



and harassed him but the employing establishment took no corrective measures. He alleged that he had an emotional reaction to an incident on May 16, 2001 when he and Robert Rosenberger were engaged in their usual “bickering;”<sup>1</sup> and the employing establishment disciplined him for threatening Mr. Rosenberger. Appellant alleged discrimination by the employing establishment because he was suspended for the May 16, 2001 incident but Mr. Rosenberger was not. He alleged an emotional reaction to an investigation regarding the May 16, 2001 incident. Appellant alleged that on May 17, 2001 postmaster Larry Jacobs told him that he was “the worst carrier he had ever had” and on June 18, 2001 he received a letter of removal from the employing establishment<sup>2</sup> for the May 16, 2001 incident and was placed in nonpay status for five weeks.

In a statement dated June 28, 2001, Jeffrey Fultz indicated that on July 29, 2000 supervisor Glenn Teare told him that Mr. Dodero had “thrown a fit” about appellant taking his express mail and leaving him with nothing to do. Mr. Fultz stated that, in January 2001, Mr. Burton was angry that the union had requested his medical limitations and started yelling at appellant about his medical records.

In a written statement submitted November 20, 2001, Mr. Jacobs indicated that appellant had a history of behavior problems when dealing with supervisors, other employees and customers and had been disciplined on several occasions. He stated that on May 16, 2001 appellant told Mr. Rosenberger that he had “bitten off more than he could chew” and they could settle the matter on the back dock where appellant would “kick his ass.” On May 17, 2001 appellant was placed on “emergency suspension” pending further investigation. On June 18, 2001 he was issued a removal notice that was subsequently reduced to a suspension at Step B of the grievance procedure.<sup>3</sup>

Appellant submitted a copy of an arbitration award issued March 19, 2002 by Clarence R. Deitsch regarding his grievance of the May 17, 2001 emergency suspension. Mr. Deitsch noted that on May 16, 2001 appellant and Mr. Rosenberger became involved in an exchange of profanity at the employing establishment. He noted that the employing establishment conducted an investigation and issued an investigative memorandum on May 25, 2001. Mr. Deitsch noted that Mr. Rosenberger testified that he was “being a jerk” and “smart mouthing” appellant about his singing a short time after appellant made the alleged threat and this did not seem to be the behavior of someone who felt threatened. After reviewing the evidence, Mr. Deitsch concluded that the employing establishment had reasonable cause on May 17, 2001 to place appellant on emergency suspension for making a credible threat of violence. He indicated that there is no requirement to conduct an exhaustive investigation prior to an emergency suspension since the purpose of this action is to respond to an imminent threat of injury to employees or property. Mr. Deitsch further concluded that the employing establishment should have realized after reviewing the investigative report and within at least 12 days following the May 17, 2001 suspension, *i.e.*, May 29, 2001, that the language involved in the incident was more in the nature

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<sup>1</sup> Appellant indicated that he and Mr. Rosenberger did not get along but denied that their relationship ever involved serious threats.

<sup>2</sup> The removal was later reduced to a 14-day suspension.

<sup>3</sup> On July 27, 2001 the removal was reduced to a “paper” suspension effective July 23, 2001 and appellant was directed to report for duty on August 1, 2001.

of shop talk and banter than threatening language. In the March 19, 2002 award, Mr. Deitsch upheld the employing establishment's emergency suspension of appellant on May 17, 2001 for making a threat of violence but shortened the period of the suspension to 12 calendar days.

Appellant also submitted medical evidence in support of his claim.

By decision dated April 8, 2002, the Office denied appellant's claim on the grounds that his emotional condition was not causally related to any compensable factors of employment. On April 12, 2002 he requested an oral hearing before an Office hearing representative. He testified at the hearing which was held on October 29, 2002.

By decision dated and finalized January 23, 2003, an Office hearing representative affirmed the Office's April 8, 2002 decision.<sup>4</sup>

### **LEGAL PRECEDENT**

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.<sup>5</sup>

Workers' compensation law does not apply to each and every injury or illness that is somehow related to the employment. In the case of *Lillian Cutler*,<sup>6</sup> the Board explained that there are distinctions in the type of employment situations giving rise to a compensable emotional condition under the Federal Employees' Compensation Act.<sup>7</sup> There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within coverage under the Act.<sup>8</sup> When an employee experiences emotional stress in carrying out his employment duties and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from an emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.<sup>9</sup> On the other hand, the

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<sup>4</sup> The record contains evidence submitted subsequent to the Office decision of January 23, 2003. However, the jurisdiction of the Board is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). Therefore, the Board has no jurisdiction to consider this evidence for the first time on appeal.

<sup>5</sup> *George C. Clark*, 56 ECAB \_\_\_\_ (Docket No. 04-1572, issued November 30, 2004).

<sup>6</sup> 28 ECAB 125 (1976).

<sup>7</sup> 5 U.S.C. §§ 8101-8193.

<sup>8</sup> *George C. Clark*, *supra* note 5.

<sup>9</sup> *Lillian Cutler*, *supra* note 6.

