U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL N. DESPRES and U.S. POSTAL SERVICE,
POST OFFICE, Providence, RI

Docket No. 02-1901; Submitted on the Record;
Issued February 27, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant established that he sustained an emotional condition in the performance of duty, as alleged.

On January 3, 2001 appellant, then a 52-year-old postmaster, filed an occupational claim alleging that on December 6, 2000 he became aware that he had sustained work-related stress. He stated that in August he was rushed to the hospital with symptoms of a heart attack. Appellant has not worked since December 6, 2000.

In an attachment to his claim, appellant stated that he had "been continually and systematically mistreated" for almost four years. He stated that in 1999 he was denied an interview twice for a level "25 POOM" (post office operations manager) position in his district for which he was "well qualified." Appellant stated that the position was given to a female employee who was junior to him in experience and level and that, while the position was vacant, it was covered by a female manager who was also junior to him in experience and level. Appellant stated that the "SENE" district manager, Thomas Day, told him that he would not recommend appellant for succession planning or career advancement even though he was a former "PCES" candidate and had received multiple performance awards. He stated that Mr. Day later mentioned at a meeting with appellant's boss and the human resource manager, that he and appellant had personality differences. Appellant stated that he had never argued with Mr. Day and acted professionally with him. He contended that, when he communicated by email to Mr. Day to request developmental assignments to assist his career, Mr. Day did not respond to his email. Further, appellant stated when several developmental assignments were opened, they went to junior female employees. He stated that this forced him to try to explain, during his out-of-state promotional interviews, why he had not received a developmental assignment in his own district.

Appellant stated that, "during this same period," management obstructed his ability to do his job which it did not do to others. He stated that they "*de facto*" forced him to meet more difficult performance standards than other postmasters while denying him resources. Appellant

stated that this was also disadvantageous to him while interviewing for two out-of-state promotions because he had to explain short-term negative performance trends that were beyond his control as in being unable to hire more people. Citing specific examples of obstruction, appellant stated that he was one of four postmasters who was ordered not to exceed their supervisor work-hour plan for any reason, even though the plan did not cover basic daily needs. He stated that he was the only postmaster making the bottom line total work-hour plan yet, unlike other offices of his size, he had no relief supervisors authorized to his office and when supervisors took off whole days, he had to cover two-thirds of those days to "get the job done" to meet the requirements for a management presence. Appellant stated that for management to cut his supervisory resource when he was making the bottom-line plan was "pure" impediment.

Citing another example, appellant stated that in 1997 he had zero lost workday injuries for the entire year and when he sought recognition for his staff in the form of a plaque or certificate from Mr. Day, Mr. Day told him that it was his job to recognize his employees. He stated that he felt that Mr. Day's response showed discrimination towards him and that "[s]uch overt animus" made it difficult for him to motivate his staff and "wield real authority."

Appellant stated that Mr. Day "overtly" ignored multiple communications to him including one which involved a "potentially life-threatening" situation in which a "very disturbed" employee, Stanley Macek, whom Mr. Day knew about, told a district nurse that his hatred for appellant was "building and building." He stated that Mr. Macek remained in his employ almost a year after the incident.

Appellant contended that Mr. Day and his staff "repeatedly addressed [him] in demeaning ways" even though he was one of the senior postmasters in the district with a solid track record. He stated that he was falsely accused of various performance lapses by Mr. Day and his acting "POOM," but they withdrew their criticisms when he challenged them to provide particulars.

Appellant also contended that he was not allowed to hire people despite the fact that his staffing shortage was so critical that his overtime averaged 18 percent. He stated that his request to rectify the situation was ignored. Appellant stated that he made a presentation of his problems at a meeting but Mr. Day "took no action to address his concerns." He stated that relying on 18 percent forced overtime "made everything incredibly more difficult, including scheduling in accordance with [their] myriad overtime rules, labor relations and climate problems [and] eroding supervisory confidence."

Appellant stated that a few weeks after a performance review, he was informed that his office was among those that would be required to make additional special presentations because his "office productivity was off base." He stated that he demonstrated the data was wrong as he was one of the best performers in the district, but Mr. Day nonetheless required him to make a special report because he ran a "high impact" office. Appellant stated that Mr. Day's words, considering that he had great staffing shortages, was "the last straw." He stated that on December 5, 2000 after his boss told him he was too emotionally involved in his job, he agreed and was no longer able to work.

Appellant submitted documents showing that from approximately November 24, 1999 through December 1, 2000 he requested authorization to hire PTF clerks and carrier casuals and management, particularly the manager for programs operations support, James A. Parker, approved his requests several times.

