

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY F. MURPHY and DEPARTMENT OF THE NAVY,
MARINE CORPS AIR STATION, CHERRY POINT, NC

*Docket No. 99-1822; Submitted on the Record;
Issued November 20, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has established that he developed an emotional condition in the performance of duty, causally related to compensable factors of his federal employment.

On November 6, 1997 appellant, then a 49-year-old staff accountant, filed a claim alleging that he developed post-traumatic stress causally related to his federal employment. He stopped work on October 31, 1997, went on disciplinary suspension for the period November 2 to 8, 1997 and thereafter took sick leave.

Appellant alleged that the employing establishment management participated in "illegal institutionalized corruptible and unlawful management practices prohibited by the Civil Service Reform Act of 1978." He claimed that as a result of his Equal Employment Opportunity (EEO) activity and allegations against management, he had been "selected, targeted and ultimately victimized by capricious and arbitrary abuse of executive and judicial authority." Appellant alleged that he was subjected to race/reprisal-based disciplinary actions including being barred from all MWR facilities for one year, receiving a letter of reprimand, receiving a letter of behavior problems, receiving a letter of proposed suspension, receiving a letter of decision of proposed suspension, being arrested and charged under Title 18 U.S.C. § 1361 for destruction of government property and being prosecuted in federal court. He alleged that these disciplinary actions constituted a covert scheme to assassinate his character, to impose financial hardship and to cause emotional stress. Appellant further alleged that these actions were based on "fake and bogus allegations and affidavits" and racism and lacked all credible supportive evidence.

Appellant alleged that his supervisor, Greg Pearson, advised him that, instead of looking like an accountant, he was dressed like a garbage man gave him a copy of the dress code policy for the employing establishment. Appellant claimed that he was insulted and felt it was discriminatory because he was the only one who received a copy of the policy. Mr. Pearson also warned appellant to stop belching while in the workplace, which additionally insulted appellant.

Appellant also submitted an EEO complaint alleging that he was harassed by Colonel Favor and Paul Mason when their office directed Criminal Investigation Division (CID) to investigate a January 15, 1997 incident of government property destruction, that he was harassed when his supervisor issued him a seven-day suspension and when he was denied allotment accounting training. His EEO complaint was not resolved in his favor.

Finally, appellant alleged that Mr. Pearson pushed him twice. In support of this allegation appellant submitted a June 26, 1997 coworker statement which claimed "Valery Frazier said that Debbie told her that Greg Pearson pushed [appellant]! [Appellant] did not push back! Incident occurred just after I left."

The employing establishment controverted appellant's claim, noting that three of the actions appellant alleged, his being barred from all MWR facilities for one year, the charges and arrest for destruction of government property and the federal court prosecution all stemmed from the same January 15, 1997 event, where appellant kicked a bench and then broke a glass door during a recreational league basketball game. It noted that on January 15, 1997 appellant was involved in an altercation with a referee during an intramural basketball game at the gym, that he was ejected from the game and subdued by his team, but kicked a glass door and shattered the glass as he was leaving the building.¹

A personnel action form indicated that appellant was issued the suspension for insulting/abusive behavior to other personnel on August 26, 1997 and for insubordination/disrespectful conduct on September 3 and 5, 1997. The grounds for this action were detailed in supervisory statements dated August 29 and September 4, 1997.

Appellant also submitted a November 5, 1997 medical report from Dr. Kristina Gintautiene, a Board-certified internist, which noted that "[appellant] is having exacerbation of his medical problems due to the stress that he is under from his place of employment." A November 4, 1997 report from a licensed clinical social worker was also submitted.

By decision dated January 16, 1998, the Office of Workers' Compensation Programs rejected appellant's claim finding that he had failed to establish fact of injury.

On January 30, 1998 appellant requested reconsideration of the January 16, 1998 decision. He submitted a January 27, 1998 report from Dr. Gintautiene which noted that appellant was currently "on leave from employment due to emotional stress incurred at work. The psychosocial problems appellant encountered there have aggravated his other medical problems.... It is my opinion that his current medical diagnoses are specifically connected with the detrimental work factors that he has been subjected to."