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.<sup>10</sup> Generally, actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act.<sup>11</sup> However, an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.<sup>12</sup>

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 a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.<sup>13</sup> If a claimant 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 record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.<sup>14</sup>

### ANALYSIS

Appellant has alleged several instances of harassment: that he was verbally abused by a fellow employee on on July 29, 2000; that, in January 2001, Mr. Burton threatened and harassed him; that the employing establishment marked him as a troublemaker when he filed a complaint; and that on May 17, 2001 postmaster Jacobs told him that he was "the worst carrier he had ever had." 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.<sup>15</sup> However, for harassment and 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.<sup>16</sup> In this case, appellant has provided insufficient corroborating evidence to establish these allegations as factual. Regarding the July 29, 2000 incident, a coworker, Mr. Fultz, stated that on July 29, 2000 Mr. Teare told him that Mr. Dodero had "thrown a fit" about appellant taking his express mail and leaving him with nothing to do. As Mr. Fultz did not witness this incident firsthand, his

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<sup>10</sup> *Lillian Cutler*, *supra* note 6.

<sup>11</sup> *Michael L. Malone*, 46 ECAB 957 (1995).

<sup>12</sup> *Charles D. Edwards*, 55 ECAB \_\_\_\_ (Docket No. 02-1956, issued January 15, 2004).

<sup>13</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Donna J. DiBernardo*, 47 ECAB 700 (1996).

statement is, therefore, of limited probative value and is insufficient to establish the fact that the incident occurred. Regarding the January 2001 incident, Mr. Fultz stated that Mr. Burton was angry that the union had requested his medical limitations and started yelling at appellant. Appellant had alleged that Mr. Burton had “threatened and harassed him.” The evidence does not support his allegations about this incident and, therefore, he has not met his burden to find the situation compensable. Regarding the allegations that, in November 2000, the employing establishment marked appellant as a troublemaker when he filed a complaint and on May 17, 2001 postmaster Jacobs told him that he was “the worst carrier he had ever had,” there is no corroborating evidence to establish these allegations as factual. Therefore, they cannot be deemed compensable factors of employment. Considering all the evidence, appellant’s allegations of harassment cannot be deemed compensable factors of employment.

Appellant also alleged several incidents regarding administrative actions (or lack thereof) by the employing establishment: that the employing establishment took no corrective action regarding the January 2001 incident when Mr. Burton threatened him; that the employing establishment unfairly suspended him (after initially giving him a letter of removal)<sup>17</sup> and placed him in nonpay status for threatening Mr. Rosenberger on May 16, 2001; and that the employing establishment discriminated and retaliated against him by not suspending Mr. Rosenberger. These allegations involve administrative or personnel actions of the employing establishment. As noted above, administrative or personnel actions are not compensable absent error or abuse. Regarding the allegation that the employing establishment took no corrective action concerning Mr. Burton’s behavior in January 2001, there is no evidence to support that this incident occurred and, therefore, there is insufficient evidence of record to establish that the employing establishment erred or acted abusively when it did not take disciplinary action against Mr. Burton for this incident. Regarding the fact that, although appellant was suspended, but the employing establishment did not suspend Mr. Rosenberger for the May 16, 2001 incident the Board finds it was reasonable for the employing establishment to consider appellant’s statement that he would “kick [Mr. Rosenberger’s] ass” as a credible threat of violence pending further investigation of the circumstances. There is no indication in the record that Mr. Rosenberger made a similar threat of violence against appellant. Therefore, the record does not support that the employing establishment erred or acted abusively in suspending only appellant.

Regarding appellant’s May 17, 2001 suspension by the employing establishment, in the March 19, 2002 arbitration award, Mr. Deitsch concluded that the employing establishment had reasonable cause on May 17, 2001 to place appellant on emergency suspension for making a credible threat of violence. Although he further concluded that the employing establishment should have realized in a shorter period of time, after reviewing the investigative report, that the language involved in the incident was more in the nature of shop talk and banter rather than threatening language, nevertheless Mr. Deitsch upheld the employing establishment’s emergency suspension of appellant for making a threat of violence, but only shortened the period of the suspension. The Board finds that the evidence of record, including the arbitration award, establishes that the employing establishment did not err or act abusively in placing appellant on suspension.

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<sup>17</sup> The mere fact that personnel actions were later modified or rescinded, does not, in and of itself, establish error or abuse. *See Garry M. Carlo*, 47 ECAB 299 (1996).

Finally, appellant alleged an emotional reaction to the investigation regarding the May 16, 2001 incident with Mr. Rosenberger. As an investigation is generally related to the performance of an administrative function of the employer and not to the employee's regular or specially assigned work duties, it is not a compensable factor of employment unless there is affirmative evidence that the employer erred or acted abusively in the administration of the matter.<sup>18</sup> The case record contains no such showing of error or abuse in the employing establishment's investigation of the May 16, 2001 incident. Therefore, this allegation does not constitute a compensable factor of employment.

**CONCLUSION**

The Board finds that appellant failed to establish that his emotional condition was causally related to any compensable factors of his federal employment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 23, 2003 is affirmed.

Issued: January 14, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>18</sup> *Ernest St. Pierre*, 52 ECAB 623 (2000).