By letter dated February 25, 2000, the manager of delivery and custom service programs, Mike Kocak requested that appellant submit all necessary documentation to support the current route alignment.

By letter dated March 9, 2001, addressing appellant's contentions regarding staffing problems, Mr. Parker stated that appellant's office, *i.e.*, the New Bedford office, was treated the same way as any other office. He stated that the requests he received from appellant's office to hire additional staff were either for short-term injuries, illness or retirements. Mr. Parker stated that the short-term temporary absences were normally handled via casual allocation and the retirements were handled via career hiring. He stated that appellant's office was authorized as many casuals as requested and in fact was allocated 12 casuals but never hired up to authorization.

Mr. Parker stated that the DSSA (Delivery Service Staffing Analysis) determined the complement level for career hiring, that appellant's office had 137 carriers and that the New Bedford office had "always" disputed the DSSA formula that determined the complement for that office. He stated that all offices were required to submit supporting documentation to increase the DSSA formula, that appellant's office was notified on "numerous occasions" what was needed to support the increase, but appellant did not submit any of the required documentation. Mr. Parker stated that on July 10, 2000 he approved three carrier positions and on November 27, 2000 approved another carrier position, raising the district's DSSA level up to 141 from 137, in anticipation of a forthcoming adjustment package which he never received. Addressing appellant's comment on "implied special treatment," Mr. Parker stated that appellant might not have received the "Triple Crown" award in 1997 because his district must have failed to achieve one of the service, budget and safety goals. He denied that Mr. Day's staff did not support appellant or treated him differently on staffing issues and denied that he or any other person to his knowledge treated appellant in a demeaning way.

By letter dated August 13, 1999, the acting manager of the post office operations, Judy L. Raney, informed appellant that he must call the district manager with all information concerning a motor vehicle or lost workday accident which he had not been doing.

By memorandum dated February 3, 1998, Mr. Day informed appellant that as postmaster it was his responsibility to take initiative to recognize his employees.

By memorandum dated August 17, 1999, Mr. Day announced that two women, Ms. Raney and Paula Joust, were promoted to acting senior managerial positions while three vacancies were available.

By memorandum dated February 19, 1999, the manager of operations program support, Paul G. Shea, instructed all postmasters and POOMS to submit quarterly verification of collection management systems.

By letter dated March 29, 2000 to an Equal Employment Opportunity (EEO) investigator, appellant stated that Mr. Day singled out his office for a "[c]limate [s]urvey." He stated that the climate survey found that appellant was a "highly capable and successful manager, who empowers his people, but whom the District is not supporting." Appellant stated that the climate team strongly recommended that Mr. Day start supporting him and "open a dialogue" with him about the support issues and although Mr. Day promised he would do that, he did not. Appellant queried how could Mr. Day justify his inaction when he had told appellant that he would not nominate him for succession planning due to "climate" issues in his office.

By letter dated April 4, 2001, appellant stated that it took him "well over a year" to get authorization to hire replacement career employees and despite his efforts, he was not allowed to hire. He stated that, at one point, Mr. Day advised him that he could hire some additional casual employees but appellant stated this was of "no help" because there were no casuals available in the labor market. Appellant stated that, since he left his employment "on stress," his replacement had been authorized to hire at least ten employees. He stated that the staff shortage "forced" him to require employees to work on overtime on their long weekend between Thanksgiving and the following Sunday despite the fact that it conflicted with plans they had previously made and they did not want to work overtime. Appellant stated that this led to a very "poor workplace climate and many grievances."

Appellant stated that, after Mr. Macek had been causing problems for a year, the compensation manager, Jimmy Ulicnik, devised a plan to separate him from employment. He stated that management asked him to defer the separation until he "cleaned up" grievances and EEO complaints Mr. Macek had filed, which appellant did. Appellant stated that he had filed an EEO complaint which had not yet been resolved.

By letter dated February 5, 2001, the manager of human resources, Ann Mailloux, stated that Mr. Day had told her in a couple of conversations that he would not recommend appellant for developmental assignments and further career development until he improved the functioning in the New Bedford office. In a meeting between her, appellant and Mr. Day, to discuss their "differences in perception," she did not remember Mr. Day saying that he and appellant had "personality differences." Ms. Mailloux denied that Mr. Day ignored appellant's message regarding the potential threat Mr. Macek posed, as Mr. Day forwarded appellant's message to her, she "looked into the situation immediately and got back to [appellant] as soon as the data was collected to let him know that there was no cause for alarm." Ms. Mailloux stated that it was their normal business policy and the district manager delegated direct management of those kinds of issues to her.

