

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD T. McDONOUGH and U.S. POSTAL SERVICE,
POST OFFICE, Springfield, MA

*Docket No. 99-315; Submitted on the Record;
Issued October 27, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has met his burden of proof in establishing that he developed an emotional condition due to factors of his federal employment.

The Board has duly reviewed the case on appeal and finds it not in posture for decision.

Appellant, a mailhandler, filed a claim on December 13, 1995 alleging that he developed an emotional condition after he was instructed to report to a different work location. The employing establishment reported, that appellant was reassigned due to allegations by his supervisor, Gene Kelly, that appellant followed him home. Appellant had previously been involved with the woman that Mr. Kelly was currently seeing. The Office of Workers' Compensation Programs denied this claim by decision dated March 10, 1996. Appellant requested a review of the written record and by decision dated August 22, 1996, the hearing representative affirmed the Office's March 10, 1996 decision.

Appellant filed a second claim on January 7, 1997 alleging that on December 31, 1996 he was threatened, assaulted and slandered by Mr. Kelly and developed an emotional condition. By decision dated February 25, 1997, the Office denied appellant's claim for failure to establish fact of injury as he did not submit any medical evidence. Appellant requested reconsideration on October 16, 1997. By decision dated January 20, 1998, the Office modified its February 25, 1997 decision to reflect that appellant had not established a compensable factor of employment. Appellant requested reconsideration on February 24, 1998 and the Office denied modification of its January 20, 1998 decision on May 21, 1998. Appellant requested reconsideration on June 29, 1998 and the Office declined to reopen appellant's claim for consideration of the merits on September 29, 1998.

In a statement dated December 31, 1996, appellant stated that he was at his workstation when Mr. Kelly approach him and began to threaten him. Appellant stated that Mr. Kelly threatened injury, stated that he knew where appellant lived and attempted to provoke a fight.

Appellant stated that he asked a coworker, Bob Arnold, to witness Mr. Kelly's actions and that he requested that Mr. Kelly leave his work area. He alleged that Mr. Kelly then began to shout that appellant had used a racial epithet. Appellant denied that either he or Mr. Arnold had done so. Appellant left his work area to find his supervisor to report a hostile employee. He denied that he had made racial comments to Mr. Kelly in the lobby. Appellant noted his prior claim regarding Mr. Kelly and stated that he believed that Mr. Kelly's actions on December 31, 1997 were in retaliation for his prior equal employment opportunity complaint.

Mr. Arnold submitted a statement noting that appellant called him and as he approached he saw Mr. Kelly was near appellant and that appellant was shaking. Appellant asked him to witness Mr. Kelly's harassment and stated that Mr. Kelly had accused him of using a racial epithet. Mr. Arnold stated that Mr. Kelly again accused appellant, appellant denied the allegation and Mr. Kelly told appellant to call the office in an insulting manner. Mr. Arnold stated that he intervened on appellant's behalf and traded insults with Mr. Kelly.

A second witness heard Mr. Kelly accuse appellant of name-calling and heard him use profanity. He stated that he did not hear appellant say anything to Mr. Kelly other than he did not want to be involved with him in an argument. The witness stated that appellant then telephoned for management intervention.

As a result of this incident, the employing establishment conducted an investigation. The investigator noted that Mr. Kelly asserted that the incident occurred because appellant and Mr. Arnold used a racial epithet. The investigator stated that Mr. Kelly did not mention the racial slur during his interview and that he stated that appellant gave him a "look" and told him, "You are back in the craft and you are mine." When questioned regarding racial slurs, Mr. Kelly asserted that appellant had said something in the past. The investigator concluded that Mr. Kelly was not subjected to racial slurs from appellant nor Mr. Arnold. He found that there was a verbal exchange between appellant and Mr. Kelly based on the history of animosity between the two. The investigator did not reach a conclusion regarding the initiator of the exchange. He stated, "[Appellant] had been taken off his bid assignment ... when Mr. Kelly was acting on the machine due to a conflict with Mr. Kelly. Both gentlemen were told to stay away from each other. It is my opinion that there would be little reason needed for the two individuals to resume their differences."

