

**United States Department of Labor
Employees' Compensation Appeals Board**

EDWIN W. RIVERA, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Tampa, FL, Employer**

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**Docket No. 04-796
Issued: July 6, 2004**

Appearances:

*Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On February 5, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated April 3 and December 31, 2003 denying his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On June 13, 2002 appellant, then a 50-year-old mail handler, filed an occupational claim alleging that he sustained depression and anxiety on May 28, 2002 due to harassment at work as diagnosed on May 28, 2002 by Dr. Walter Afield. Appellant stopped working on June 6, 2002.

In a supplemental statement, appellant alleged that, after reporting an injury to Benny Gant, his supervisor, Mary Ann Manies called him into her office, and in the presence of other

supervisors, accused him of lying in his report and humiliated him. She told him that Sandra Peterson, a nurse, did not see any swelling or physical difference between his two wrists. He stated that Ms. Manies intimidated him by telling him that she was going to report him to the postal inspector for investigation.

Appellant stated that, prior to July 5, 2001, Mr. Gant had harassed him, and he had reported Mr. Gant to Michael Hickey and Stephen Bereheiko, postal managers, but they did not do anything. Appellant stated that on July 6, 2001 Mr. Gant gave him an investigative interview and told him that it could lead to a disciplinary action. Appellant stated that intimidation and threats from management led to a deterioration of his mental health and on July 13, 2001 he was hospitalized.

Following his discharge from the hospital, appellant received a letter of warning dated July 19, 2001 from Mr. Gant for the July 5, 2001 incident. Appellant stated that he filed an Equal Employment Opportunity (EEO) complaint and, even though it was settled, he was persecuted, harassed and intimidated by his supervisors. On September 5, 2001 he received another letter of warning from Phil Perry, a supervisor, for unsatisfactory attendance. Appellant stated that on May 8, 2002 he received a letter of warning from, Cathy Bradley, a supervisor, because he overslept due to the medication he was taking and arrived late at work.

On January 7, 2002 he filed an EEO complaint due to harassment by Mr. Perry telling him that Ms. Manies did not want to talk to him after appellant had asked to speak to her. Appellant noted that the settlement dated February 11, 2002 indicated that there would be no disciplinary action issued from February 11 to September 5, 2002.

On March 21, 2002 Gary Banlowe gave appellant an investigative interview. Appellant stated that he did not receive a letter of warning because they did not find him guilty, but these actions created a negative impact on him. Appellant was prohibited from flossing his teeth in the rest room and was prohibited from going to the nurses station.

In a statement dated June 14, 2002, Mr. Banlowe, appellant's supervisor, noted that appellant had expressed his dislike for management and consistently and intentionally attempted to provoke supervisors. Mr. Banlowe stated that appellant was allowed to see the nurse when escorted by a supervisor and appellant required a supervisor to accompany him to the medical unit two or three times a day to have his blood pressure checked. In one instance when he was accompanying appellant who walked behind him, Ms. Bradley noted that appellant put his belt around his neck to indicate to other employees that he was on a leash.

On June 20, 2002 appellant alleged that Mr. Gant discriminated against him by not taking his seniority into consideration when assigning duties and talking to coworkers about his health and work habits. On July 5, 2001 Mr. Gant showed his coworkers the light-duty medical restriction note he received from the medical unit "with the sole purpose of degrad[ing] him." He complained to Mr. Bereheiko and Mr. Hickey but they did not stop the harassment and discrimination.

In a meeting with Mr. Hickey, Mr. Gant and Larry Cruz, a union representative, appellant complained about Mr. Gant ordering him to get out of the men's room and return to his working

area. When asked by Mr. Hickey what he wanted appellant to change, Mr. Gant stated that he would not follow appellant into the bathroom if appellant stopped flossing his teeth in the bathroom. Appellant stated that flossing his teeth only took a few seconds but Mr. Hickey stated that appellant was not getting paid to floss his teeth in the bathroom. Appellant stated that he agreed to stop flossing his teeth in the bathroom. Appellant suspected that, because of his complaints against Mr. Gant, upper management was trying to get him to resign.

Appellant alleged that subsequently Mr. Gant discriminated against him when he indicated on line 28 of appellant's claim form that appellant was not injured while in the performance of duty.