Ms. Mailloux stated that the New Bedford office had multiple problems including EEO complaints and allegations of sexual harassment and assault and she called in the Employee and Workplace Intervention Analyst (EWIA) to objectively analyze the situation and recommend a solution. She said EWIA's conclusion was that the manager of customer service was causing or contributing to the "bulk of the problems" and appellant was not properly disciplining him.

By letter dated February 21, 2001, the then postmaster, Ms. Raney, stated that she did not treat appellant differently than any other postmaster regarding staffing issues and he was not held to a higher standard than other similarly situated postmasters. She stated that she sent him an

email telling him to contact the district manager to report a lost workday accident because he had failed to report one, which he was suppose to do pursuant to the directive from the district manager.

In a memorandum dated March 1, 2001, the manager of post office operations, Jenny A. McKay, agreed that the New Bedford office had an excellent safety record from 1997 to 1999 and that recognition was given two years later to the Warwick office for two consecutive years of outstanding performance. She stated that regarding Mr. Macek, appellant wanted to hold off separating him because of the investigation that was being conducted. Ms. McKay said he did not express concerns for his safety. She stated that appellant could have hired casuals and not have been forced to work 18 percent overtime. Ms. McKay stated that no preferential treatment of accommodation was given to appellant's office after his departure.

In a memorandum dated April 23, 2001, Mr. Day stated that appellant felt he should only deal with the district manager whereas he was suppose to report to the manager of post office operations and if he, Mr. Day, supported appellant's approach, he would have undercut the manager's responsibility. Regarding Mr. Macek, he stated that he delegated responsibility of the problem to the human resources and crisis management team which was standard operating procedure and that appellant "was never satisfied unless he was personally involved." Mr. Macek stated that during his tenure appellant's division had serious performance issues in that his division had multiple "zero bundles," a "roll-away" accident, failed a safety audit and had the worst productivity performance in the Northeast. He also referred to appellant's "workplace climate" with the high rate of grievances, claims of physical and mental abuse and sexual harassment which appellant did not take responsibility to control. Because of the problems in appellant's division, Mr. Day stated that he would have been "grossly negligent" if he had not placed appellant's division on the "[h]ot [l]ist" and insisted that a workplace survey be conducted. He stated that he tried to help appellant by intervening to obtain a new parking lot for the carrier vehicles in the New Bedford office and asked Mr. Parker to work personally with appellant to resolve staffing issues.

In response to appellant's contention that a position he wanted went to a female junior to him in experience and level, Mr. Day stated that appellant was not selected for interviews by two separate boards based upon performance, not longevity. He denied that he hindered appellant from obtaining jobs in Florida and stated that, to the contrary, he gave appellant a positive reference. Mr. Day did tell appellant that he would not support him for succession planning because of the performance problems in his office. Mr. Day indicated to appellant that he would support his enrollment in the advanced leadership program.

By letter dated April 26, 2001, Mr. Ulicnik stated that he had a meeting with appellant to discuss Mr. Macek's separation and appellant opted to continue with Mr. Macek's working status while an investigation of carrier fraud continued.

By decision dated July 27, 2001, the Office denied appellant's claim, stating that the evidence of record failed to demonstrate that appellant sustained an injury in the performance of duty as alleged.

By letter dated August 27, 2001, appellant requested an oral hearing before an Office hearing representative which was held on January 14, 2001. At the hearing, appellant testified that he believed his stress was work related because it "can[not] stem from anything else." He stated that he was happily married, fairly well adjusted and never missed work unless he had a medical condition which was rare. Appellant reiterated that his office was assigned an increasing amount of work but he was unable to obtain the resources to do the work and described how he had to make career employees work over the Thanksgiving holiday, despite their objections. He stated that because his overtime was high, the District had him do special reports that "not everybody" had to do which was time consuming. Appellant claimed his office had one of the best performance records, but regardless of that he was "issued a series of extra tasks and extra duties and extra reports and extra meetings and extra justification documents" and he had to get information from his managers and supervisors which was distracting and diverted them from their work. He stated that the work assignment he received to personally review 167 collection boxes with 300 daily mail pickups "was impossible." Appellant described his employees' disappointment for not receiving recognition for their safety records. He stated that to say he agreed not to terminate Mr. Macek immediately was a "misrepresentation" because a year had gone by since Mr. Macek had posed a threat. Appellant stated that the "climate" problem in his office was that people were forced to work overtime.

