

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

MELIE D. SOUTHERLAND, Appellant

and

**U.S. POSTAL SERVICE, PRIORITY MAIL
CENTER, Phoenix, AZ, Employer**

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**Docket No. 04-1238
Issued: March 17, 2005**

Appearances:
Melie D. Southerland, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On April 8, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated January 7, 2004 that denied modification of a January 9, 2003 decision, denying his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the January 7, 2004 decision.

ISSUE

The issue is whether appellant sustained an emotional condition in the performance of duty causally related to factors of his federal employment.

FACTUAL HISTORY

On July 7, 2002 appellant, then a 39-year-old distribution clerk, filed an occupational disease claim alleging that he sustained an emotional condition beginning May 1, 2001 due to work factors including racial discrimination, harassment, retaliation and a hostile work environment. He alleged that his supervisors criticized his job performance, imposed unfair performance standards, closely monitored his work, required him to undergo additional training,

changed his job assignments, did not timely post daily assignment schedules, did not adequately keep him informed regarding certain matters, gave him assignments shortly before his lunch period began, asked him to stay longer when he submitted a leave slip to leave early, discussed his attendance record with him, disciplined him unfairly and would not let him talk to the Postmaster General when he visited. He also alleged that supervisors made racial comments and at a large meeting a supervisor alleged that appellant had filed unfair charges against his supervisors. Appellant alleged that supervisors tried to separate black employees who were working together, discriminated by holding a baby shower for one employee, made it difficult to file grievances and wanted to fire employees for filing grievances. He stated that his supervisor asked other employees for personal information about him, one supervisor told appellant that he walked too slowly and supervisor Humberto Trujillo stared at him and withheld his pay in retaliation for an Equal Employment Opportunity (EEO) Commission complaint. Appellant indicated that he had filed grievances and an EEO complaint alleging harassment and discrimination.

In a statement dated July 29, 2001, Joe Cuccinotto, Clercraft Director stated that on July 17, 2001 appellant submitted a petition signed by several employees alleging racial discrimination at the employing establishment. He indicated that Mr. Trujillo denied that there was such a problem.

In a written statement dated January 6, 2002, David Hernandez, a union steward, stated that on December 22, 1997 he discussed with another union steward an alleged incident in which Mr. Trujillo referred to black employees as "coons." He was instructed by the chief steward to investigate reports of a hostile work environment at a certain employing establishment facility¹ but indicated that supervisors, including Mr. Trujillo, were not cooperative and asked him to leave. Mr. Hernandez stated that he "heard" that employees who wanted to be witnesses to discrimination were intimidated and nothing further was done about the situation. He stated that he worked with Mr. Trujillo for four months and had observed him yell at employees and supervisors.

By letters dated October 25, 2002 and November 14, 2003, the employing establishment denied all of appellant's allegations.

Appellant submitted two local newspaper articles dated November 28, 2001 and January 30, 2002, which described allegations of racial discrimination at the employing establishment. The articles noted that he had filed an EEO complaint alleging racial discrimination and that the local office of the NAACP was conducting an investigation.

In reports dated May 16, 2001 to October 13, 2003, Dr. Gerald P. Shaw, a psychiatrist, indicated that he had treated appellant since May 1, 1998 for panic disorder, anxiety and depression which appellant reported was aggravated by harassment at work.

By decision dated January 9, 2003, the Office denied appellant's emotional condition claim on the grounds that his allegations were not established as factual.

¹ It was not appellant's duty station.

On February 4, 2003 appellant requested an oral hearing before an Office hearing representative. He testified at the hearing which was held on October 20, 2003. Appellant also submitted copies of medical records, newspaper articles and a local news broadcast videotape concerning allegations of racial discrimination at the employing establishment and documents relating to grievances he had filed.

By decision dated January 7, 2004, the Office hearing representative affirmed the January 9, 2003 decision on the grounds that the evidence of record failed to establish that appellant's emotional condition was causally related to any compensable factors of employment.

LEGAL PRECEDENT

The Federal Employees' Compensation Act² provides for the payment of compensation benefits for injuries sustained in the performance of duty. 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.³

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,⁴ the Board explained that there are distinctions in the type of employment situations giving rise to a compensable emotional condition under the Act. 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.⁵ 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.⁶

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

² 5 U.S.C. §§ 8101-8193.

³ *George C. Clark*, 56 ECAB ____ (Docket No. 04-1572, issued November 30, 2004).

⁴ 28 ECAB 125 (1976).

⁵ *George C. Clark*, *supra* note 3.