Referring to the investigative interview, appellant alleged that Mr. Gant refused to write down his complete responses to some of the questions that were asked. Appellant stated that he did not claim that his health was affected due to harassment and discrimination by management.

On December 30, 2001 Mr. Perry ordered appellant to work out of his section. Appellant disagreed and requested to see Ms. Manies saying he would only work out of his section if Ms. Manies told him to do so. Mr. Perry left but returned and threatened to terminate appellant if he did not follow his instructions. On January 3, 2002 Ms. Tokley, a supervisor, questioned Mr. Perry about what happened on December 30, 2001. Appellant stated that he felt that Ms. Manies was manipulating the supervisors to harass him.

Louis T. Rubens, a coworker, stated that he witnessed management harass appellant on several occasions. He stated that, in one instance, Mr. Gant showed him and other employees appellant's medical documentation. Mr. Rubens stated that Mr. Gant appeared biased toward appellant and his work habits. Mr. Rubens stated that he saw Mr. Gant follow appellant into the bathroom and he questioned appellant about his breaks. Mr. Rubens stated that he witnessed Mr. Gant time appellant's breaks on a daily basis.

Michael Bridges, a coworker, stated that, while he was assigned to pay location 310 under Mr. Gant, he saw Mr. Gant stand over appellant and "watch his every move." He stated that when appellant went to use the rest room, Mr. Gant would follow him. Mr. Bridges said that in one instance he saw Mr. Gant walk into the rest room and bend slightly at the waist to look under the stall at people's feet. Thereafter he waited outside the rest room for appellant and ordered him back to work.

Ms. Bradley stated that appellant was not prohibited from going to the medical unit but was required to be escorted by a supervisor. She cited to a complaint appellant made of being denied treatment for his blood pressure. The medical unit supervisor noted that appellant said he wanted to look at his medical records. Ms. Bradley noted that appellant was escorted to make sure he received proper care.

Ms. Bradley stated that on April 4, 2002 appellant called in sick, was 1.17 units late calling, and was marked absent without leave. In an investigative interview with appellant on April 19, 2002, she gave him five days to produce a signed letter from his physician to establish that the medication he was on would cause him to oversleep or be unconscious. Ms. Bradley stated that appellant did not provide the medical documentation so she issued a letter of warning

on May 8, 2002. She met with a union steward on May 10, 2002 and gave appellant five additional days to submit the required documentation. It was not submitted and she did not remove the letter of warning.

In a statement dated June 14, 2002, Mr. Hickey stated that appellant came to him concerning Mr. Gant's questioning him in the rest room. Mr. Hickey stated that appellant told him that Mr. Gant would come in and ask why he was taking so long and that he was needed in his work area. Mr. Hickey told appellant he would look into the matter. Mr. Hickey spoke to Mr. Gant who advised that appellant was spending too much time in the rest room and was not in his workplace. Mr. Gant said that other employees were complaining that appellant was not doing his fair share of the work. Mr. Hickey advised Mr. Gant not to go in the rest room but wait until appellant returned to the operation. Mr. Hickey met with Mr. Gant, Henry Dupree, a shop steward and appellant. Mr. Gant was told not to go into the rest room to find appellant but if appellant was using the rest room for an unusual amount of time, medical documentation would be required. If no medical documentation was provided, Mr. Gant could take disciplinary action if appellant was away from his work area. Mr. Hickey stated that the problem regarding this issue did not arise again. He noted that appellant was asked to floss his teeth on his own time as he would clock back in from lunch and go to the rest room and floss his teeth. Mr. Hickey stated that he observed this conduct.

On June 14, 2002 Mr. Gant denied discriminating against any employee under his control. He stated that, when an employee told him that he or she was hurt, it was his job to fill out an accident report and get the employee to the hospital if necessary. Mr. Gant stated that an investigative interview with appellant was held because he did not comply with the postal guidelines.

In a statement dated June 14, 2002, Mr. Bereheiko stated that appellant told him that Mr. Gant harassed and discriminated against him. Contrary to appellant's assertion that he did nothing about it, Mr. Bereheiko talked to Mr. Gant who told him that he was only trying to correct appellant's deficiencies in his work habits and appellant would leave his work assignment without permission. Mr. Gant stated that he would have to find appellant and find out why he left and instruct him to return to work. Mr. Bereheiko stated that Mr. Gant treated appellant the same as he would any other employee in his location.

