

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY D. CARTER and DEPARTMENT OF VETERANS AFFAIRS,
HOUSTON NATIONAL CEMETERY, Houston, TX

*Docket No. 03-16; Submitted on the Record;
Issued March 21, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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

On July 25, 2001 appellant, then a 50-year-old cemetery caretaker, filed a claim for an occupational disease alleging that he became aware that he was experiencing severe, work-related stress, depression, anxiety and anger on February 26, 2001. He stopped working on April 10, 2001.

Appellant stated that his supervisor, Linda Barry, the cemetery director, Jorge Lopez, and the assistant director, Abe Stice, created a "hostile, unsafe, unhealthy, adversarial, unjust, fearful and demoralizing workplace environment." He stated that they harassed and discriminated against him because of his race. Appellant stated that he experienced a hostile work environment since he filed an Equal Employment Opportunity (EEO) complaint in July 1999 and had a work-related injury on December 28, 1999. He also stated that management failed to accommodate his work disability. Appellant stated that, since his EEO hearing on February 15, 2001, the intimidation tactics increased and had caused him to take many days off due to stress, depression and anger.

Appellant stated that his work-related condition began when Mr. Lopez, then the assistant director, hired a Hispanic friend with less seniority and experience than appellant. He stated that he had to testify for a black employee who was fired and when Mr. Lopez returned as director in February 1999, he abolished appellant's job as the tools and parts attendant. Appellant stated that he filed an EEO complaint in July 1999 protesting the treatment and consequently was harassed.

In a statement dated April 10, 2001, appellant indicated that toward the end of February, Ms. Barry decided to change his light-duty workstation and replace the chair he had been using with a steel back chair. At the first break on the morning of his new assignment, he informed Ms. Barry that the chair hurt his back and was causing "discomfort, pain and suffering" to his

right knee. By letter dated February 26, 2001, appellant asked Ms. Barry if he could have his previous chair and she was unresponsive, allegedly stating that he might roll off of it and injure himself or he should get a coat to put between the steel chair and his back. He requested leave without pay from February 26 to March 2, 2001 which was granted. When appellant contacted Ms. Barry on March 5, 2001, she still refused to give him back the other chair. He stated that he was granted additional leave without pay from March 5 to 9, March 12 and 23, 2001.

Appellant stated that on March 26, 2001 he went to the workers' compensation claims coordinator, Linda McCrary, to complete some papers and schedule a functional capacity evaluation. He called Ms. Barry to ask for leave without pay, was told she was on vacation. He spoke to Mr. Lopez and made an appointment for on March 27, 2001, when he requested leave from March 26 to 30, 2000 and explained the problem about the chair. Mr. Lopez allegedly jumped up from his chair and, in a loud disrespectful tone of voice said "Sit down I need to talk to you!" Appellant stated that he wanted a union representative present, that he and Mr. Lopez spoke in loud tones and he felt great stress.

On May 16, 2001 Ms. Barry issued appellant a 14-day proposed notice of suspension for unauthorized absences on March 28, 29 and 30, 2001 and on April 2, 2001. She also charged appellant with disrespectful conduct on March 27, 2001 when, in response to Mr. Lopez telling appellant that he had to report for work, appellant became angry, raised his voice and spoke very loudly to Mr. Lopez, stating "You do what you have to do and I [wi]ll do what I have to do!" On June 18, 2001 Mr. Stice suspended appellant for seven days from June 25 through July 1, 2001.

In a letter dated June 6, 2001, Mr. Lopez stated that he was eager to welcome appellant back to the employing establishment. He stated that at no time had management either knowingly or unknowingly placed appellant in a position which would aggravate his back injury or violate appellant's physical limitations. Mr. Lopez stated that they had a shortage in manpower requirements and appellant's presence would help alleviate the manpower shortage.

In a report on a light-duty assignment dated June 11, 2001, Ms. Steadman stated that on April 4, 2001 appellant was interviewed and instructed on ergonomic seating. She stated that a Herman Miller chair was issued prior to that date. Ms. Steadman addressed appellant's concerns performing light-duty work and stated that appellant was willing to work with management in developing light-duty tasks he could perform.

By letter dated October 22, 2001, the cemetery caretaker supervisor, Samuel S. Reyes, issued appellant a notice of proposed removal based on his failure to follow the leave requesting policy and procedures and in being absent without leave for periods of time in July and September 2001. By letter dated February 6, 2002, the assistant cemetery director, Mr. Stice, issued appellant a notice of proposed removal from his position due to his physical inability to perform the major requirements of the job. He stated that appellant missed work from April 11 through September 21, 2001 and from November 24, 2001 and continuing due to post-traumatic stress disorder and minor depressive disorder. By letter dated January 14, 2002, Mr. Stice vacated the October 22, 2001 notice of removal.

On August 9, 2001 appellant filed a discrimination complaint protesting the June 18, 2001 decision to suspend him for seven days and for harassment, reprisal, intimidation and

retaliation. He alleged discrimination based on race and disability and alleged harassment and reprisal because of his prior EEO activity. In an amended complaint dated July 27, 2001, appellant alleged that Mr. Stice and others perjured themselves in sworn testimony on February 15, 2001 at an EEO hearing. He contended that Ms. Barry abused her authority in proposing to suspend him on May 14, 2001 and that Ms. Barry acted with other authorities to “intimidate, threaten, harass and coerce” him based on his EEO complaint.

By letter dated September 18, 2001, Mr. Lopez notified appellant of a temporary change in duty station effective September 24, 2001, with the duty station being changed to appellant’s home address. Mr. Lopez stated that the change was not a disciplinary or adverse action but was necessary as a result of a pending administrative investigation.

