

2000, he advised her of action to be taken to bring her office's performance up to a satisfactory level. He noted that she subsequently made an allegation of sexual harassment against him. Appellant stated that, although the false accusation of sexual harassment was stressful, "it was the subsequent actions taken by my superiors 15 months later that has created my mental condition." He stopped work on June 21, 2001 and did not return.¹

On February 21, 2002 Dr. Mark A. Napier, a Board-certified psychiatrist, related that appellant was under his treatment for a major depressive disorder, hypertension and stress. He related that appellant had been falsely accused by a subordinate of sexual harassment which appellant believed was made up in order to avoid disciplinary action. Dr. Napier noted that on June 15, 2001 appellant has been informed by a supervisor that he could either be demoted or fired because of the allegations. On June 19, 2001 appellant was advised that he would be demoted. Dr. Napier advised that appellant was presently unable to return to work and that the workplace situation described to him had contributed to the development of appellant's symptoms. Given appellant's history, the physician stated that the events at work were the only apparent source of appellant's emotional condition.

The employing establishment controverted the claim and submitted evidence related to the disciplinary actions taken in the case. In a June 19, 2002 letter, Roger T. Nienaber, the district manager, addressed appellant's allegations. He noted that, in May 2000, Ms. Calvert contacted the manager of human resources to advise that she had been sexually harassed by appellant. Mr. Nienaber asked Grace Corbin, the equal employment opportunity process manager, to meet with Ms. Calvert; however, she did not respond to several requests that her complaint be put in writing. When he first learned of the allegation, Mr. Nienaber advised appellant not to have further contact with Ms. Calvert or anyone at her post office. In February 2001, Ms. Calvert attended a meeting at Mr. Nienaber's office to discuss performance issues. She left the meeting "yelling and screaming" and subsequently filed a sexual harassment claim. Upon notice of this complaint, Mr. Nienaber assigned the East St. Louis office to another manager, Mary Evans. He shared the investigation file with Ms. Evans when it became apparent that disciplinary action would need to be taken against Ms. Calvert; stating that none of her witnesses could corroborate her allegations.

Mr. Nienaber stated that an attorney was brought in to conduct an investigation and he obtained statements from all witnesses identified by Ms. Calvert. It was determined that disciplinary action was appropriate against Ms. Calvert for her failure to cooperate with the investigation. It became apparent, also, that corrective action against appellant would need to be taken for inappropriate behavior allowed on postal premises during Christmas parties for which he was responsible. On July 24, 2001 Mr. Nienaber met with appellant and advised him that the sexual harassment charges were not found to be true. However, the investigation had also determined that appellant had made inappropriate remarks to Ms. Calvert and, unless appellant could provide further information as to what had transpired in December 1999, it would be found that he had provided false information during the investigation.

¹ The Office of Personnel Management approved appellant's disability retirement on July 8, 2003.

Mr. Nienaber subsequently met with other supervisors and managers in August 2001 to advise upper level managers of their shared responsibility towards their personal conduct and that of their employees and to make sure they understood that they could not have similar parties in their offices. He indicated that appellant had been moved from one position to another, at no loss of pay.

Attached was the April 5, 2001 investigation report conducted by Thomas J. Blum, deputy managing counsel in Atlanta. His investigation revealed that appellant has issued several letters of warning to Ms. Calvert in 1998 and placed her on a performance improvement plan (PIP) to address performance problems. Her allegation of sexual harassment first arose on May 30, 2000, complaining of inappropriate comments made by appellant to her in December 1999. This complaint was made following a May 9, 2000 letter from appellant to Ms. Calvert citing performance problems. Although provided appropriate complaint forms to submit, the issue was not raised again by Ms. Calvert until a February 3, 2001 meeting with Mr. Nienaber to discuss performance issues. Mr. Blum noted that Ms. Calvert provided a sworn statement containing several allegations of sexual harassment by appellant. He interviewed a number of postmasters and managers as part of the investigation and concluded that Ms. Calvert did not produce any facts to support her allegations against appellant. As part of his investigation, Mr. Blum noted that appellant had hosted Christmas parties in 1999 and 2000 at which a retired postmaster had dressed up as Santa Claus and told jokes to the assembled managers and postmasters, some of which were adult in nature with sexual references. Mr. Blum noted that on December 15, 1999 it was alleged that appellant had made a sexually explicit remark to Ms. Calvert. He contacted Willie Haynes by telephone regarding the accusations, who denied that appellant had made any sexually explicit remarks to her.²