The employing establishment placed appellant in off-duty status on December 31, 1996 due to the verbal conflict. Appellant received a 14-day suspension on January 23, 1997 for conduct unbecoming a postal employee related to this incident. L.J. Kopacz, a supervisor, stated that he suspended all three employees on December 31, 1996.

In a statement dated February 24, 1998, appellant noted the history of his 1995 claim and alleged that Mr. Kelly went out of his way to confront him in the area that appellant was reassigned to avoid contact with Mr. Kelly. He stated that Mr. Kelly walked directly into his personal space and began screaming obscenities and threats. Appellant stated that he did not provoke the attack.

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.¹ The employment must cause the injury in order for an injury to be considered as arising out of the employment and the facts of the case must show some substantial employer benefit is derived or an employment requirement gave rise to the injury.²

Appellant alleged that the employing establishment erred in placing him in an emergency off-duty status on December 31, 1996 and in issuing a 14-day suspension on January 23, 1997 based on appellant's part in the December 31, 1996 verbal altercation. As a general rule, an employee's emotional reaction to an administrative or personnel matter is not covered under the Federal Employees' Compensation Act. But error or abuse by the employing establishment in what would otherwise be an administrative or personnel matter, or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.³ In this case, there is no evidence that the employing establishment did not act reasonably in issuing the disciplinary actions. Appellant's supervisor, Mr. Kopez stated that he suspended all three parties involved in the December 31, 1996 altercation.

Appellant alleged that he was harassed by Mr. Kelly. For harassment or discrimination 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 or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. 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.⁴ In this case, appellant submitted statements from two witnesses supporting his allegation that Mr. Kelly came to appellant's work space on December 31, 1996 and accused appellant of name calling and that Mr. Kelly began to shout and curse. There is no evidence from the employing establishment that refutes that this employment incident occurred as alleged. The Board finds that appellant has substantiated his allegation of harassment by Mr. Kelly on December 31, 1996.

As appellant has established a compensable factor of employment, harassment by Mr. Kelly, the Board will consider the medical evidence of record. In support of his claim, appellant submitted a report dated July 29, 1997 from Dr. H. Douglas. Barnshaw, a Board-certified, who stated that he first treated appellant on January 2, 1996 for anxiety/stress over conflict with a supervisor. He stated, "In January 1997 he again had a conflict with this same man causing increase in his symptoms requiring some time off from work. Dr. Barnshaw noted that appellant was treated with medication.

¹ *Lillian Cutler*, 28 ECAB 125, 129-31 (1976).

² *See Eugene G. Chin*, 39 ECAB 598, 602 (1988).

³ *Martha L. Watson*, 46 ECAB 407 (1995).

⁴ *Alice M. Washington*, 46 ECAB 382 (1994).

This report contains a history of injury, diagnosis and an opinion that appellant's preexisting condition was exacerbated by the accepted employment incident. While these reports are not sufficient to meet appellant's burden of proof, they do raise an uncontroverted inference of causal relation between appellant's accepted employment incident on December 31, 1996 and an exacerbation of his diagnosed condition and are sufficient to require the Office to undertake further development of appellant's claim.⁵ On remand the Office should refer appellant and a statement of accepted facts to an appropriate physician to determine the causal relationship between appellant's December 31, 1996 employment incident and his diagnosed condition of anxiety/stress as well as determining any period of resulting disability. After this and such other development as the Office deems necessary, the Office should issue an appropriate decision.⁶

The September 29, May 21 and January 20, 1998 decisions of the Office of Workers' Compensation Programs are hereby set aside and remanded for further development consistent with this opinion.

Dated, Washington, DC
October 27, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁵ *John J. Carlone*, 41 ECAB 354, 358-60 (1989).

⁶ Due to the disposition of this issue, it is not necessary for the Board to address the issue of whether the Office abused its discretion by refusing to reopen appellant's claim for review of the merits on September 29, 1998.