On July 20, 2001 appellant filed an EEO complaint pertaining to the July 5, 2001 meeting with Ms. Manies. He stated that, in a settlement agreement of September 14, 2001, Ms. Manies apologized to him and acknowledged that he was to be treated with dignity and respect.

By letter dated October 28, 2002, Mr. Gant stated that he never saw appellant's medical record, noting that it was the employing establishment's policy for medical records to be kept by the medical unit. Mr. Gant stated that, when an employee was out on sick leave, he took the doctor's medical note to the medical unit. He stated that he never reviewed any employee's record and appellant told a lie.

By letter dated February 14, 2003, Jeanne Rosas, a human resource specialist, stated that the agency was unaware that Mr. Gant allegedly showed appellant's medical record to other employees. She stated that, as Mr. Gant noted in his October 28, 2002 letter, supervisors and

managers were not privy to confidential medical information. Ms. Rosas stated that the medical unit confidentially managed all medical documentation.

By decision dated April 3, 2003, the Office denied appellant's claim, finding that the evidence did not support that he sustained an emotional condition in the performance of his duties. The Office found that appellant had not substantiated any compensable work factors.

By letter dated April 17, 2003, appellant requested an oral hearing which was held on October 20, 2003.

In a statement dated November 23, 2003, Mr. Gant stated that he did not show the medical restriction note to Mr. Rubens or any other employee. Mr. Gant stated that appellant was required to keep a copy of the restriction note on his person in case a supervisor questioned him about his work.

By decision dated December 31, 2003, the Office hearing representative affirmed the April 3, 2003 decision.

LEGAL PRECEDENT

To establish that he has sustained an emotional condition causally related to factors of his federal employment, appellant must submit: (1) factual evidence establishing employment factors or incidents alleged to have caused or contributed to his condition; (2) rationalized medical evidence establishing that he has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that his emotional condition is causally related to the identified compensable employment factors.¹

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.² The issue is not whether the claimant has established harassment or discrimination under standards applied the EEO Commission. Rather the issue is whether the claimant under the Act has submitted evidence sufficient to establish an injury arising in the performance of duty.³ To establish entitlement to benefits, the claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.⁴

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.⁵ However, for harassment to

¹ *Robert W. Johns*, 51 ECAB 137, 141 (1999).

² *Michael Ewanichak*, 48 ECAB 364, 366 (1997); *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

³ *See Martha L. Cook*, 47 ECAB 226, 231 (1995).

⁴ *Barbara E. Hamm*, 45 ECAB 843, 851 (1994).

⁵ *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

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.⁶

ANALYSIS

Appellant contended that Mr. Gant, a supervisor, showed his work restriction form to coworkers on July 5, 2001 in violation of the Employee Labor Relations Manual, ELM 314.44. Appellant has not established that this incident occurred, as alleged. Mr. Rubens stated that he saw Mr. Gant show other employees appellant's medical documentation but he did not identify the date or the specific form. In statements dated October 28, 2002 and November 23, 2003, Mr. Gant denied looking at any restricted records or showing the July 5, 2001 restriction note to Mr. Rubens or any other employee. In a February 14, 2003 letter, the employing establishment's human resource specialist stated that the agency was unaware that Mr. Gant showed appellant's medical record to other employees. Since appellant's contention that Mr. Gant showed the July 5, 2001 work restriction form to his coworkers is not substantiated by the evidence of record, appellant has not established a compensable factor of employment.⁷

Appellant contended that Mr. Gant prohibited him from flossing his teeth in the men's room and ordered him to leave the men's room and return to his work area. The evidence establishes that Mr. Gant followed appellant into the bathroom at least in one instance. Mr. Rubens stated that he saw Mr. Gant follow appellant into the bathroom on "many occasions" but did not state any times or give dates. Mr. Bridges also stated that Mr. Gant followed appellant to the rest room and cited one instance where, when Mr. Gant saw appellant's shoes behind a stall, Mr. Gant waited outside and ordered appellant back to work. At the meeting with Mr. Hickey, Mr. Gant stated that he followed appellant into the bathroom because appellant took excessive breaks from his work area. Mr. Bereheiko stated that Mr. Gant looked for appellant to correct deficiencies in appellant's work habits, since appellant would leave his assignment without permission.