On December 13, 2001 appellant filed another complaint in which he reiterated his allegations of discrimination and harassment. On January 31, 2002 the Equal Employment Opportunity Commission (EEOC) found that, since the proposed notice of removal dated October 22, 2001 was not finalized, it would dismiss that part of appellant’s complaint.

By letters dated December 6 and 12, 2001, Mr. Lopez identified three jobs available at the employing establishment in Houston for which appellant could apply.

On February 15, 2002 the EEOC commenced an investigation based on appellant’s August 21, 2001 complaint.

By decision dated February 15, 2002, the Office of Workers’ Compensation Programs denied appellant’s claim, stating that the evidence of record failed to establish that appellant’s emotional condition arose out of and in the course of his employment.

Appellant requested written review of the record.

By decision dated August 21, 2002, the Office hearing representative affirmed the Office’s February 15, 2002 decision.

The Board finds appellant did not sustain an emotional condition 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 his 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

¹ 5 U.S.C. §§ 8101-8193.

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 EEOC. Rather the issue is whether the claimant under the Act has submitted 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

On May 16, 2001 Ms. Barry issued appellant a notice of a 14-day proposed notice of suspension for unauthorized absences and disrespectful conduct in a meeting with Mr. Lopez on March 27, 2001. Mr. Stice suspended appellant for seven days from June 25 through July 1, 2001. On September 18, 2001 Mr. Lopez notified appellant of a temporary change in duty station pending an administrative investigation. The purpose of the administrative investigation was not specified. Mr. Reyes issued appellant a notice of proposed removal on October 22, 2001 and Mr. Stice issued appellant a notice of proposed removal on February 6, 2002 for failure to follow leave request policy and procedures as in having unexcused absences and being unable to perform his job due to his posttraumatic stress and minor depressive disorders. The employing establishment vacated the October 22, 2001 notice of proposed removal on January 14, 2002. There is no indication that the February 6, 2002 notice was ever finalized. The Board has held that reactions to disciplinary matters such as letters of warning and inquiries regarding conduct pertain to actions taken in an administrative capacity and are not compensable unless it is established that the employing establishment erred or acted abusively.⁸ Appellant has not submitted evidence sufficient to establish that the individuals taking these administrative actions acted abusively or were in error. He has not shown that these measures

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).

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, 795-96 (1991).

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

⁸ *Sherry L. McFall*, 51 ECAB 436, 440 (2000).

were taken to discriminate or harass him based on race or disability, or to retaliate against him for filing any EEO complaints. The change of duty assignment due to a pending administrative investigation, as in the employing establishment's assigning appellant to work at home, constitutes an administrative action and as such is only compensable if appellant shows that management acted abusively or unreasonably.⁹ Although management did not specify the purpose of the administrative investigation which prompted the change of duty station, appellant has not shown that management acted unreasonably or abusively. The outcome of the four EEO complaints are not in the record. The Board has held that EEO complaints are insufficient to establish allegations of discrimination and harassment.¹⁰

Appellant alleged that on April 10, 2001 Ms. Barry changed his light-duty workstation and replaced the chair he had been using with a steel back chair, causing back and right knee pain. He alleged that Ms. Barry, Mr. Lopez and Ms. Steadman refused to address the problem. The Board finds that there is insufficient evidence in the record of this incident. In a report dated April 11, 2001, appellant's treating physician stated that management gave him a chair that caused him physical problems. In the light-duty report dated June 11, 2001, Ms. Steadman noted that on April 4, 2001 appellant was instructed on ergonomic seating and issued a "Herman Miller" chair. While the record reflects that appellant was assigned a new chair for his use, the evidence is insufficient to show any error in not accommodating appellant's light-duty restrictions. Moreover, the Board has held that appellant's frustration from not being permitted to work in a certain environment does not come within the coverage of the Act.¹¹ Appellant has not shown that management's assignment of office equipment violated his physical restrictions or that it was done as discrimination or harassment. Appellant did not present medical evidence showing that he required a specific chair for his back. Therefore he has not shown that management acted abusively or unreasonably in this regard.¹²

Appellant's allegations that Ms. Barry, Mr. Lopez and Mr. Stice created a hostile, work environment are vague and general and are supported by the evidence of record. Appellant did not present supporting evidence that he was discriminated or harrassed based on race or for his disability EEO activities. The evidence is insufficient to establish retaliation by his supervisors and managers for his EEO complaints. Appellant did not corroborate that Mr. Lopez hired a friend who had less seniority and experience and abolished appellant's job as a tool and parts attendant. He did not show that management failed to accommodate his disability. The December 6 and December 12, 2001 letters from Mr. Lopez showed that he identified jobs at the employing establishment which appellant might be able to perform. In the March 27, 2001 meeting, appellant did not substantiate that Mr. Lopez yelled at him when he asked about getting a proper chair. Without probative and reliable evidence to support his contentions, appellant has not established that these allegations as factual.¹³

⁹ See *Ruth S. Johnson*, 46 ECAB 237, 241 (1994).

¹⁰ See *Jesse J. Starcher*, 51 ECAB 314 (2000).

¹¹ See *Martha L. Watson*, 46 ECAB 425, 435 (1995).

¹² See *id.*; *Joseph G. Cutrufellow*, 46 ECAB 285, 293 (1994).

¹³ See *Jesse J. Starcher*, *supra* note 10.

The Board therefore finds that appellant has failed to establish a compensable factor of employment. Since no compensable factors have been established, it is not necessary to address the medical evidence.¹⁴

The August 21 and February 15, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
March 21, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹⁴ *Diane C. Bernard*, 45 ECAB 223, 228 (1993).