U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HOWARD M. HETT and U.S. POSTAL SERVICE,
WESTERN STATION, Milwaukee, WI

Docket No. 01-686; Submitted on the Record;
Issued January 25, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON
PRISCILLA ANNE SCHWAB

The issue is whether appellant sustained an emotional condition while in the performance of duty on or before August 5, 1998 as alleged.

On August 14, 1998 appellant, then a 47-year-old letter carrier, filed an occupational disease claim, alleging that his anxiety reaction and stress resulted from an August 5, 1998 disciplinary meeting called by station manager Patti Rosenwald and attended by four other supervisors. Ms. Rosenwald called the meeting due to appellant's sexual harassment of a female letter carrier and loud and disruptive behavior on the workroom floor. Appellant asserted that a union steward was not present at the meeting.

Appellant also attributed his condition to a subsequent emergency placement from August 5 to 11, 1998 pending an investigation into his disruptive conduct. He noted that he had been treated for depression since 1992 and had a previous claim accepted for generalized anxiety disorder with mixed emotional features.[1]

In an August 6, 1998 memorandum, the employing establishment placed appellant in a nonpay status effective August 5, 1998 for "disruptive behavior." Ms. Rosenwald also directed that appellant undergo a psychiatric fitness-for-duty examination which he did. In an August 13, 1998 report, Dr. Walter T. Davison, a psychiatrist consulting to the employing establishment,

[1] In a September 8, 1998 letter, the Office of Workers' Compensation Programs reiterated appellant's allegations regarding the August 5, 1998 meeting and the lack of union representation and explained the deficiencies in the evidence submitted. The Office requested that appellant provide additional factual information regarding the August 5, 1998 meeting, as well as a detailed, well-rationalized report from his attending physician explaining how and why the alleged employment factors would cause the claimed emotional condition.

diagnosed an adjustment reaction with mixed emotional features and released appellant to return to work with no restrictions.[2]

In a notice of proposed removal dated September 28, 1998, the employing establishment charged appellant with sexually harassing Michelle Nash, a letter carrier, on April 18, 1998 noting that appellant admitted to doing so in an April 20, 1998 disciplinary meeting. The employing establishment also asserted that on July 21, 1998 appellant shouted "all managers are idiots" on the workroom floor, created a loud disturbance and made threatening and harassing remarks to Ms. Nash. In a July 23, 1998 meeting, appellant harassed and "verbally attacked" supervisor Chuck Woods.[3]

On July 28, 1998 the employing establishment instructed appellant not to have any contact with Ms. Nash except for very specific work discussions. He did not comply. Also, on August 1, 1998 appellant blocked acting supervisor Janet Ingraham from entering her workstation, held papers out of her reach, then threatened her with harassment charges. The employing establishment conceded that there was no union steward present at the August 5, 1998 disciplinary meeting. The employing establishment concluded that appellant's "behavior on the workroom floor [was] disruptive and intolerable."

By decision dated November 25, 1998, the Office denied appellant's claim on the grounds that he had not established a compensable factor of employment. The Office found that the August 5, 1998 disciplinary meeting, fitness-for-duty examination and proposed removal were reasonable administrative actions in light of appellant's inappropriate and disruptive behavior. The Office further found that appellant had not established any error or abuse by the employing establishment regarding these administrative, disciplinary actions, which were, therefore, not considered to be within the performance of duty.

Appellant disagreed with this decision and in a December 15, 1998 letter, requested reconsideration. Appellant alleged that the Office had erred by failing to inform him of deficiencies in the evidence. He submitted additional evidence.

Appellant filed a Step One grievance on August 19, 1998 which was subsequently denied.

Appellant filed an Equal Employment Opportunity (EEO) complaint on November 2, 1998 alleging that the August 5, 1998 meeting, fitness-for-duty examination, proposed removal and an October 23, 1998 "day of reflection" with pay were retaliatory or discriminatory actions against him on the basis of mental disability.

[2] Appellant participated in a September 9, 1998 "day in court" regarding his proposed removal. In a September 10, 1998 letter, the employing establishment directed appellant to return to work on September 11, 1998 at 7:00 a.m.

[3] In a July 24, 1998 memorandum, Ms. Rosenwald stated that in a July 23, 1998 meeting regarding the performance of another letter carrier appellant became loud, threatening and demanded full investigations into very minor infractions of employing establishment policy.

Appellant submitted December 1998 statements from coworkers Clarence Nieser and Joe Dougherty stating that there was no union steward present at the August 5, 1998 disciplinary meeting.

In an undated memorandum, Dennis Nott, an employing establishment manager and Barry Weiner, a union official, noted that while it was necessary to include a union steward in disciplinary meetings with bargaining unit employees, "some situations may dictate immediate action, but there is no reason for a steward not to be informed as soon as practical."

By decision dated January 20, 1999, the Office denied appellant's request on the grounds that the evidence submitted was insufficient to warrant modification of its prior decision. The Office found that appellant had been informed of the deficiencies in the evidence. The Office also found that the grievance and EEO documents did not establish any error or abuse by the employing establishment.