By decision dated March 14, 1998, the Office denied modification of its January 16, 1998 decision finding that appellant failed to implicate any compensable factors of employment.

¹ Appellant apologized for the door but explained that the action of the referee was inappropriate and unmerited.

Appellant again requested reconsideration and in support he resubmitted Dr. Gintautiene's January 27, 1998 report and a statement from coworker Michael F. Whitley. Mr. Whitley detailed his complaints about Mr. Pearson and the employing establishment. He also stated that Ms. Frazier had said that Debbie just told her that Mr. Pearson pushed appellant twice, but that appellant did not push back. A memorandum from Kathy S. Moss to Bruce B. Wood regarding Mr. Pearson's work ethics was also submitted. Ms. Moss felt that Mr. Pearson was working "against" her and that appellant's recent EEO complaint was valid.

Appellant further alleged numerous failures by the employing establishment, including but not limited to failure to establish rapport/listen, failure to motivate/empower, failure to seek/provide positive feedback, failure to resolve conflicts, failure to properly use human resources, failure to properly utilize personnel, failure to take corrective actions, failure to negotiate, and failure to recognize cultural/ethnic/gender differences.

By decision dated February 2, 1999, the Office denied modification of its January 16, 1998 decision finding that the evidence submitted in support was insufficient to warrant modification.

The Board finds that appellant has failed to establish that he developed an emotional condition in the performance of duty, causally related to compensable factors of his federal employment.

To establish appellant's occupational disease claim that he has sustained an emotional condition in the performance of duty, appellant must submit the following: (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 or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.² Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.³

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 illness has some connection with the employment but nevertheless does not come within the concept of workers' compensation. These injuries occur in the course of employment and have some kind of causal connection with it but are not covered because they do not arise out of the employment. Distinctions exist as to the type of situations giving rise to an emotional condition which will be

² See *Donna Faye Cardwell*, 41 ECAB 730 (1990).

³ *Id.*

covered under the Federal Employees' Compensation Act. Generally speaking, when an employee experiences an emotional reaction to his or her regular or special assigned employment duties or to a requirement imposed by his employment or has fear or anxiety regarding his or her ability to carry out assigned duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is regarded as due to an injury arising out of and in the course of the employment and comes within the coverage of the Act.⁴ Conversely, if the employee's emotional reaction stems from employment matters which are not related to his or her regular or assigned work duties, the disability is not regarded as having arisen out of and in the course of employment and does not come within the coverage of the Act.⁵ Noncompensable factors of employment include administrative and personnel actions, which are matters not considered to be "in the performance of duty."⁶

When working conditions are alleged as factors in causing 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.⁷ When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁸ When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence of record.⁹ If the evidence fails to establish that any compensable factor of employment is implicated in the development of the claimant's emotional condition, then the medical evidence of record need not be considered.

In the present case, the Office properly found that none of the causative factors appellant alleged were compensable factors of employment.

In the instant case, many of appellant's allegations of employment factors that caused or contributed to his condition fall into the category of administrative or personnel actions. In *Thomas D. McEuen*¹⁰ the Board held that an employee's emotional reaction to administrative

⁴ *Donna Faye Cardwell*, *supra* note 2, *see also Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Id.*

⁶ *See Joseph Dedonato*, 39 ECAB 1260 (1988); *Ralph O. Webster*, 38 ECAB 521 (1987).

⁷ *See Barbara Bush*, 38 ECAB 710 (1987).

⁸ *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁹ *See Gregory J. Meisenberg*, 44 ECAB 527 (1993).

¹⁰ 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

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. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.¹¹ Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. The incidents and allegations made by appellant which fall into this category of administrative or personnel actions include: employing establishment management practices,¹² including the exercise of executive and judicial authority,¹³ investigations,¹⁴ disciplinary actions,¹⁵ denial of training,¹⁶ criticism of appellant's mode of dress and belching¹⁷ and the various interactive personnel failures noted by appellant. Appellant has presented no evidence of administrative supervisory error or abuse in the performance of these actions and therefore they are not compensable now under the Act.