⁶ *Lillian Cutler*, *supra* note 4.

factors of employment and may not be considered.⁷ 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.⁸

Where the disability results from an employee's emotional reaction to her regular or specially-assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act. 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.⁹ 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.¹⁰ 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.¹¹

ANALYSIS

The Board finds that there is insufficient evidence of record to establish appellant's allegations as factual. He alleged that supervisors made it difficult to submit grievances, wanted to terminate employees in retaliation for filing grievances, did not keep him adequately informed regarding certain matters, set unfair performance standards, discriminated by holding a baby shower for an employee, did not permit him to speak to the Postmaster General, asked other employees to provide personal information about him and permitted acts of racial discrimination. The employing establishment denied these allegations. There is insufficient evidence of record to establish that these incidents occurred as alleged. Therefore, they are not deemed compensable factors of employment.

Appellant further alleged that supervisors criticized his job performance, closely monitored his work, required him to undergo additional training, changed his job assignments, did not timely post daily assignment schedules, gave him assignments shortly before his lunch period began, asked him to stay longer when he submitted a leave slip to leave early, discussed his attendance record with him and disciplined him unfairly. These allegations involve administrative or personnel actions that are not compensable under the Act absent evidence of error or abuse. The employing establishment denied these allegations and appellant has not submitted sufficient evidence of error or abuse by the employing establishment in its handling of administrative and personnel matters.

⁷ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁸ *Id.*

⁹ *Lillian Cutler*, *supra* note 4.

¹⁰ *Michael L. Malone*, 46 ECAB 957 (1995); *Gregory N. Waite*, 46 ECAB 662 (1995).

¹¹ *Charles D. Edwards*, 55 ECAB ____ (Docket No. 02-1956, issued January 15, 2004).

Appellant alleged discrimination and harassment at the employing establishment. 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.¹² 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.¹³ Appellant alleged that supervisors made racial comments, alleged that he filed unfair charges against them, tried to separate black employees who were working together, made it difficult to file grievances and wanted to fire employees for filing grievances, one supervisor told appellant that he walked too slowly; and supervisor Humberto Trujillo harassed him, stared at him and withheld his pay in retaliation for filing complaints. However, he has provided insufficient evidence to establish these allegations of harassment and discrimination as factual.

Two witnesses provided statements in support of appellant's claim. Mr. Cuccinotto stated that appellant submitted a petition from several employees alleging racial discrimination. However, this statement does not provide any specific details such as dates, individuals involved or a description of the incidents constituting discrimination. Therefore, it does not establish any specific acts of discrimination against appellant. Mr. Hernandez stated that he tried to investigate an incident in which Mr. Trujillo allegedly referred to black employees as "coons." He stated that he "heard" that employees who wanted to be witnesses to discrimination were intimidated from doing so and that he had personally observed Mr. Trujillo yell at employees and supervisors. However, Mr. Hernandez' statement does not establish any specific acts of discrimination on the part of Mr. Trujillo against appellant. Witness statements that do not describe specific incidents involving a claimant are of limited probative value in establishing his or her allegations as factual.

Appellant submitted two local newspaper articles which described allegations of racial discrimination at the employing establishment. The articles noted that appellant had filed an EEO complaint alleging racial discrimination and that the local office of the NAACP was conducting an investigation. However, this evidence is not sufficient to establish that the employing establishment discriminated against him.¹⁴ The Board has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the necessary causal relationship between a claimed condition and employment factors because such materials are of general application and are not determinative of whether the specifically claimed condition is related to the particular employment factors alleged by the employee.¹⁵ The materials submitted merely noted that allegations had been made.

¹² *Id.*

¹³ *Donna J. DiBernardo*, 47 ECAB 700 (1996).

¹⁴ There is no EEO or other agencies Dr. Chmell final decision of record with any findings supporting these allegations of racial discrimination. The employing establishment noted that on April 29, 2003 appellant's class action lawsuit against the employing establishment was dismissed because the typicality and commonality prerequisites were not met.

¹⁵ *William C. Bush*, 40 ECAB 1064 (1989).

The Board finds there is insufficient specificity in the evidence of record to establish appellant's allegations as factual. Therefore, they do not constitute compensable factors of employment.

Appellant submitted allegations pertaining to abuse of employees in general and certain named individuals. However, even if such allegations were established as factual, they do not establish the allegations regarding his own experiences at the employing establishment. Appellant has failed to establish that his emotional condition was causally related to any compensable factors of employment. The Office properly denied his claim.

CONCLUSION

The Board finds that appellant failed to establish that his emotional condition was causally related to any compensable factor of employment.¹⁶

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 7, 2004 is affirmed.

Issued: March 17, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹⁶ Unless appellant alleges a compensable factor of employment substantiated by the record, it is unnecessary to address the medical evidence. *See Garry M. Carlo*, 47 ECAB 299 (1996).