

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

C.G., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Modesto, CA, Employer)

**Docket No. 06-53
Issued: August 7, 2006**

Appearances:
C.G., *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On October 11, 2005 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated April 1, 2005 denying his emotional condition claim, a nonmerit decision dated May 31, 2005 denying his request for a hearing and a merit decision dated September 21, 2005 denying modification of the denial of his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the May 31, 2005 nonmerit decision.

ISSUES

The issues are: (1) whether appellant has established that he sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied his request for a hearing as untimely under 5 U.S.C. § 8124.

FACTUAL HISTORY

On June 1, 2004 appellant, then a 45-year-old distribution clerk, filed an occupational disease claim alleging that he sustained stress, exhaustion and a mental breakdown due to

harassment, a hostile work environment and retaliation for a civil suit filed against the employing establishment.¹ He stopped work on June 1, 2004.

In a letter dated August 14, 2003, appellant informed the postmaster, Don Reddig, that he believed that a stand-up talk about safety while unloading trucks was directed at him. He further indicated that Dave Arenas, a coworker, made sexual comments towards him, including stating that he went panty shopping in the box section at work and warning coworkers that he would watch their backside.

The record contains numerous letters appellant sent to his attorneys and to a state agency describing harassment at work. He informed his attorneys, in a letter received by the Office on June 7, 2004, that less senior coworkers were promoted over him and also described actions taken by coworkers towards each other. In subsequent letters, appellant described harassment by Sherry Langham, a coworker, who he alleged stalked him by requesting reassignments to his start time. He also noted that a swastika was placed on the mail case that belonged to himself and a black coworker, Tanya Clark. In a letter received by the Office on June 7, 2004, appellant related that on January 24, 2004, Ms. Langham twice removed his picture from a coworker's station. He asserted that on February 7, 2004 he was retrieving mail when he heard a loud cry of "URGHH [d]amn [p]icture" and saw Ms. Langham taking down his picture once again. Appellant related that he was "shocked and scared" and requested leave but it was denied. He informed management of Ms. Langham behavior but no action was taken.

In a statement dated February 7, 2004, Cindy Chambers, a coworker, noted that Judy Texeira, a supervisor, told her that she would have to solve the problem of Ms. Langham moving her picture of appellant because if management intervened all employees would have to remove personal items from their areas. Ms. Chambers indicated that she placed a note on the picture asking that it not be folded or removed on February 6, 2004 but that when she came to work the next day the picture had been turned over. Ms. Chambers related that she spoke with Ms. Langham, who indicated that she could not bear to look at appellant. Ms. Chambers stated that she agreed to let Ms. Langham turn the picture around but not to fold or damage it.

In a letter dated July 20, 2004, Ms. Chambers reiterated that management did not talk to her about "the incident with the photograph on May 19, 2004" but that she informed Ms. Texeira and John Ferreira about the February 7, 2004 incident.

By letter dated July 30, 2004, the Office requested additional information from appellant regarding his claim.

In a letter dated January 5, 2004, received by the Office on August 31, 2004, appellant related that Ms. Langham "outed him" and that as a result a coworker threatened to kill him. He further related that a carrier remarked he should be in a milk commercial because of the white stuff on his lips. Appellant additionally asserted that on July 26, 2003, four swastikas were placed on the machine where he worked with another coworker. He indicated that a coworker

¹ The record indicates that appellant filed suit in district court against the postmaster on September 4, 2003 alleging sexual harassment, retaliation, discrimination based on sexual orientation and negligent hiring, training and retention of unfit employees.

ripped the swastikas down and that the postmaster, Mike Guzman, talked to everyone a week later stating that such action would not be tolerated.

In another statement of the same date, appellant noted that on November 18, 2003 he heard a “cat whistle” when he bent over and that he was harassed for wearing a military t-shirt. Appellant informed management of events and was told it was not sexual harassment. On December 18, 2003 appellant emptied a cage that had the words “Chili Ray -- ND is Gay” written on it.

Charlie Evans, a shop steward, related that at a meeting with the postmaster Cory S. Sandobal, appellant discussed Ms. Langham’s turning over his picture and bidding on jobs that coincided with his schedule. Mr. Evans noted that Ms. Langham admitted that she turned over appellant’s picture.

In an incident report dated May 19, 2004, an investigator related that Ms. Teixeira maintained that she had talked with Ms. Langham who admitted turning over appellant’s picture. He noted that Ms. Teixeira “states that she did not instruct [Ms. Langham] not to turn over pictures, but said that [Ms. Langham] and [Ms. Chambers] had told her that they had settled the problem already.”