Appellant also alleged harassment and discrimination on the part of his supervisor and management. With regard to his allegations of harassment and discrimination, it is well established that for harassment or discrimination to give rise to a compensable disability under the Act there must be some evidence that the implicated incidents of harassment or discrimination did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable.¹⁸ An employee's charges that he was harassed or discriminated against are not determinative of whether or not harassment or discrimination occurred.¹⁹ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.²⁰ Words and actions that appellant implicated as being harassment must be confirmed by supporting evidence that they did, in fact, occur as alleged. However, in this case such corroboration was not forthcoming from him. Thus, appellant has not established a compensable employment factor due to harassment or

¹¹ See *Richard J. Dube*, 42 ECAB 916 (1991).

¹² See *Apple Gate*, 41 ECAB 581 (1990) (no relationship to appellant's regular or specially assigned duties).

¹³ See *Donna Faye Cardwell*, *supra* note 2; (failure to obtain appropriate redress or corrective actions).

¹⁴ See *Sammy N. Cash*, 46 ECAB 419 (1995); *Mary L. Brooks*, 46 ECAB 266 (1994); *Jimmy B. Copeland*, 43 ECAB 339 (1991).

¹⁵ See *Gregory N. Waite*, 46 ECAB 662 (1995); *Jose L. Gonzalez-Garced*, 46 ECAB 559 (1995); *Carolyn King Palermo (Dwayne Palermo)*, 42 ECAB 435 (1991).

¹⁶ See *Jose L. Gonzalez-Garced*, *supra* note 15; (training is an administrative function).

¹⁷ See generally *Gregory N. Waite*, *supra* note 15; *Thomas J. Costello*, 43 ECAB 951 (1992) (personal behavior and adherence to dress code are personnel matters not related to regular or specially assigned duties).

¹⁸ *Helen Casillas*, 46 ECAB 1044 (1995); *Ruth C. Borden*, 43 ECAB 146 (1991).

¹⁹ See *O. Paul Gregg*, 46 ECAB 624 (1995).

²⁰ See *Anthony A. Zarcone*, 44 ECAB 751 (1993).

discrimination under the Act in this respect. Further, the Board notes that appellant's EEO complaints alleging discrimination were not resolved in appellant's favor.

Appellant also alleged that he experienced stress because management had it "in for him" due to his EEO-related activities on behalf of another employee. The Board has frequently explained that matters pertaining to union activities or similar activities do not arise out of a claimant's regular or specially assigned job duties, are voluntary and are therefore not deemed to be compensable factors of employment.²¹ Therefore, any stress appellant experienced related to his voluntary EEO activities on behalf of another is not compensable under the Act.

Finally, appellant alleged that his supervisor, Mr. Pearson, pushed him twice. It is well established that physical contact arising in the course of employment may give rise to a compensable factor of employment.²² However, for alleged physical contact to give rise to a compensable factor of employment, there must be evidence of record which substantiates that it occurred as alleged. In this case, the record reveals only appellant's uncorroborated claims of being pushed twice by his supervisor and a hearsay statement from a coworker regarding what another coworker told her about being told by a third coworker that appellant had been pushed. As no statement was presented from someone who actually witnessed the acts occur, appellant's allegations of physical contact remain unsupported and therefore, not established as having occurred as alleged.

The factors in the case record that appellant has implicated in the development of his emotional condition are not related to his regular or special assigned employment duties or to a requirement imposed by his employment, such that he has failed to implicate any compensable factors of his employment in the development of his emotional disability.

²¹ See *George A. Ross*, 43 ECAB 346 (1991).

²² See *Helen Casillas*, 46 ECAB 1044 (1995); *Ruth C. Borden*, 43 ECAB 146 (1991); *Alton L. White*, 42 ECAB 666 (1991).

Accordingly, the decision of the Office of Workers' Compensation Programs dated February 2, 1999 is hereby affirmed.

Dated, Washington, DC
November 20, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member