The monitoring of activities at work are administrative functions of the employer and not duties of the employee and are only considered compensable if the employing establishment acts unreasonably or abusively. Since the evidence indicates that Mr. Gant followed appellant into the bathroom on at least one occasion and stopped doing so following a meeting with management. The evidence does not establish that management acted abusively or unreasonably. Management portrayed appellant's teeth flossing in the men's room as an activity that was taking him excessively away from his work, it was not unreasonable or abusive for management to monitor his activities.

Regarding appellant's contention that he was prohibited from going to the nursing station, management stated that appellant was allowed to go to the nurses station if he was escorted by a supervisor. Ms. Bradley indicated that there was some confusion in one instance of whether appellant had gone to the medical unit for treatment or to check medical books. Mr. Banlowe suggested that appellant was taking advantage of the system by going to the

⁶ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

⁷ *See Barbara E. Hamm, supra* note 4.

nursing station two or three times a day with a supervisor to check his blood pressure. To the extent that managers required appellant to be accompanied by a supervisor to go to the nursing station relates to monitoring appellant, he has not established that management acted unreasonably, nor has appellant shown that it constituted harassment.

Appellant contended that, after reporting his injury to Mr. Gant, Ms. Manies called him into her office, and in the presence of other supervisors, accused him of lying. He stated that Ms. Manies intimidated him by telling him that she was going to report him to the postal inspector for investigation. Appellant did not corroborate that Ms. Manies made the statements alleged. In the EEO settlement dated September 14, 2001, Ms. Manies apologized to appellant and management acknowledged that he was to be treated with dignity and respect. Ms. Manies did not admit to appellant's allegation. Absent evidence corroborating the incident of harassment, appellant has not shown a compensable factor of employment.⁸

Appellant also contended that he received three letters of warning, on July 19, 2001 regarding his July 5, 2001 injury; on September 5, 2001 for unsatisfactory attendance; and on May 8, 2002 because he overslept due to the medication he was taking and arrived at work late. Ms. Bradley explained that on April 4, 2002 appellant called in sick and was marked absent without leave. In an investigative interview on April 19, 2002, she gave him five days to produce a signed letter by his doctor explaining the reason for his absence. However no documentation was submitted and she issued the letter of warning. After a meeting with the union steward on May 10, 2002, she gave appellant five more days to submit the necessary medical documentation but he did not comply and she did not remove the letter of warning. 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 in such capacity.⁹ Appellant has not shown that management acted abusively in this regard.

Appellant alleged that on July 6, 2001 Mr. Gant gave him an investigative interview and told him the results could lead to disciplinary action and removal from the employing establishment. He noted that Mr. Gant refused to write down appellant's complete responses during the interview. On March 21, 2002 Mr. Banlowe gave him an investigative interview and that Mr. Gant discriminated against him by not taking his seniority into consideration when assigning duties was not corroborated by any evidence in the record. Appellant did not corroborate that Mr. Gant discriminated against him by intentionally discrediting his report regarding another claim, by indicating on the claim form that appellant was not injured while in the performance of duty. Appellant did not submit supporting evidence that on December 30, 2001 Mr. Perry discriminated against him when he ordered appellant to work out of his section and when he asked Mr. Perry to speak to Ms. Manies, Mr. Perry threatened to terminate appellant if he did not follow instructions. Appellant also did not corroborate that on January 3, 2002, in a conversation between the supervisor, Ms. Tokley and Mr. Perry, Mr. Perry indicated that Ms. Manies did not want to talk with appellant.

⁸ See *Ernest J. Malagrida*, 51 ECAB 287, 290 (2000).

⁹ *Sherry L. McFall*, 51 ECAB 436, 440 (2000).

Appellant has not shown that management discriminated against or harassed, intimidated and humiliated him. Mr. Gant denied that he discriminated against appellant and Mr. Hickey stated that appellant was treated with dignity and respect. Appellant has therefore failed to establish a compensable factor of employment.¹⁰

CONCLUSION

The Board finds that appellant did not establish any compensable factors of employment and did not establish that he sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the December 31 and April 3, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 6, 2004
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ As no compensable work factors have been identified, it is not necessary to address the medical evidence. *Roger Williams*, 52 ECAB 468, 474 (2001).