Based on the investigation, on August 13, 2001 Mr. Nienaber issued a proposed downgrade based on (a) the December 15, 1999 sexual remark of appellant to Ms. Calvert, a subordinate employee; (b) making a false statement during the investigation by denying that any sexual related comments were made to Ms. Calvert; and (c) for the sexual remarks made by a retired postmaster at the Christmas party held on the employing establishment premises in December 2000.³ On October 25, 2001 David C. Fields, Sr., the midwest operations manager of operations support, found the charges to be credible but, in light of appellant's service, the action was reduced to a letter of warning in lieu of a 14-day suspension effective

² He provided several inconsistent statements concerning the December 15, 1999 remarks attributed to appellant. To Mr. Nienaber, he acknowledged that the term "pussy" had been used by appellant but was unaware of the context. However, he later indicated that he did not hear the term used at all and stated that he exercised poor judgment in the statements he provided to help Ms. Calvert keep her job. Mr. Haynes noted that he was a close friend with both appellant and Ms. Calvert.

³ An April 23, 2001 memorandum from the Midwest Operations Manager of Human Resources noted that Ms. Calvert's assertions were not supported after investigation but that Mr. Nienaber should address the poor judgment exercised by appellant in allowing adult jokes to be told at the Christmas parties.

October 29, 2001. Appellant was laterally reassigned to work as a manager of operation programs support with responsibility over delivery programs rather than postmasters.⁴

Appellant responded that he was not at fault as Ms. Calvert's allegations against him were not substantiated. He contended, however, that the investigation by Mr. Nienaber was erroneous and that his manager had abused his authority by not promptly investigating the allegations in 2000 when first raised. Appellant alleged that Mr. Nienaber's meeting with area postmasters and managers on August 29, 2001 was abusive and that Ms. Calvert had been compelled by management to file charges against him.

By decision dated November 8, 2002, the Office denied appellant's claim, finding that he did not establish his allegations that management had conspired against him when investigating the allegations of sexual harassment. It was also found that the evidence was insufficient to establish that management had failed to promptly investigate the charges or in separating appellant from Ms. Calvert.

Appellant requested a hearing before an Office hearing representative, which was held on June 25, 2003. Appellant provided testimony at the hearing, as did several coworkers, who noted that he had been wrongly accused of sexual harassment by Ms. Calvert. It was noted that appellant's area of responsibility at work included the supervision of 22 postmasters and 9 station managers, including Ms. Calvert. As her management was deficient, part of appellant's duty was to take action to correct performance and, in turn, she initiated a claim of sexual harassment.

In an October 10, 2003 decision, the hearing representative affirmed the November 8, 2002 compensation order, finding that appellant had not established a compensable factor as giving rise to his emotional condition.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁵ The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of performance."⁶ "In the course of employment" relates to the elements of time, place and work activity. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in her employer's business, at a place where she may reasonably be expected to be in connection with her employment and while she was reasonably fulfilling the duties of her employment or engaged in

⁴ On October 22, 2002 a notice of proposed removal was issued for appellant's inability to perform the duties of his position, noting his absence since June 29, 2001. On December 23, 2002 the removal action was upheld and made effective January 4, 2003.

⁵ 5 U.S.C. § 8101 *et seq.*

⁶ This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

doing something incidental thereto. The employee must also establish an injury “arising out of the employment.” To arise out of employment, the injury must have a causal connection to the employment, either by precipitation, aggravation or acceleration.⁷

When an employee experiences emotional stress in carrying out her employment duties or has fear and anxiety regarding her ability to carry out her duties and the medical evidence establishes that the disability resulted from her 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 resulted from an emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of the work. By contrast, there are disabilities having some kind of causal connection with the employment that are not covered under workers’ compensation law because they are not found to have arisen out of employment, such as when disability results from an employee’s fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.⁸

Workers’ compensation law does not cover an emotional reaction to an administrative or personnel action unless the evidence shows error or abuse on the part of the employing establishment.⁹ The Board has held that actions of an employer which the employee characterizes as harassment or discrimination may constitute a factor of employment giving rise to coverage under the Act, but there must be some evidence that harassment or discrimination did in fact occur. As a general rule, allegations alone are insufficient to establish a factual basis for an emotional condition claim.¹⁰ Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.¹¹ The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.¹²

⁷ See *Clayton Varner*, 37 ECAB 248 (1985).

⁸ *Lillian Cutler*, 28 ECAB 125 (1976).

