraded in writing” since November 1995, even though during a workload review on January 4, 1996 he was advised by Mr. Kennedy that he was pleased with three of four cases and “very pleased with a fourth case.” Appellant stated that he was very surprised when on February 1, 1996 his supervisor gave him a written workload review, rating his performance in two critical elements as not satisfactory. In determining whether the employing establishment erred or acted abusively in other cases regarding employment evaluations, the Board has examined whether the employing establishment acted reasonably.<sup>6</sup> While appellant has alleged that he was surprised that his written work review on February 1, 1996 resulted in an unsatisfactory performance rating in two critical elements, while his supervisor had indicated to him on January 4, 1996 that he was pleased with his work, appellant has not established that his supervisor acted unreasonably in his written February 1996 review. Specifically, appellant has not established that the February 1996 review was for the same work and covered the same time period as the favorable January review. Appellant has therefore not established the compensability of this allegation.

Appellant has also alleged that he was harassed by his supervisor. Actions of an employee’s supervisors or coworkers which the employee characterizes as harassment may constitute a factor of employment giving rise to a compensable disability under the Act. However, for harassment to give rise to a compensable factor of employment, there must be evidence that harassment or discrimination did, in fact, occur.<sup>7</sup> Mere perceptions of harassment are not compensable. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement, the claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.<sup>8</sup> Appellant has alleged that his supervisor stated “that he would do things to me.” A meeting was held thereafter with both parties, upline management and a union representative present. During this meeting, appellant’s supervisor did not recall making the statement in question, but apologized if he had said anything which offended appellant. The Board notes that other than appellant’s statement, there is no corroborating evidence that this statement was in fact made. Furthermore, appellant’s supervisor apologized if in fact such statement was made. In a factually, similar case, *Isabel Apostol*, 44 ECAB 901 (1993), the Board found that to establish harassment based upon a comment made by a supervisor, appellant must establish that the comment was actually made, and that the comment, or any other action by the employing establishment was a form of harassment. In this case, appellant has not established that the specific statement was in fact made and that it was intended to harass appellant. Furthermore, appellant has alleged that Mr. Kennedy laughed at his emotional state during a telephone conversation on February 1, 1996. Mr. Kennedy has categorically denied that he laughed at appellant, but noted that he may have laughed “about something else” while on the telephone. As appellant has not submitted any corroborating evidence that Mr. Kennedy in fact laughed about his emotional state during a telephone conversation, appellant has not established that this alleged incident of harassment occurred.

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<sup>6</sup> *Harriet J. Landry*, 47 ECAB 543 (1996).

<sup>7</sup> *Helen P. Allen*, 47 ECAB 141 (1995).

<sup>8</sup> *See Joel Parker, Sr.*, 43 ECAB 220 (1991).

Finally, the Board notes that appellant did submit a May 15, 1997 decision from the Massachusetts Division of Employment and Training, which found that appellant had good cause for resigning his employment due to a personality conflict with his supervisor. The Board has previously noted that the findings of other government agencies are not dispositive with regard to questions arising under the Act. However, such evidence may be given weight by the Office and the Board.<sup>9</sup> Even accepting the existence of a personality conflict between appellant and Mr. Kennedy, as noted previously, appellant has not submitted the necessary evidence to establish that Mr. Kennedy, acted unreasonably, abusively or in fact harassed appellant. As appellant has not established a compensable factor of employment in this case, the Office properly denied his claim without evaluation of the medical evidence.

The decision of the Office of Workers' Compensation Programs dated September 5, 1997 is hereby affirmed.

Dated, Washington, D.C.  
January 19, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>9</sup> *Shelby J. Rycroft*, 44 ECAB 795 (1993).