By decision dated April 9, 2002, the Office hearing representative affirmed the Office's July 27, 2001 decision.

The Board finds that appellant failed to establish that he sustained an injury in the performance of duty, as alleged.

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 her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[1] 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.[2]

Where an employee alleges harassment and cites to specific incidents and the employer denies that harassment occurred, the Office or some other appropriate fact finder must make a determination as to the truth of the allegations.[3] The issue is not whether the claimant has established harassment or discrimination under standards applied the Equal Employment Opportunity Commission. Rather the issue is whether the claimant under the Act has submitted

[1] 5 U.S.C. §§ 8101-8193.

[2] *Clara T. Norga*, 46 ECAB 473, 480 (1995); *see Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[3] *Michael Ewanichak*, 48 ECAB 364, 366 (1997); *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

evidence sufficient to establish an injury arising in the performance of duty.[4] To establish entitlement to benefits, the claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.[5]

To the extent that disputes and incidents alleged as constituting harassment by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[6] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[7]

In this case, appellant has not shown that he was discriminated against or treated differently than other postmasters. One of appellant's major contentions was that he was understaffed, that his repeated requests for additional staffing were unreasonably refused and the staff shortage generated problems in his office. The evidence appellant submitted showing that he requested authorization for additional staff from approximately November 24, 1999 through December 1, 2000 shows that management approved some of his requests. Mr. Parker stated that regarding staffing, appellant's office was treated the same way as the other offices. He stated that he authorized as many casuals as requested, up to 12, but appellant did not hire up to the authorized amount. Mr. Parker stated that, if appellant wanted to increase the number of his career employees under the DSSA formula, he needed to support his request with documentation and although he was notified numerous times to submit the necessary documentation, he did not do so. Staffing decisions constitute an administrative or personnel action and as such are only compensable if management acted abusively or erroneously.[8] Appellant claimed that, even though he was authorized to hire casuals, none were available in the market so the authorization of casuals was not helpful. He, however, has not proven that assertion. Further, management denied that appellant was treated differently than any other office regarding staffing issues. Appellant did not show that he suffered a staff shortage due to abusive or erroneous action by management.[9]

Appellant has not established that Mr. Day showed him "animus" or hostility in several instances, as alleged. Mr. Parker denied that he or any other person to his knowledge treated appellant in a demeaning way. Regarding appellant's contention that he was denied interviews twice for the position of post office operations manager and the job and the "acting" position of

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[4] *See Martha L. Cook*, 47 ECAB 47 ECAB 226, 231 (1995).

[5] *Barbara E. Hamm*, 45 ECAB 843, 851 (1994).

[6] *Clara T. Noga*, *supra* note 2 at 481; *David W. Shirey*, 42 ECAB 783, 795-796 (1991).

[7] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[8] *See Sharon K. Watkins*, 45 ECAB 290, 297 (1994); *Frank A. McDowell*, 44 ECAB 522, 526 (1993).

[9] Note that appellant is not stating that working overtime *per se* caused him stress, which might be compensable, *see Frank A. McDowell*, *supra* note 8, but rather, management's unwillingness to honor his staffing requests which he characterized as hostile and discriminatory behavior caused him stress. Even if, however, appellant's overtime work caused him stress, Ms. McKay indicated that appellant could have avoided working overtime by hiring casuals.

the job, were given to females who were junior to him in level and experience, Mr. Day stated that appellant was not selected for interviews by two separate boards based upon his performance, not longevity. The Board has held that denials by the employing establishment for a different job, promotion or transfer are not compensable factors of employment as they do not involve the employee's ability to perform his or her regular or specially assigned work duties but rather constitute a desire to work in a different position.[10] Appellant has not shown that Mr. Day erroneously or abusively denied him the interviews. Contrary to his assertion that Mr. Day obstructed appellant in his out-of-state job search, Mr. Day stated that he gave appellant a positive reference. Appellant has not shown that he was impeded in his out-of-state interview process. His contention that, when several developmental assignments were opened, they went to junior female employees, was not clearly established by the record and to the extent the record shows Ms. Raney and Ms. Joust were assigned to cover job openings until they were filled, appellant has not shown that management discriminated against him with those assignments.

