

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL A. SALVATO and U.S. POSTAL SERVICE,
NORTH BAY PROCESSING & DISTRIBUTION CENTER, Petaluma, CA

*Docket No. 01-1790; Submitted on the Record;
Issued July 16, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
DAVID S. GERSON

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

On February 16, 2000 appellant, then a 42-year-old mail processing equipment mechanic, filed a claim for an occupational disease for work-related stress that he attributed to harassment and discrimination.

In response to an April 6, 2000 letter from the Office of Workers' Compensation Programs advising him of what was needed to support his claim, appellant submitted a statement describing incidents at the employing establishment from October 21 to November 4, 1999. He also submitted several medical reports, primarily from his attending psychologist, Dr. Anne Kopp, Ph.D., regarding his condition, diagnosed as an adjustment disorder with anxious and depressed mood and its relationship to his employment.

By letter dated August 10, 2000, the Office requested that the employing establishment comment on appellant's allegations.

By decision dated September 11, 2000, the Office found that the evidence failed to establish an injury in the performance of duty, as the incidents appellant cited were either self-generated, involved administrative functions of the employer or were not shown to have occurred.

By letter dated September 25, 2000, appellant requested reconsideration. He submitted evidence regarding his numerous Equal Employment Opportunity (EEO) complaints and grievances and the resolutions thereof and more medical reports.

By decision dated November 20, 2000, the Office found that the only factors that were within the scope of employment were those relating to the duties appellant was hired to perform,

that his settled grievances did not show error or abuse and that the medical evidence was irrelevant because no compensable employment factors were shown.

By letter dated April 26, 2001, appellant requested reconsideration, contending that error or abuse did occur. He submitted further evidence regarding EEO complaints and grievances and additional reports from Dr. Kopp.

By decision dated June 26, 2001, the Office found that the additional evidence was not sufficient to warrant modification of its prior decisions.

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

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 an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation 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.¹ Generally, actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of personnel matters, coverage may be afforded.² Where appellant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.³

Appellant submitted copies of his numerous EEO complaints and grievances and of their resolutions, as support of his claim of harassment and discrimination and to show error or abuse by the employing establishment in its administration of personnel matters. However, the fact that appellant filed EEO complaints and grievances does not substantiate the allegations contained therein and the settlement of his EEO complaints and grievances does not establish error or abuse by the employing establishment.⁴

Appellant contended that on November 9, 1996 the employing establishment's supervisor of maintenance operations, Frank Warner, verbally abused him and physically threatened him by calling him over, grabbing his own crotch and launching into an angry, agitated and threatening diatribe. Mr. Warner's version of this incident was markedly different, involving only reminders

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

² *Michael Thomas Plante*, 44 ECAB 510 (1993).

³ *Joel Parker, Sr.*, 43 ECAB 220 (1991).

⁴ *Michael Thomas Plante*, 44 ECAB 510 (1993).

about attending four meetings, carrying a radio and scheduling meetings with union representatives. Appellant did not submit any substantiation of his version, despite the fact that the incident occurred immediately after he was engaged in a discussion with a union steward. There is no reason to accept appellant's account of this incident in preference to that of Mr. Warner.

According to appellant, on November 16, 1996 he called his supervisor, Tom Silman and asked him to advise Mr. Warner that he would no longer talk to him without witnesses present. Mr. Silman's recollection of this conversation was that appellant said he would not talk to Mr. Warner without a union steward present as a witness. In any event, Mr. Silman and Mr. Warner went to the battery room to talk to appellant about this request, requested another employee to leave and attempted to talk to appellant, who called the police.

The November 16, 1996 incident was the subject of a grievance by appellant for denial of a request for a steward and a letter of warning issued to appellant on December 17, 1996 for failure to follow instructions to stay and engage in a discussion. On February 4, 1997 a settlement of appellant's grievance was reached: "Without prejudice to either party, it is mutually agreed that employee requests for a steward shall not be unreasonably denied." On February 18, 1997 a settlement of appellant's grievance of the employing establishment's letter of warning was reached: this letter of warning would be removed from appellant's disciplinary record after six months if his behavior in the workplace was corrected and he had no subsequent conduct infractions. Neither of these settlement agreements establishes any error or abuse by the employing establishment.

