

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACK J. LOMBARDO and U.S. POSTAL SERVICE,
POST OFFICE, Kansas City, KS

*Docket No. 03-958; Submitted on the Record;
Issued July 27, 2004*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

On November 9, 2001 appellant, then a 51-year-old supervisor of distribution operations, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that he sustained an emotional condition due to various incidents and conditions at work.¹ In support of his claim, he submitted a number of statements and supporting documentation. The employing establishment controverted the claim.²

In statements dated November 8 and 14, 2001, appellant noted that on September 22, 2001 all the supervisors were told that they would be selecting their assignments based on the senior plant manager, James Gonzalez' instructions, he was advised on November 3, 2001 that he was prevented from participating in six higher level positions without any notification from management and indicated that he stopped work on November 6, 2001 as a result of job harassment. He opined that management abused their authority by lying, deceiving him and continuing to harass him. Appellant stated that he was given a letter of warning for a Family Medical Leave Act (FMLA) absence due to appellant's wife being on kidney dialysis that was later removed. He indicated that he was denied a detail outside of the facility and the reply was

¹ Appellant alleged that his emotional condition was caused by R.E. Miller becoming his supervisor in September 2001, being removed from a tour, being assigned to a lower level position without notification and harassment.

² Appellant had filed a prior claim for emotional illness as a result of factors of his federal employment, case number 11-0134490. By letter dated October 9, 1998, the Office of Workers' Compensation Programs accepted that work factors resulted in depressive reactions in 1991 and from August through November 1994. In a decision also dated October 9, 1998, the Office denied that episodes of depression in 1995 and 1996 were related to appellant's employment. The Office considered allegations of harassment and discrimination through 1996, under this prior case.

threatening. Appellant discussed his denial of a detail to Florida as evidence of discrimination against him.

In a November 16, 2001³ statement, appellant further addressed the factors he believed caused or contributed to his condition. He indicated that Mr. Miller discriminated against him in 1990 and he filed an Equal Employment Opportunity (EEO) complaint in 1990, that resulted in a favorable decision in 1993.⁴ Appellant stated that he filed his complaint after he was sent to Tour 2, without any reason, despite being the senior supervisor on Tour 3. He alleged that Mr. Miller continued his actions in 1995 and again on November 3, 2001 by removing him from his assignment and higher level opportunities. Appellant explained that he was not informed that he was being removed, but the person who would be taking his place was informed. Appellant indicated that he subsequently started having problems with eating and sleeping. He explained that seniority was supposed to be used to determine who would act at a higher level however he was replaced by someone who was junior to him.⁵ Appellant indicated that Mr. Miller continued to discriminate against him because Mr. Miller was in a higher level position and had a problem with the fact that appellant was more senior and more effective at communicating with the employees. He also submitted a November 5, 2001 email, to appellant, from his supervisor, Clarion E. Felchle, who discussed his reasons for assigning Peter Kornechuk instead of appellant to the acting manager of district operations position on Saturdays and Sundays. Mr. Felchle noted that his reasons were to allow for consistency on weekends in leadership, because the results from prior weekends were insufficient, because appellant was not available at work and to start developing individuals for the future. Mr. Felchle informed appellant that he had planned to discuss the changes with him; however, neither of the two had been at work on the same day for several days.

Appellant submitted a number of reports dated November 18, 1999 through December 5, 2001 from Dr. Sandip Sen, a Board-certified psychiatrist and neurologist, who diagnosed a major depressive disorder, which was in remission. Dr. Sen did not discuss specific work factors or incidents; however, he indicated that appellant's condition was caused by work stress and conflict with the supervisor. He also indicated that appellant was losing sleep and was unable to concentrate as appellant felt he was harassed at work.

In a letter dated December 11, 2001, appellant indicated that he received a letter of warning for missing a staff meeting due to his wife being on dialysis and despite advance notification to the employing establishment that he might not be at the meeting. He stated that the letter of warning caused him to be removed from participation in a manager of district operations position six levels above his salary and that his manager planned to recover the higher level pay that appellant had received when he performed the higher level manager of district

³ It appears appellant filed a statement dated November 13, 2001 and the information is essentially the same.

⁴ This decision pertains to the period covered by appellant's previous claim and does not involve periods at issue in the current appeal.

⁵ In an email dated June 14, 2000, Susan L. Jennings, the new leader of the unit, indicated that a meeting was held by Liz Brown, a coworker and the unit was informed that appellant was no longer going to run the unit. Ms. Jennings stated that appellant subsequently entered, without realizing that a change in leadership had occurred.

operations position, even though he did not indicate that the pay would be recovered from others who had performed in a higher level capacity. Further, appellant indicated that Mr. Felchle was favoring younger employees and that his continuing harassment forced him into retirement.⁶ Additionally, he provided a copy of a letter dated January 4, 2001, to the EEO regarding instances of discrimination that occurred in 1996 and 1997. Appellant also advised that all of the managers had received a black leather jacket however he had not.