Mr. Day stated that he did not support appellant for succession planning because of the performance problems in his office. Denying appellant's career advancement assistance is an administrative action[11] and Mr. Day's denial due to performance problems was reasonable. While appellant claimed that his office had a top performance but was undermined by staff shortages, Mr. Day and the manager of human resources, Ms. Mailloux, stated that appellant's office had multiple problems including a high rate of EEO complaint filings, allegations of sexual harassment and assault and a poor working climate. Mr. Day stated that appellant had multiple "zero bundles," a "roll-away" accident and his office failed a safety audit. Mr. Day stated that his decision to place appellant on the "[h]ot [l]ist" and to conduct a climate survey was necessary to address the problems in appellant's office. The Board has held that performance assessment is a personnel action and is not covered under the Act unless appellant shows that the employing establishment erred or acted abusively in its administrative capacity.[12] Appellant has not shown that Mr. Day acted erroneously or abusively in assessing his office's performance. Further, he did not show that Mr. Day "falsely accused him of performance lapses." Appellant must present corroborating evidence to support his assertions.[13]

Regarding appellant's request for recognition of his staff's excellent injury-free work record in 1997, Mr. Day's informing appellant that he was responsible for recognizing his employees was an administrative action and appellant has not shown that it was abusive or erroneous.[14] Appellant's contention that Mr. Day ignored his email addressing the potential threat Mr. Macek posed to him is not corroborated by the evidence. Mr. Day stated that appellant felt that he should only deal with the district manager which Mr. Day stated was inappropriate as it would have undercut the manager of operations' responsibility. He stated that as part of standard office procedure, he referred appellant's email about Mr. Macek to the human

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[10] *Ronald C. Hand*, 49 ECAB 113, 115 (1997).

[11] *See Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).

[12] *Ernest J. Malagrida*, 51 ECAB 287, 288-90 (2000); *Barbara J. Nicholson*, 45 ECAB 803, 809 (1994).

[13] *See Barbara E. Hamm*, *supra* note 5 at 851.

[14] *See Tanya A. Gaines*, 44 ECAB 923, 933-34 (1993).

resources and crisis management team. Ms. Mailloux corroborated that Mr. Day forwarded appellant's message to her, that she looked into the situation immediately, collected data and let appellant know there was no danger. Although appellant asserted that he had to wait a year before management addressed his concern with Mr. Macek, Ms. Mailloux, the compensation manager, Mr. Ulicnik and the manager of operations, Ms. Raney, stated that it was appellant's decision to defer Mr. Macek's separation until he, appellant, resolved Mr. Macek's grievances and EEO complaints. Ms. McKay stated that appellant did not express concerns for his safety. Appellant has not shown that management acted abusively or erroneously in addressing the potential threat Mr. Macek posed. He also did not show that Mr. Day "overtly ignored" other emails appellant sent him.

A memorandum dated February 19, 1999 showed that Mr. Shea instructed all postmasters and POOMS to submit quarterly verification of collection management systems. Ms. Raney stated that she informed appellant he must report a lost workday accident because that was the policy of the office and appellant had failed to follow it. Appellant did not present evidence to corroborate that his office was singled out in having him prepare extra, unnecessary documentation which hindered him from performing his duties and distracted his staff. He therefore, did not establish a compensable factor in this regard.[15] Ms. McKay denied preferential treatment or accommodation was given to appellant's office after he left. Appellant has not established any compensable factors of employment and, therefore, he has failed to establish his emotional claim.[16]

[15] *See Ernest J. Malagrida*, *supra* note 12 at 290.

[16] Because appellant did not establish a compensable factor of employment, the medical evidence need not be addressed. *See Diane C. Bernard*, 45 ECAB 223, 228 (1993).

The April 9, 2002 and July 30, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
February 27, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

Dated,

CHECK LIST FOR LEGAL STAFF

Check/Answer all that apply

Docket #: 02-1901

Date Appeal Filed: 7/5/02_______

List all decisions Date Issue(s)

issued within

one year before 4/9/02; 7/30/01 Emotional claim__________

date appeal filed

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Are all the issues listed above, and only those issues, addressed in the issues statement and in the text of your draft? Y

Have all decisions, and only those decisions, listed above been disposed of? *I.e.,* by affirmance, remand, reversal, *etc.*

If appellant is represented on appeal, is the attorney/representative's authorization present? NA

Is there an outstanding oral argument request? N

Has the draft been proofed for typos, grammatical errors and proper citation form? Y

Was the Office hearing rep's decision adoptable? No, only because it's an emotional case.

If so, is a memorandum explaining why adoption was preferred attached and the hearing rep's decision attached with references to case record? NA

Were the updated versions of the regulations (1/4/99), A.M.A., *Guides* (2/1/01), Larson (5/00) and the Procedure Manual cited? NA

Dated, Washington, DC

February 21, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member