Appellant also has not shown error or abuse in the employing establishment's decisions regarding leave usage, which are administrative in nature.⁵ The employing establishment denied his request for annual leave for February 8, 1997 on the basis of staffing needs. Appellant indicated in his grievance that he was told on February 4, 1997 that he could not use leave on February 8, 1997, but his requests for leave for that date are dated February 8 and 9, 1997. A March 21, 1997 settlement adjusted his pay to show four hours of annual leave and four hours of leave without pay on February 8, 1997. Appellant's grievance regarding the employing establishment's requirement that he provide documentation for sick leave for August 2, 1997, requested that day, was also settled without prejudice to the position of either party.

On February 23, 1999 appellant was suspended for seven days for unacceptable conduct on February 10, 1999. On March 4, 1999 appellant was suspended for 14 days for unacceptable conduct and failure to follow instructions on February 18, 1997. Both these suspensions were rescinded in an April 19, 1999 settlement agreement and appellant was reimbursed for five days of lost wages for each suspension. The parties also agreed that the absence without leave with which appellant was charged on February 10, 1999 would be changed to sick leave under the Family Medical Leave Act. Nothing in these settlements or in appellant's statements about the suspensions or incidents leading to them shows any error or abuse by the employing establishment.

⁵ *Jimmy Gilbreath*, 44 ECAB 555 (1993).

Appellant has not shown error or abuse in the employing establishment's payment of three hours of overtime, instead of the eight hours requested by appellant, for his attendance at an EEO hearing on May 8, 1997. Although an August 13, 1999 settlement agreement states that appellant is entitled to receive compensation for his attendance at this hearing, the agreement does not indicate the amount of compensation and does not show any error in the employing establishment's payment.

Appellant has not shown that an October 7, 1998 incident, in which he alleged a supervisor threatened to write him up if he did not provide medical documentation showing he was unable to undergo out-of-town training, occurred as alleged. The employing establishment's final agency decision on appellant's EEO complaint that this incident constituted retaliation for prior EEO activity was that appellant was not an aggrieved employee.

As verified by a November 2, 1999 letter from the manager of maintenance operations, appellant was placed in an off-duty status on October 30, 1999, with administrative leave paid until November 4, 1999, after which appellant would be on leave without pay unless he requested sick or annual leave. Appellant was not allowed to return to work until the employing establishment's medical officer cleared him. The employing establishment denied appellant's grievance on December 29, 1999 and February 27, 2000, but agreed to a prearbitration settlement on November 27, 2000 rescinding appellant's emergency placement in an off-duty status and paying appellant a lump sum of \$3,000.00 for the period of his absence from November 4 to 29, 1999. Appellant has not shown that the employing establishment's action in placing him in an off-duty status for acting irrationally was erroneous or abusive or that his reaction to a supervisor's attempt to talk to him on October 21, 1999, which appellant characterized as an anxiety attack, was anything more than appellant's perception that he was being harassed. The Board has held that actions of an employee's supervisor which the employee characterizes as harassment or discrimination may constitute factors of employment giving rise to coverage under the Act. However, 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 alone of harassment or discrimination are not compensable under the Act.⁶

Appellant also has not shown error or abuse in the employing establishment's assignment of work and of his schedule, which are administrative actions.⁷ His grievance about not being allowed to work on Christmas day 1999 was denied on the basis that he was not on the holiday list. Appellant's January 14, 2000 request for EEO counseling regarding Mr. Warner's refusal to change his schedule does not show error or abuse in this decision. No error or abuse was shown in the apparent denial of advanced sick leave requested by appellant on February 25, 2000 or in the August 26, 2000 cancellation of his February 2000 reassignment on the basis that he was not qualified for the position to which he had been reassigned.

The disposition of appellant's grievance regarding the denial of union representation at a February 17, 2000 meeting with Mr. Warner is unclear. The case record contains two

⁶ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁷ *Alice M. Washington*, 46 ECAB 382 (1994) (schedule); *James W. Griffin*, 45 ECAB 774 (1994) (duties).

notifications of that decision regarding this incident: one indicates the grievance is sustained, the other, that the grievance is denied. The evidence does not show that appellant was entitled to a steward for this meeting, which the union characterized as investigatory and management characterized as an unofficial discussion of deficiencies.

In summary, appellant has not shown error or abuse in the employing establishment's administration of personnel matters. He also has not shown harassment or discrimination. As appellant has not cited any compensable factors of employment, his claim was properly denied.

The June 26, 2001, November 20 and September 11, 2000 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
July 16, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

David S. Gerson
Alternate Member