In a December 12, 2001 letter, the Office advised appellant of the additional factual and medical evidence needed to establish his claim. By letter of the same date, the Office advised the employing establishment to submit factual evidence regarding appellant's claim.

By letter dated December 12, 2001, the employing establishment challenged that appellant's condition was related to factors of his federal employment and noted that he was including incidents based on his prior claim.⁷

In a December 19, 2001 response, appellant again discussed the factors which he believed caused or contributed to his condition; which included the November 3, 2001 incident in which he was denied a training detail while other supervisors were not; that he was harassed by his supervisor, Mr. Miller; that he was removed from his higher level position; that his work schedule was changed; and that on December 13, 2001 appellant was advised by his supervisor that he was not allowed to work part time, despite providing medical documentation. Appellant also noted that he had filed an EEO complaint concerning prior discrimination that had been settled favorably.⁸ Appellant also enclosed a December 13, 2001 statement, in which he indicated that on Saturday, December 8, 2001, he returned to work with medical restrictions. He stated his work hours were limited to four hours daily and he was cleared by the medical unit at the employing establishment to work four hours a day. Appellant stated that, when he returned to work on Tuesday, December 13, 2001, he was told by Mr. Kornechuk that work increments of eight hours were needed and appellant would not be paid for the four hours he had worked on December 8, 2001. Appellant stated that he went to see Mr. Miller and, after being told to wait, was informed that he would not be paid for working four hours. Appellant explained that as a manager, he should be paid for eight hours despite having only worked for four hours. He also indicated that Mr. Miller told him that "as soon as I finish signing these 3971's for you, you need to hit the rode [*sic*]."

In a February 7, 2002 decision, the Office found that the evidence was insufficient to establish that appellant sustained an injury in the performance of duty.

⁶ Additionally, he provided a copy of a letter dated January 4, 2001, to the EEO Commission regarding instances of discrimination that occurred in 1996 and 1997. Appellant also advised that all of the managers had received a black leather jacket however he had not.

⁷ See *supra* note 2.

⁸ Appellant included a copy of EEO decisions dated September 24, 1993 and April 7, 1995, regarding allegations of reprisal. The 1993 decision found that he was discriminated against when his tour of duty was changed on or about January 1991. The 1995 decision found that the employing establishment breached a settlement agreement regarding appellant's payrate.

By letter dated March 3, 2002, appellant requested a hearing that was held on November 27, 2002.⁹

By letter dated November 30, 2002, appellant submitted additional evidence including a letter dated September 24, 1998 in which Mr. Miller advised that appellant was undergoing anger control counseling due to incidents involving a union representative. He also submitted an order from the United States District Court for the District of Kansas notifying him that his Title VII claim had sufficient merit to warrant the appointment of counsel.

In a January 30, 2003 decision, an Office hearing representative affirmed the February 7, 2002 decision, finding that appellant failed to establish employment factors to which he attributed his emotional condition.

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.

Workers' compensation law does not apply to each and every 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 or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to her regular or specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.¹⁰ 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.¹¹

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he or she claims compensation was caused or adversely affected by employment factors.¹² This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.¹³

⁹ Appellant provided testimony about denials or nonaction on his requests for various work details. He also discussed a change in work positions following the arrival of the new manager. Appellant stated that he was removed from his position as acting MDO on Saturdays. He also discussed his disagreement with the manner in which this change occurred. Appellant stated that the agency denied him part-time work and he was given a letter of warning for missing work. He stated that he retired in January 2002. Appellant also stated that he had an EEO complaint that was not settled.

¹⁰ 5 U.S.C. §§ 8101-8193.

¹¹ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 126 (1976).

¹² *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

¹³ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by the physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.¹⁴ If appellant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of the matter establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.¹⁵

In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and he has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors or coworkers.¹⁶ Appellant alleged that his supervisors made statements and engaged in actions which he believed constituted harassment and discrimination. However, although he provided general allegations in which he alleged that his condition was caused by his supervisor, Mr. Miller in September 2001 and that his supervisor, Mr. Felchle was favoring younger employees, he did not provide a specific instance of harassment or any corroborating evidence to support his allegations. Appellant also asserted that he was discriminated against when all of the managers were given black leather jackets, except for him. Additionally, he also alleged that harassment and discrimination on the part of management contributed to his claimed stress-related condition. In particular, appellant alleged that Mr. Miller continued to discriminate against him because Mr. Miller was in a higher level position despite the fact that appellant had seniority, however, appellant did not provide any specific allegations of discrimination other than to say that his supervisors harassed him or continue to harass him. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.¹⁷ 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 of harassment or discrimination are not compensable under the Act.¹⁸ Appellant, however, did not fully identify the nature of the harassment or discrimination. He provided no corroborating evidence, such as current witness statements¹⁹ to establish that the statements

