

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS L. LINEBERG and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Martinsburg, WV

*Docket No. 03-1443; Submitted on the Record;
Issued September 12, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has established that he sustained an emotional condition causally related to compensable work factors.

The case was before the Board on a prior appeal. In a decision dated July 18, 2001, the Board affirmed a decision of the Office of Workers' Compensation Programs dated October 28, 1999.¹ The Board found that appellant had not substantiated a compensable work factor because he did not submit probative evidence establishing his allegation of harassment. The history of the case is contained in the Board's prior decision and is incorporated herein by reference.

In a letter dated June 5, 2002, appellant through his representative, requested reconsideration of his claim. Appellant submitted a decision dated September 25, 2001 from an administrative judge with respect to appellant's Equal Employment Opportunity Commission (EEOC) claim for race-based harassment and reprisal. In addition, appellant submitted a copy of a written transcript of an EEOC hearing before the administrative judge on June 21, 2001.

By decision dated May 9, 2003, the Office denied modification of the denial of the claim. The Office acknowledged that the administrative judge had found that appellant was subject to race-based harassment, but stated that appellant had "failed to address [his] participation in the cause of this racially charged situation." The Office further stated that the witness statements were hearsay and that appellant's perceptions were not compensable.

The Board finds that appellant has substantiated a compensable work factor based on harassment. The case will be remanded to the Office for further development of the medical evidence.

¹ Docket No. 01-231 (issued October 28, 1999).

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by factors of his federal employment.² To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.³

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 coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it, but nevertheless are not covered because they are found not to have arisen out of the employment. Disability, is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand where 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.⁴

The September 25, 2001 decision from the EEOC administrative judge, contains a detailed history of appellant's allegations of race-based harassment. To summarize, appellant worked as a carpenter/maintenance mechanic and he was made acting work leader for several independent projects. To assist him in these projects, appellant was assigned compensated work therapy (CWT) workers. Appellant was Caucasian, while most of the CWT workers were African American. He alleged that because of his successful working relationship with the CWT workers, he was subject to harassment from other Caucasian coworkers.

The administrative judge determined that appellant was subject to race-based harassment; he found that racial epithets were used on a regular basis and that appellant was threatened with harm because of his association with African American CWT workers. The Board finds that the evidence of records supports the finding of harassment in this case. Appellant provided a detailed description at the EEOC hearing of a work environment that included racial epithets, with supporting testimony from a coworker and a September 28, 1998 notice that had been issued with respect to offensive remarks regarding race. As to specific racial comments made to appellant, the administrative judge noted that much of appellant's testimony could only be corroborated by the accused harassers. He found that their testimony denying the use of racial epithets toward appellant not to be credible, noting inconsistencies and inaccuracies in their testimony. For example, the accused harassers denied that a racial epithet had ever been uttered in the carpentry shop, which was contradicted by the weight of the evidence, including testimony

² *Pamela R. Rice*, 38 ECAB 838 (1987).

³ *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁴ *Lillian Cutler*, 28 ECAB 125 (1976).

from a witness not supportive of appellant's claim. In view of the evidence of record, including the administrative judge's assessment of the credibility of the witness testimony presented at the June 21, 2001 hearing, the Board finds that the record substantiates a claim based on harassment by coworkers using racial epithets directed at appellant.⁵ It is well recognized that a compensable work factor may be established if the record substantiates a claim of harassment.⁶ The Board finds that appellant has established a compensable work factor in this case.

The Board notes that the administrative judge stated that the record showed appellant was "threatened with bodily harm" because of his association with African American workers. According to the administrative judge a coworker, Ron Duncan, testified that on February 4, 1999 a Harry Stanholtz made a threatening move toward appellant when he entered the shop. The testimony evidence from Mr. Duncan in the record, however, does not report that appellant was threatened. There is also an allegation of an incident where Mr. Stanholtz held a piece of metal and told appellant that "you could kill" somebody with this, but even accepting this as factual, it does not constitute a threat against appellant. The Board finds that the evidence of record is not sufficient to establish that appellant was threatened with bodily harm.

With respect to the allegation of harassment based on retaliation or reprisal, the administrative judge found that appellant had failed to show that harassment was reprisal based. Appellant alleged that he was subject to harassment because he had participated as a witness in an investigation of sexual harassment made by a coworker. The Board finds no probative evidence of record to establish reprisal based harassment.

Since appellant has substantiated a compensable work factor, the medical evidence must be reviewed to determine if appellant has met his burden of proof to establish an emotional condition causally related to the compensable work factor.

The case will be remanded to the Office to prepare an accurate statement of accepted facts and further develop the medical evidence. After such development as the Office deems necessary, it should issue an appropriate decision.

⁵ While the findings of other government agencies are not dispositive with regard to questions arising under the Act, such evidence may be given weight by the Office and the Board. *See Ernest J. Malagrida*, 51 ECAB 287 (2000).

⁶ *See Felix Flecha*, 52 ECAB 268, 273 (2001) (use of a derogatory epithet can constitute harassment under the Act).

The decision of the Office of Workers' Compensation Programs dated May 9, 2003 is set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, DC
September 12, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member