⁹ *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff’d on recon.*, 42 ECAB 556, 572-73 (1991).

¹⁰ See *Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case the Board looked beyond the claimant’s allegations of unfair treatment to determine if the evidence of record substantiated such allegations).

¹¹ *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (for harassment to give rise to a compensable disability, there must be evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, 38 ECAB 838 (1987) (the claimant failed to establish that the incidents she characterized as harassment occurred as alleged).

¹² *Paul Trotman-Hall*, 45 ECAB 229, 234-44 (1993) (Groom, Alternate Member, concurring).

ANALYSIS

Appellant initially attributed his emotional condition to the actions taken by Mr. Nienaber following the allegations of sexual harassment by Ms. Calvert. He noted that the allegations were false, stated that Mr. Nienaber had “fabricated something” and put pressure on Ms. Calvert to make charges against him. Appellant alleged error in the investigation of the matter, contending that the charges were not promptly investigated, that he was not separated from Ms. Calvert, and that the discipline he received was abusive. He also argued error on the part of Mr. Nienaber for meeting with area postal management employees on August 29, 2001 and discussing aspects of the investigation with his peers and coworkers.

The actions of an employee’s supervisor which are characterized as harassment or abuse may constitute a compensable factor of employment if the record demonstrates that the manager erred or acted abusively in the administration of personnel matters.¹³ Appellant alleged that Mr. Nienaber assisted in fabricating the sexual harassment allegations raised by Ms. Calvert. The record indicates that, following a mid-year performance evaluation in April 2000, appellant had counseled the postmaster that disciplinary action would need to be taken if she did not bring up the performance of her office. He indicated that Ms. Calvert subsequently made an accusation of sexual harassment. Mr. Nienaber stated that he first learned of the allegation after Ms. Calvert made a telephone call to the human resources manager. He asked an EEO specialist to meet with Ms. Calvert and advised appellant not to have direct contact with her. Mr. Nienaber noted that, as appellant was located at a different facility, he would not have too meet with her alone and all telephone conversations between the two parties could be monitored by a third individual. The record does not support appellant’s contentions that Mr. Nienaber or other postal authorities improperly solicited or fabricated the charges made by Ms. Calvert. The evidence establishes that Ms. Calvert did not actively pursue her charges against appellant, despite meeting with equal opportunity personnel and being provided with appropriate forms to complete. Rather, following a February 3, 2001 meeting at which Mr. Nienaber raised performance deficiencies on her part; Ms. Calvert followed up with a telephone call to postal headquarters reviving her allegations against appellant. As of February 14, 2001, her supervision was placed under Ms. Evans.

The multitude of witness statements provided to Mr. Blum from appellant’s peers and coworkers make clear that appellant at no time engaged in the conduct alleged by Ms. Calvert in a sworn statement. The evidence collected by Mr. Blum, however, does not substantiate appellant’s allegation that Ms. Calvert’s assertions were brought forward based on coercion by Mr. Nienaber or other management employees. Rather, the record sadly reflects that Ms. Calvert’s response to criticism of her performance by her supervisors was to raise fictitious allegations. Complicating matters were the several statements provided by Mr. Haynes, who denied to Mr. Blum that appellant had ever made sexually explicit remarks to Ms. Calvert but who acknowledged to postal management on several occasions that appellant had used the term “pussy” during remarks made on December 15, 1999. There is no evidence that Mr. Nienaber fabricated or conspired with Ms. Calvert regarding her allegations. However, as part of the

¹³ See *Bernard Snowden*, 49 ECAB 144 (1997).

investigation into the matter, Mr. Blum found out about conduct taking place at office holiday parties, which formed part of the basis for appellant's discipline.

It is well established that the employer has the right to conduct investigations into matters when wrongdoing is suspected.¹⁴ Appellant has contended that there was undue delay in the investigation of the matters raised by Ms. Calvert; however, he has not substantiated that the investigation conducted in this case was in error or otherwise unreasonable. It was only after the February 3, 2001 meeting that Ms. Calvert formalized her complaint and provided a sworn statement. This matter was investigated by outside counsel, who provided an April 5, 2001 report of his meetings with witnesses and concluded that she did not produce facts sufficient to substantiate her allegations against appellant. The April 23, 2001 memorandum of the human resources operations manager noted that Ms. Calvert's assertions were not supported in the investigation but that Mr. Nienaber should address the poor judgment exercised by appellant in allowing adult jokes to be told at Christmas parties.

