

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH A. FRANCO, III and DEPARTMENT OF LABOR,
OFFICE OF FEDERAL CONTRACT COMPLAINT PROGRAMS,
Phoenix, AZ

*Docket No. 01-2133; Submitted on the Record;
Issued September 24, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

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

Appellant, a 47-year-old district director, filed a claim for an emotional condition on March 3, 1997. By decision dated June 8, 1998, the Office of Workers' Compensation Programs denied appellant's claim. Appellant requested reconsideration on May 19, 1999. In a decision dated June 8, 1999, the Office denied modification of its June 8, 1998 decision. He requested reconsideration on November 10, 1999. By decision dated February 17, 2000, the Office reviewed appellant's claim on the merits and denied modification of its prior decisions. Appellant again requested reconsideration which was denied by the Office following merit review on May 10, 2001.

The Board finds that appellant has failed to establish that he developed an emotional condition due to factors of his federal employment.

Appellant attributed his emotional condition to alleged actions by his superiors, Regional Director Helene Haase, District Director William Smitherman and area Office Director Sarah Nelson. He provided statements describing alleged actions by these persons including the dates on which the actions occurred. Appellant also provided copies of emails he sent to various employing establishment officials regarding his Equal Employment Opportunity (EEO) and other claims. Appellant alleged that his emotional condition was due to persistent abusive treatment in the form of relentless threats, acts of harassment, false accusations, intentional delay and sabotage of his work and other mistreatment. In a statement dated November 10, 1999, appellant alleged that management had engaged in a pattern of mistreatment designed to harass, intimidate and retaliate against him for having filed an EEO complaint. Appellant stated that this conduct included refusing to meet with him to discuss his workload, directing him to attend and participate in important meetings without any prior notice or opportunity to prepare, changing his work assignments without notice, assigning him to perform clerical duties and withholding

approval of sick leave until after it was scheduled to begin. Appellant stated that following the settlement of his grievance he was subjected to continuing acts of abusive treatment by managers. He stated that his manager obstructed and sabotaged his work, maliciously denigrated his performance and abilities, delayed review of his work for extended periods of time and then rejecting or returning it for specious, inappropriate or petty reasons, made false accusations of insubordination, refused to speak with him, excluded him from staff meetings and developmental assignments given to coworkers, changed his work assignments and schedule verbally without notice, refused to meet with him to discuss assignments, denied him leave for medical appointments, placed him on a performance improvement plan while he was disabled and on sick leave, treated him in a rude and abusive manner and perpetuated a hostile work environment. Appellant alleged acts of reprisal including reacted acts of false accusations, threats, insults and other improper activities on February 28, 1997 including verbal abuse, confrontation about the issues in his EEO complaint, false accusations, insults regarding his performance and abilities and threats to remove him from management.

According to appellant, regional director Ms. Haase demoted appellant from district director to assistant district director. She then appointed Mr. Smitherman district director in appellant's place. Ms. Haase stated that appellant was performing unsatisfactorily and that she considered placing him on a performance improvement plan or other adverse action. Ms. Haase stated that she had previously issued appellant a reprimand for performance, had demoted him as a less severe action and met with him to inform him how to perform satisfactorily. Ms. Haase stated that appellant gave out documents to nongovernment entities, leaked drafts and gave inside information about a complaint to an unauthorized person. She also stated that appellant's staff was refusing to do what he asked of them.

Appellant alleged that when Ms. Haase determined that he filed an EEO complaint, she implied that appellant was involved in a press conference, accused him of lack of cooperation and threatened him. Appellant stated that he viewed Ms. Haase's statements to be improper, that her continued unfounded allegations and threats constituted harassment and reprisal for his discrimination complaint. He noted that Ms. Haase sent him an article entitled, "What's worse than job stress? Jobless Stress." She accused appellant of insubordination, denigrated his abilities and performance and maligned his integrity.

Appellant stated that on January 16, 1997 Ms. Haase telephoned him and implied that he was involved in a press conference regarding a complaint investigation, accused him of a lack of cooperation and of undermining the agency, attempted to engage appellant in a discussion of his EEO complaint and made threats to remove him from management. Appellant denied any knowledge of or any involvement in any plans for a press conference. He Alleged Ms. Haase accused him of failing to support her or to cooperate with her directions and of undermining the agency. Ms. Haase stated that her options regarding appellant were to have him report to Mr. Smitherman or to place him on a performance improvement plan. Appellant responded that his performance appraisal did not indicate that he was failing to meet his performance standards.