In a statement dated June 8, 2004, Mr. Guzman related that he asked Ms. Teixeira to resolve the issue of the picture.²

In a June 25, 2004 response to appellant’s discrimination complaint, an official with the employing establishment related that Ms. Teixeira “had a discussion with [Ms.] Langham and [Ms.] Chambers and advised them not to touch personal property, including photographs that did not belong to them.”

On August 4, 2004 appellant stated that Ms. Langham turned over, tore and destroyed all pictures with his image, stalked him and “outed” him to coworker, which led to Gary Silva threatening to kill him. He related that management did nothing but that he received a seven-day suspension for telling Ms. Langham to shut up “because of her continuous outburst.” Appellant noted that Ms. Langham changed her start time to coincide with his four different times and intentionally sabotaged his work by “[s]weeping errors on the machines.”

In a statement dated August 7, 2004, Linda Burnett, a coworker, indicated that while working with appellant other coworkers laughed and told her that she was wasting her time because he was gay. She also stated that coworkers stated that homosexuals should not be allowed to work at the employing establishment and that they needed to do something about appellant. Ms. Burnett related that she reported the incidents to management but was informed that it was not sexual harassment but just a matter of opinion. She indicated that she witnessed Ms. Langham fold a picture of appellant that belonged to Ms. Chambers and stick a pin in the middle.

² Mr. Guzman noted that appellant and Ms. Langham had “a history outside the office” but did not elaborate on this comment.

In a statement dated August 11, 2004, [Ms.] Clark related that someone placed swastikas on the equipment where she worked with appellant.

In a statement received by the Office on August 31, 2004, Ms. Teixeira indicated that Ms. Langham confirmed responsibility for the incident with appellant's photograph. Ms. Teixeira stated that management did not instruct her to tell Ms. Langham not to touch other's property.

In a district court stipulation of compromise settlement dated December 15, 2004, the employing establishment agreed to pay appellant \$130,000.00 and he agreed to resign on January 14, 2005 and take leave without pay from December 7, 2004 to January 14, 2005. The stipulation provided that it was not an admission of fault by the employing establishment.

On December 20, 2004 appellant resigned from employment, citing a hostile work environment.

In a statement dated March 21, 2005, Mr. Sandobal related that he had been postmaster since April 17, 2004. He indicated that he did not have any knowledge about appellant's seven-day suspension and further maintained that management had no control over Ms. Langham changing her start times to coincide with appellant's work schedule. Mr. Sandobal stated that he had a meeting with appellant on May 19, 2004 regarding Ms. Langham turning over his picture. He indicated that appellant did not accuse her of sabotaging his work.

By decision dated April 1, 2005, the Office denied appellant's claim on the grounds that he did not establish an emotional condition in the performance of duty. The Office determined that he failed to establish any compensable employment factors.

By letter postmarked May 3, 2005, appellant requested an oral hearing on his claim, which the Office denied as untimely under section 8124 in a May 31, 2005 decision.

Appellant requested reconsideration on June 18, 2005 and submitted medical evidence in support of his request. In a decision dated September 21, 2005, the Office denied modification of its April 1, 2005 decision.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an 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 his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.³ On the other hand, the disability is not covered where it results from such factors as an

³ 5 U.S.C. § 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

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.⁴

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.⁵ However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.⁶ In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.⁷

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.⁸ A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.⁹ The issue is whether the claimant has submitted sufficient evidence under the Act to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹⁰ 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.¹¹

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

⁴ *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁵ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

⁶ See *William H. Fortner*, 49 ECAB 324 (1998).

⁷ *Ruth S. Johnson*, 46 ECAB 237 (1994).

⁸ See *Michael Ewanichak*, 48 ECAB 364 (1997).

⁹ See *Charles D. Edwards*, 55 ECAB ____ (Docket No. 02-1956, issued January 15, 2004); *Parley A. Clement*, 48 ECAB 302 (1997).

¹⁰ See *James E. Norris*, 52 ECAB 93 (2000).

¹¹ *Beverly R. Jones*, 55 ECAB ____ (Docket No. 03-1210, issued March 26, 2004).

factors of employment and may not be considered.¹² 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.¹³