At this point, Mr. Nienaber contacted Mr. Haynes who acknowledged that appellant had used the term "pussy" in remarks to Ms. Calvert on December 15, 1999. On August 15, 2001 the manager issued a proposed downgrade and thereafter held an August 29, 2001 meeting with area postmasters and managers to discuss conduct at Christmas parties and the issue of sexual harassment. On October 25, 2001 Mr. Fields found the charges against appellant to be credible but reduced the proposed disciplinary measure to a letter of warning. The Board has held the fact that the employing establishment lessens a disciplinary action taken towards an employee does not establish that it acted in an erroneous or abusive manner.¹⁵ The evidence submitted by appellant does not substantiate his contentions that the employing establishment erred in taking the disciplinary action or in laterally reassigning him to the position of manager of operations support.

Appellant has argued that the April 23, 2001 human resources memorandum constituted an exoneration of the charges brought against him and that Mr. Nienaber erred in disregarding the investigation report of Mr. Blum. This overlooks, however, that other information was revealed during the investigation for which he was ultimately disciplined, specifically the conduct at the office holiday parties. Moreover, the evidence reflects that the actions taken by Mr. Nienaber were at the direction of his superiors, who had the opportunity to review and consider the materials provided by Mr. Blum. The record does not substantiate appellant's allegations that Mr. Nienaber abused his authority in terms of continuing to investigate the matter, speaking with Mr. Haynes or in the disciplinary recommendation he ultimately made. The record is clear that Ms. Calvert was located at a post office in East St. Louis and that she did not share an office with appellant. There is no finding by any tribunal with appropriate jurisdiction that Mr. Nienaber did not adequately comply with postal regulations concerning the investigation of sexual harassment allegations or in cautioning appellant as to his supervision of Ms. Calvert until her placement with Ms. Evans on February 14, 2001. The record reflects that on August 29, 2001 Mr. Nienaber advised upper management personnel that they were not to have holiday parties of a similar nature and that the various managers and postmasters shared in

¹⁴ See *Merriett J. Kauffman*, 45 ECAB 696 (1994).

¹⁵ See *Sherry L. McFall*, 51 ECAB 436 (2000).

the responsibility for such activities at their individual offices. The several witness statements provided by appellant do not substantiate his allegation of verbal abuse or error by his supervisor in conducting the meeting. The various actions and proposals made by Mr. Nienaber were ultimately forwarded to his superiors for review and approval. The Board finds that appellant has not substantiated his allegations of error or abuse against Mr. Nienaber or other postal employee's with regard to the conduct of the investigations, the discipline taken, the supervision of Ms. Calvert, or the meeting of August 29, 2001. He has not substantiated a compensable factor of employment as to the administrative actions in this case.

The Board notes, however, that, at the hearing before the Office hearing representative, appellant expanded the nature of his claim to implicate the performance of his duties as a supervisor. The evidence of record establishes that appellant had area wide supervisory responsibility for 22 postmasters and 9 station managers, including Ms. Calvert. As part of his assigned duties, he met with her in April, 2000 to discuss deficiencies in her duties as a postmaster and to propose methods to improve. The record establishes that appellant had previously issued several letters of warning to Ms. Calvert and had placed her on a PIP in order to address specific performance matters. In response, she initiated the sham charges of sexual harassment against him. It is well established that where a claimed disability results from an employee's emotional reaction to the performance of his regular or specially assigned duties or to a requirement of the employment, the disability comes within the coverage of the Act.¹⁶ Appellant has attributed his emotional condition, in part, to the stress arising from his supervision of Ms. Calvert and the allegations she made against him. The Board finds that the record substantiates a compensable employment factor under *Cutler*.

As the Office found that there were no compensable employment factors established in this claim, it did not conduct a review of the medical evidence. The Board will remand the case to the Office for preparation of a statement of accepted facts and further development of the medical evidence, as is appropriate, to be followed by a *de novo* decision on appellant's entitlement to benefits under the Act.

CONCLUSION

The Board finds that the case is not in posture for decision. Appellant has established a compensable employment factor under *Cutler* and the case is remanded for further action on his emotional condition claim.

¹⁶ *Lillian Cutler, supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the October 10, 2003 decision of the Office of Workers' Compensation Programs be affirmed, in part, in finding that appellant has not established his allegations of administrative error or abuse. The decision is set aside, however, with regard to the compensable factor found by the Board. The case is returned to the Office for further action in conformance with this decision.

Issued: September 13, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board