On January 30, 1997 appellant stated that he was subjected to continued threats, harassment and reprisal as Ms. Haase found him responsible for a press conference. He also noted that Ms. Haase directed Mr. Smitherman to issue a counseling memorandum to him regarding his involvement with the scheduling of the meeting. Appellant stated that this was an

act of reprisal for filing an EEO complaint. On May 15, 1997 appellant alleged that Mr. Smitherman failed to respond to his request for official time to gather organize, copy and send evidence regarding his EEO complaint.

Mr. Smitherman allegedly informed appellant that the national office was “after his head.” He allegedly failed to supply appellant with performance standards for his new position and stated that he could not tell appellant what his job would entail. Mr. Smitherman criticized appellant’s performance and found him accountable for the completion of cases that he did not control. Appellant stated that Ms. Haase and Mr. Smitherman denied his request for sick leave. Appellant requested reassignment to a compliance officer vacancy on March 11, 1997.

Appellant requested 40 hours of official time to provide evidence for his EEO complaints. In a letter dated May 29, 1997, appellant stated that Mr. Smitherman failed to grant him official time to gather evidence for his EEO complaint. Mr. Smitherman confiscated the key to appellant’s old office and threatened to retaliate against him for betraying him. He stated that Mr. Smitherman accessed and destroyed messages on appellant’s voice mail over his objections. Appellant stated that Mr. Smitherman scheduled a review on the same day that he told appellant to continue his investigation and failed to give appellant any notice of the meeting and that these actions constituted intentional efforts to harass, intimidate and discredit appellant’s professionalism. Appellant stated that Mr. Smitherman requested that he perform clerical support work. He stated that Mr. Smitherman directed him to attend an important meeting without any prior notice, ignored a leave request, continued to make spur of the moment work assignments and avoided meeting with appellant to discuss work assignments and appellant’s request to work on his complaint.

In a grievance appellant requested recession of a counseling memorandum and reinstatement to flexiplace status. The grievance provided appellant’s disagreement with the counseling memorandum.

Appellant stated that he received a performance improvement plan (PIP) on June 16, 1999. Area office director Ms. Nelson stated that appellant had met his performance deadlines but that the quality of his work was not acceptable. In an email dated April 22, 1999, appellant stated that Ms. Nelson harassed him and perpetuated a hostile environment. He stated that she requested that he complete a line on a form which was not a mandatory entry. Appellant included a note regarding this issue with his completed form and Ms. Nelson accused him of insubordination. Appellant stated, “I believe that this petty feedback and these absurd accusation and thinly veiled threats constitute a continuing pattern of harassment and retaliation for my having used the grievance process to challenge her counseling memorandum.”

On March 22, 1999 appellant stated that Ms. Nelson had changed his written work assignments and his schedule verbally without notice, that she refused to meet with him to discuss an assignment, that she issued a memorandum purporting to document his alleged failure to meet his communication standard and denied him one hour of credit leave. Appellant stated that Ms. Nelson was attempting to set him up to fail the terms of the counseling memorandum and that her actions constituted harassment and retaliation for his grievance.

Appellant submitted a grievance and a series of emails detailing his difficulties with Ms. Nelson. In his grievance appellant stated that Ms. Nelson used her position to sabotage him by establishing unreasonable deadlines, assigning time consuming additional work not contained in his PIP without adjusting his PIP, delaying her review of his completed case work for weeks, then instructing him to conduct additional time consuming investigations of potential disparate treatment and intentionally delaying the resolution of a case to ensure that appellant could not complete the case before the end of the PIP. He further stated that Ms. Nelson issued a series of memorandums to him that misstated events that occurred and found that all of the work completed during the PIP to be unacceptable for reasons that conflict with the employing establishment's policies, procedures and practices and with reasonable measurements of appellant's case management performance and communications.

Appellant alleged that Ms. Nelson harassed him and retaliated against appellant by repeatedly yelling at him, hanging up the telephone in the middle of conversations, ordering him to stay away from her work area, telling other employee's not to have contact with him and initiating investigations without cause, assigning a coworker to investigate appellant's activities with external clients, canceling a meeting appellant had scheduled with an external client without notifying appellant and making unfounded and false accusations regarding appellant's actions. He stated that she treated him in a hostile, noncommunicative and accusatory manner. He further stated that Ms. Nelson assigned him cases without prior notice or directions, closed his cases without notifying him, assigned him to an alternative work space and then moved him. Appellant stated that Ms. Nelson shouted at him and called him names and insulted him. He alleged that she accused him of creating a hostile environment by typing down too heavily on his keyboard and of having an "evil stare." On February 17, 2000 appellant stated that Ms. Nelson had not met with him to discuss this plans and accomplishments, had not provided appellant with feedback and continued to give him new assignments without regard to his existing workload or plans. He stated that Ms. Nelson accused him of lying and made personal insults. Appellant stated that Mr. Smitherman made a "verbal blast" at him. He stated that the hostility was daily and pervasive. Appellant stated that Ms. Nelson provided him with a PIP, which was based on false statements, required him to be in multiple places at once. He stated that she required him to complete work assignments in far less time than his coworkers. The draft PIP required that appellant's written work must have no typographical errors even as the document and the sentence in which that requirement appeared contained typographical errors. On March 01, 2000 appellant stated that Ms. Nelson had assigned him more than three times the workload of his coworkers. On March 17, 2000 he stated that she repeatedly scheduled meeting and then postponed them, scheduled deadlines for 3 of appellant's 10 cases, which allowed him much less time than the 60 days required of other compliance officers. Appellant alleged that Ms. Nelson also gave him nine additional assignments with immediate, conflicting and unreasonable deadlines. Appellant alleged that Ms. Nelson rejected his request for flexiplace without discussion or direct response.