¹⁴ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹⁵ *Id.*

¹⁶ See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

¹⁷ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹⁸ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁹ The record contains statements related to the earlier accepted conditions, but appellant has not submitted statements to confirm the November 5, 2001 incident or incidents subsequent.

actually were made or that the actions actually occurred.²⁰ In particular, with regard to not being given a black leather jacket, appellant alleged that this was discriminatory. However, he provided no further details to show the purpose of the jackets or why they were given. He has not shown that the receipt or nonreceipt of the jackets were somehow related to the performance of his duties. Regarding his allegation that Mr. Miller discriminated against him because appellant had more seniority, appellant did not provide any evidence. Furthermore, appellant indicated that Mr. Felchle favored younger employees, but he did not provide any corroborating evidence to show age discrimination in this regard. Without corroborating evidence, the Board cannot determine whether these actions were discriminatory. Thus, he has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant alleged that he was discriminated with respect to his FMLA leave. The Board has repeatedly held that procedures regarding leave usage, pertain to personnel functions of the employer, rather than to duties of the employee²¹ and are not compensable unless appellant establishes that the employing establishment erred or acted abusively in carrying out its administrative functions.²² The record reflects that appellant received a letter of warning regarding his usage of FMLA leave in 1998. However, appellant indicated that the letter of warning was eventually removed. The mere fact that personnel actions were later modified or rescinded, does not, in and of itself, establish error or abuse.²³ He has not established error or abuse.

Appellant also submitted copies of two grievances, which were settled with determinations of fault by the employing establishment. However, these were related to earlier incidents which were prior and not part of the instant claim and; therefore, provided no support that his supervisors harassed or discriminated against him and thus are of no probative value.

Appellant alleged that his supervisor wrongly removed him from a higher level position and changed his work schedule or duties, without informing him or without regard to his seniority. Additionally, appellant alleged that he was not allowed to work part time and that he was given a letter of warning concerning his absences from work. An employee's complaints concerning the manner in which a supervisor performs his or her duties as a supervisor or the manner in which a supervisor exercises his or her supervisory discretion fall, as a rule, outside the scope of coverage of the Act.²⁴ This principle recognizes that a supervisor or manager, in general, must be allowed to perform their duties and that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will

²⁰ See *William P. George*, 43 ECAB 1159, 1167 (1992).

²¹ *Joseph C. DeDonato*, 39 ECAB 1260 (1988).

²² *Thomas D. McEuen*, *supra* note 11, *reaff'd on recon.*, 42 ECAB 566 (1991).

²³ *Dennis J. Balogh*, 52 ECAB 232 (2001).

²⁴ *Christophe Jolicoeur*, 49 ECAB 553 (1998).

not be compensable absent evidence of error or abuse.²⁵ Likewise, the assignment of a work schedule or tour of duty is an administrative function of the employing establishment and absent even error or abuse does not constitute a compensable factor of employment.²⁶ In this case, appellant has not submitted sufficient evidence of error or abuse to substantiate that his supervisor acted unreasonably.

Regarding appellant's allegation that he was denied details, the Board has previously held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Act, as they do not involve his ability to perform his regular or specially assigned work duties, but rather constitute his desire to work in a different position.²⁷ Thus, appellant has not established a compensable employment factor under the Act in this respect.

Appellant also contended that Mr. Miller threatened him by telling him to hit the "ro[a]d." The Board has recognized the compensability of verbal altercations or abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.²⁸ In this case, appellant has not shown how the isolated comment made by Mr. Miller would rise to the level of verbal abuse or otherwise fall within the coverage of the Act.²⁹ Thus, appellant has not established a compensable employment factor under the Act, with respect to the claimed harassment or verbal abuse.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and; therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.³⁰

²⁵ *Id.*

²⁶ *Peggy R. Lee*, 46 ECAB 521 (1995).

²⁷ *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

²⁸ *See Mary A. Sisneros*, 46 ECAB 155, 163-64 (1994); *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

²⁹ *See, e.g., Alfred Arts*, 45 ECAB 530, 543-44 (1994) and cases cited therein (finding that the employee's reaction to coworkers' comments such as "you might be able to do something useful" and "here he comes" was self-generated and stemmed from general job dissatisfaction). *Compare Abe E. Scott*, 45 ECAB 164, 173 (1993) and cases cited therein (finding that a supervisor's calling an employee by the epithet "ape" was a compensable employment factor).

³⁰ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

The January 30, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 27, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member