ANALYSIS

Appellant primarily attributed his condition to harassment by his coworkers at the employing establishment. The Board has held that actions of an employer which the employee characterized as harassment or discrimination may constitute a factor of employment giving rise to coverage under the Act, but there must be some evidence that the harassment or discrimination did in fact occur.¹⁴ Mere perceptions and feelings of harassment or discrimination will not support an award of compensation.¹⁵ In this case, appellant's contention that Mr. Arenas told coworkers that he went panty shopping at work and advised coworkers to watch their backsides around him are unsubstantiated by the record. He further failed to submit evidence supporting his allegations that Ms. Langham stalked him by requesting reassignments that coincided with his work hours, sabotaged his work and "outed" him to coworkers. The record further contains no evidence corroborating his contentions that coworkers "cat whistled" at him, harassed him for wearing a military shirt, threatened to kill him or placed the words "Chili Ray -- ND is Gay" in his work location. In a statement dated August 7, 2004, Ms. Burnett, a coworker, maintained that coworkers laughed at appellant and told her she was wasting her time working with him because he was gay and stated that homosexuals should not be allowed to work at the employing establishment. She did not, however, specifically identify the coworkers involved or address whether appellant was present at the time of the comments. In a statement dated March 21, 2005, Mr. Sandobal, the postmaster, noted that during a meeting on May 19, 2004 appellant did not mention that Ms. Langham sabotaged his work and indicated that management could not control her bidding on start times. The record contains a December 15, 2004 compromise settlement in which the employing establishment agreed to pay appellant \$130,000.00 and he agreed to resign on January 14, 2005. The settlement, however, contains a stipulation that it is not an admission of fault by the employing establishment. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.¹⁶ As appellant has not provided corroborating evidence, such as witness statements, in support of his allegations of harassment in the above-described incidents, he has not established a compensable employment factor.

¹² *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹³ *Id.*

¹⁴ *Lori A. Facey*, 55 ECAB ____ (Docket No. 03-2015, issued January 6, 2004).

¹⁵ *Id.*

¹⁶ *Kathleen A. Donati*, 54 ECAB 759 (2003).

Appellant further attributed his emotional condition to Ms. Langham removing his picture from a coworkers' workstation. In a letter received by the Office on June 7, 2004, appellant related that on January 24, 2004, Ms. Langham twice removed his picture from a coworker's station. He asserted that on February 7, 2004 he was retrieving mail when he heard a loud cry of "URGHH [d]amn [p]icture" and saw Ms. Langham taking down his picture once again. Both coworkers and a supervisor at the employing establishment confirmed that Ms. Langham tampered with photographs of appellant and, consequently, he has established the required factual basis for his allegation of harassment. In a statement dated February 7, 2004, Ms. Chambers related that Ms. Langham told her that she could not bear to look at appellant's picture. Clearly, the relationship between appellant and Ms. Langham was one of friction and strain. Additionally, the record contains no probative evidence to suggest that this conflict was imported into the workplace from appellant's domestic or private life¹⁷ and, as it appears that the workplace brought these coworkers together and compelled their contact, the Board finds that the evidence is sufficient to establish that Ms. Langham's tampering with his picture constitutes a compensable factor of employment.¹⁸

Additionally, appellant alleged that an unknown coworker placed four swastikas on equipment that he used with a coworker, Ms. Clark. In a statement dated August 11, 2004, Ms. Clark confirmed that someone placed swastikas on the equipment on which she worked with appellant. The employing establishment did not dispute the occurrence of this event. Consequently, appellant has established a compensable factor of employment as he has established a factual basis for his allegation of harassment and discrimination with respect to the placement of swastikas at his work location.

Regarding appellant's contentions that he received a seven-day suspension, that less senior coworkers received promotions over him and that management directed a lecture on safety toward him, the Board finds that these contentions relate to administrative or personnel matters unrelated to the employee's regular or specially assigned work duties and do not fall within coverage of the Act.¹⁹ Although the handling of disciplinary actions and promotions are generally related to the employment, they are administrative functions of the employer and not duties of the employee.²⁰ The Board has found, however, that 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. In this case, appellant has not submitted any evidence either establishing a factual basis for his contentions or showing that the employing establishment erred in an administrative matter. Thus, he has not established a compensable employment factor.

As appellant attributed his emotional condition, in part, to incidents at work that are factually established as occurring and constitute compensable employment factors, the case

¹⁷ While Mr. Guzman, in his statement dated June 8, 2004, indicated that appellant and Ms. Langham knew each other outside employment, he did not provide any details in support of his assertion.

¹⁸ See *David R. Pronk*, Docket No. 05-388 (issued June 16, 2005).

¹⁹ *Debora L. Hanna*, 54 ECAB 548 (2003); *Andrew J. Sheppard*, 53 ECAB 170 (2001).

²⁰ *Id.*

presents a medical question regarding whether his emotional condition is due to the compensable employment factors. The Office, therefore, must base its decision on an analysis of the medical evidence. As the Office found that there were no compensable employment factors, it did not analyze or develop the medical evidence. The case will be remanded to the Office for this purpose.²¹ After such further development as deemed necessary, the Office should issue a *de novo* decision on this matter.²²

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 21, May 31 and April 1, 2005 are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 7, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

²¹ See *Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).

²² In view of the Board's disposition of the merits, the issue of whether the Office properly denied appellant's request for a hearing under section 8124 is moot.