Appellant also alleged that Ms. Nelson denied his leave requests, changed his work assignments, refused to meet with him and attempted to set him up to fail.

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. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.¹

Appellant attributed his emotional condition to all the above-mentioned events, which he felt constituted harassment, discrimination and reprisal for filing both EEO complaints and grievances. Appellant provided detailed statements of the actions by all three supervisors as noted above. Among his many allegations, appellant indicated that he was yelled at, unjustly accused of violating policy and held to different standards than his coworkers. For harassment or discrimination to give rise to a compensable disability under the Federal Employees' Compensation 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.²

In support of his claim for harassment, appellant submitted his own statements. The only evidence in the record pertaining to appellant's claims is the settlement agreement signed by Ms. Haase on July 28, 1997. This agreement settled four EEO complaints. Appellant withdrew his complaints and the employing establishment agreed to remove any negative documentation from appellant's personnel file, agreed that appellant would remain in the position of equal opportunity specialist with pay retention for his former position of supervisory equal opportunity specialist, agreed that the employing establishment would clarify rules and regulations regarding the release of information and agreed that the employing establishment would provide ethics training. This settlement agreement provided no concessions of wrongdoing and that the employing establishment would not retaliate against appellant for his participation in the EEO process. The Board has held that such settlement agreements without admissions of wrongdoing are not sufficient to establish error on the part of the employing establishment.³

As appellant has not submitted sufficient evidence such as witnesses' statements or findings from an adjudicatory body regarding his EEO complaints and grievances he has failed to establish discrimination, harassment or retaliation as a compensable factor of employment.

Appellant attributed his emotional condition to his regular or specially assigned duties including overwork, more difficult work and time constraints, changes in appellant's PIP, the scheduling of meetings and the requirement that he perform specially assigned clerical duties. If established as factual, these allegations would be compensable factors of employment. However, appellant has not submitted any evidence to support his allegations that these events

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

² *Alice M. Washington*, 46 ECAB 382 (1994).

³ *Georgia M. McCardle*, 48 ECAB 502, 504 (1997); *Mary L. Brooks*, 46 ECAB 266, 274 (1994).

occurred as alleged. Appellant did not submit any reports indicating that he worked more than eight hours a day, did not submit any statements from witnesses or coworkers indicating that he had more cases assigned and of greater difficulty than others or any evidence other than his own contemporaneous statements regarding his work duties.

As noted above, appellant did submit a copy of a grievance settlement, however, this document stated it did not constitute an admission of wrongdoing, misconduct or liability by the employing establishment. Therefore, this document does not support appellant's allegations of wrongdoing on the part of his supervisors. As appellant did not submit the necessary supportive evidence, he did not establish that these compensable employment factors occurred as alleged.

In regard to appellant's allegations regarding the denial of leave requests, including official time, flexiplace, his demotions and disciplinary actions, as well as improperly assigned work duties and unreasonably monitored work activities the Board finds that these allegations related to administrative or personnel matters, unrelated to appellant's regular or specially assigned work duties and do not fall within the coverage of the Act.⁴ As a general rule, an employee's emotional reaction to an administrative or personnel matter is not covered under the 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.⁵ In this case, appellant has submitted no witness statements, no copies of office procedure nor other evidence to document that his supervisor erred or acted abusively in demoting him, denying leave, assigning work or other administrative actions. Without the necessary corroborating evidence, appellant has failed to establish this factor of employment.

As appellant has failed to submit the necessary factual evidence to establish a compensable factor of employment, the Office properly denied his claim for an emotional condition.

⁴ See *Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

⁵ *Martha L. Watson*, 46 ECAB 407 (1995).

The May 10, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 24, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member