Appellant again requested reconsideration and alleged that the Office had committed legal error by denying his claim.[4] He submitted additional evidence.[5]

In an April 14, 1998 final settlement agreement, Al Jelinek, a union official and S. Wanto, an employing establishment official, agreed that appellant "or any other letter carrier will be provided a union steward upon request in accordance with the National Agreement and applicable law." The settlement agreement was made without prejudice to any party.

In a March 25, 1999 letter, the employing establishment rescinded the August 6, 1998 emergency placement and made appellant whole by granting him all appropriate salary and benefits for the 48 hours he was in nonpay status.

In a July 21, 1999 EEO settlement agreement, appellant agreed to resign voluntarily effective March 1, 2000 and to remain in a nonsalaried, nonduty status until that time. The employing establishment gave appellant a $5,000.00 lump-sum payment to resolve any of his expenses related to his resignation. The agreement stipulates that neither party admitted to any wrongdoing.

On September 10, 1999 the Office of Personnel Management (OPM) approved appellant's application for disability retirement.

By decision dated July 26, 2000, the Office denied modification of its prior decision. The Office found that the settlement agreements did not establish any wrongdoing by the employing establishment.

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[4] The record indicates that, the Office delayed in processing appellant's June 16, 1999 request for reconsideration, his request was not assigned to a claims examiner until November 1999 and a decision was not issued until July 26, 2000. However, this delay did not prejudice appellant's case because the Office issued a decision on the merits on July 26, 2000.

[5] Appellant also submitted copies of a U.S. Supreme Court decision and employing establishment procedures. None of these documents mentions appellant's compensation claim. He also submitted copies of letters to his elected representatives, repeating the arguments he made to the Office and requests for reconsideration.

The Board finds that appellant has not established that he sustained an emotional condition while in the performance of duty.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to employment. Where disability results from an employee's emotional reaction to employment matters unrelated to the employee's regular or specially assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the Federal Employees' Compensation Act's coverage.[6] Disabling conditions resulting from an employee's desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.[7]

As part of its adjudicatory function, the Office 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.[8] When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. 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.[9]

In this case, appellant attributed his emotional condition to an August 5, 1998 disciplinary meeting, lack of union representation at the August 5, 1998 meeting, a September 28 1998 letter of proposed removal and a March 25, 1999 letter rescinding disciplinary emergency placement. The Board finds that these allegations relate to administrative or personnel matters unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[10]

Although matters such as disciplinary actions, leave requests, the assignment of work duties and overtime and investigative interviews are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[11] However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing

[6] *Lillian Cutler*, 28 ECAB 125 (1976).

[7] *Raymond S. Cordova*, 32 ECAB 1005 (1981); *Lillian Cutler*, *supra* note 6.

[8] *See Barbara Bush*, 38 ECAB 710 (1987).

[9] *Ruthie M. Evans*, 41 ECAB 416 (1990).

[10] *See Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993).

[11] *Id.*

establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[12]

In this case, the employing establishment submitted a detailed description of appellant's disruptive behavior on four occasions from April 18 to August 1, 1998, including sexual harassment to which appellant admitted, shouting and creating a disturbance on the workroom floor and threatening supervisors. The Board finds that the employing establishment's August 5, 1998 disciplinary meeting, fitness-for-duty order "emergency placement" and the proposed removal were reasonable administrative actions commensurate with the seriousness of appellant's repeated misconduct and insubordination. There is no evidence that the employing establishment committed error or abuse with regard to any of these actions.

Appellant also asserts that the March 25, 1999 rescission of the August 6, 1998 emergency placement and the July 21, 1999 EEO settlement changing the proposed removal to a voluntary resignation demonstrate error or abuse by the employing establishment. However, the Board has held that rescission of a disciplinary action does not establish that its issuance was in error.[13] Also, the July 21, 1999 settlement agreement stipulates specifically that neither party admitted to any wrongdoing.

Appellant asserted that the employing establishment committed error by not honoring his request for a union steward at the August 5, 1998 disciplinary meeting. The employing establishment's memorandum by Mr. Nott and Mr. Weiner, acknowledges that it is not always possible to ensure that a steward will be in attendance at a disciplinary discussion. Also, the April 14, 1998 final settlement agreement regarding union representation was made without prejudice to any party and does not constitute an admission of wrongdoing.

Consequently, appellant has not established that he sustained an emotional condition in the performance of duty as he submitted insufficient evidence to establish a compensable factor of employment.[14]

[12] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[13] *Richard J. Dube*, *supra* note 12.

[14] Appellant submitted an August 5, 1998 report from Dr. Michael N. Katzoff, an attending neurologist, regarding a sleep disorder study. Appellant also submitted results of cardiac and neurologic studies and examinations conducted in August and September 1998. In an October 19, 1998 report, Dr. Jay B. Winston, an attending psychiatrist, diagnosed an adjustment disorder with mixed emotional features. Dr. Winston reiterated this diagnosis in November 5 and 11, 1998 reports. However, as appellant has failed to establish a compensable factor of employment, the medical record need not be addressed. *Margaret S. Krzycki*, 43 ECAB 384 (1992).

The decision of the Office of Workers' Compensation Programs dated July 26, 2000 is hereby affirmed.

Dated, Washington, DC
January 25, 2002

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member