United States Department of Labor
Employees' Compensation Appeals Board

R.K., Appellant	)	
and	)	**Docket No. 06-480**
	)	**Issued: August 17, 2006**
DEPARTMENT OF THE NAVY, COMMANDER NAVAL FORCES, Japan, Employer	)	

Appearances:
Stephen D. Scavuzzo, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 22, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated September 27, 2005. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

Appellant, a 52-year-old management analyst, filed a claim for an emotional condition on January 10, 2003. He stated that he experienced harassment, verbal abuse and a demeaning, hostile work environment for eight months, resulting in the deterioration of his physical and mental condition. He asserted, as follows:

> "After working successfully for the Federal Government for 30 years as a military officer and civil service employee, I accepted a job at Commander Naval Forces

Japan last December 2001 and began right away experiencing stressful situations due to varied reasons.... These situations culminated in my collapse on August 16, 2002.... The chronic stress symptoms began in July of 2002 and still persist....”

On January 27, 2003 the employing establishment rebutted appellant’s allegations:

“The [employing establishment] does not concur with [appellant’s] allegations that this working environment with the [employing establishment] is the cause of his medical condition. [Appellant’s] primary role is to provide analytical and evaluative methods and techniques in assessing program development or execution and improving organizational effectiveness and efficiency and serve as an adviser to all levels of management. [Appellant] freely admits he has absolutely no experience in the field he was hired for and his request for training was denied. His request for training was not denied for the fact there was no training available or offered in the management analyst field. The [employing establishment] accommodated [appellant] by placing him on approved sick leave from August 16, 2002 to January 2003, based on his physician’s recommendation for home rest/sick leave. Also other physicians indicated [appellant’s] medical condition limits one or more major life activities such as social activities, impairment in his memory and concentration and unable to drive because of his extreme anxiety. Yet [appellant] has been seen attending classes to learn to speak Japanese, seen driving throughout the military base in his private vehicle and to include traveling to the Philippines and the United States during the periods he was on sick leave.”

In a detailed February 14, 2003 statement, appellant made the following allegations:

“(1) In October 1999, appellant tried to secure a promotion as business office manager with the employing establishment. However, the employing establishment selected a retiring naval officer, [Frederick] Crecelius, who was not eligible for the position because of his status as a retiring naval officer. When appellant attempted to have the employing establishment investigate what he considered a wrongful hiring practice, Mr. Crecelius, in his position as appellant’s supervisor, retaliated by engaging in a pattern of harassment against him. One of the things Mr. Crecelius did to cause appellant embarrassment was to reveal personal information in his medical record, including the fact that he was experiencing sexual dysfunction with his wife;

“(2) Mr. Crecelius failed to meet a mandatory requirement by failing to provide appellant with performance standards;

“(3) On August 12, 2002 Mr. Crecelius informed appellant that he was only satisfying 25 percent of his expectations. This assessment contributed significantly to appellant’s feelings of worthlessness and to his emotional breakdown;

"(4) Mr. Crecelius made derogatory remarks against appellant and treated him in a demeaning, condescending manner, embarrassing him and causing him humiliation in front of his coworkers;

"(5) Mr. Crecelius made derogatory remarks against appellant's coworkers, which caused appellant to fear that he would encounter similar treatment;

"(6) Mr. Crecelius summoned appellant from orientation training class, saying that it was a waste of time. Appellant felt that this exemplified Mr. Crecelius' deficiency in supervisor training;

"(7) Mr. Crecelius assigned appellant to supervise a "difficult" coworker who behaved in a defensive, antagonistic and hostile manner for four months, causing appellant a great deal of stress;

"(8) On several occasions a coworker called appellant a "cryp," in reference to his disability caused by bilateral bunionectomy and plantar fascitis. Mr. Crecelius not only tolerated these insulting remarks but stated, when a coworker proposed a golf outing with him and appellant, that appellant would probably need a handicapped parking place by the green. When appellant objected to this remark, Mr. Crecelius "scoffed" at appellant's objections. Appellant not only felt embarrassed, but felt that his integrity or character was being impugned. Mr. Crecelius also tolerated hostile and demeaning treatment toward appellant by other coworkers;

"(9) Management arbitrarily denied him reimbursement for parking fees, hotel bills, travel claims and damages for moving expenses;

"(10) Management discriminated against him by altering the work hours of his assistant, while denying a similar request on his part;

"(11) Mr. Crecelius arbitrarily denied appellant sick leave and overtime pay, although he had to work overtime to finish his assigned tasks;

"(12) Mr. Crecelius notified appellant that he was denying [his] request to attend five training classes throughout the year;

"(13) Appellant was wrongfully charged with criminal conduct for exceeding the amount of yearly visits to his fiancée on base housing allowed by Navy regulations."

By letter dated March 27, 2003, the Office requested additional information.

In a report dated April 28, 2003, Dr. Amado Daylo, a specialist in psychiatry stated:

"[Appellant] has been seen in our mental health clinic monthly since August 2002. He was initially diagnosed with adjustment disorder with

depressed and anxious features, but since occupational stressors continue unresolved, he currently suffers from major depressive disorder.

"[Appellant's] depressive symptoms have not resolved because of ongoing work-related stressors and he has been unable to work since August 2002. [He] did in fact attempt to return to work. However, [appellant] encountered the same hostile work environment as he had experienced before, including an attempt to wrongfully terminate him. Such stressors predictably led to an intensification of [his] depressive symptoms. [Appellant] became hopeless and tearful most [of] the time and experienced severe disruptions in sleep, concentration and interpersonal relations."

Dr. Daylo diagnosed major depressive disorder, single episode, severe.

Appellant submitted a written statement dated May 3, 2003, responding to the March 27, 2003 Office questionnaire, essentially reiterating his allegations.

By decision dated September 30, 2003, the Office denied appellant's claim on the basis that he failed to establish any compensable factors of employment and thus fact of injury was not established.

By letter dated October 19, 2003, appellant requested an oral hearing, which was held on July 13, 2005. At the hearing, appellant's attorney argued that he had implicated three compensable factors of employment. He contended that appellant was subjected to retaliation for whistle-blowing after reporting to the Naval Inspector General that the employing establishment had violated a regulation by hiring Mr. Crecelius. Appellant testified that Mr. Crecelius was required to spend 180 days separated from military service before he could be considered for the position as business manager at Naval Forces Command in Japan (CNFJ), a position for which he had unsuccessfully applied. Appellant filed a complaint with the Naval Inspector General's office to contest this violation of Department of Defense hiring practices. This led to a hostile work environment. Subsequent to the hearing, appellant submitted documents from the Office of the Naval Inspector General, which corroborated that he had filed a complaint in November 2000, that the employing establishment had conducted an investigation into the Mr. Crecelius' hiring and that this investigation had concluded on February 20, 2002 that appellant's division had in fact committed a prohibited personnel practice and violated Department of Defense regulations by hiring Mr. Crecelius.

Counsel argued that appellant was wrongfully charged with criminal conduct for exceeded the allowable number of yearly visits to his fiancée, who was also a civilian Naval employee, on base housing. Appellant stated that he had been operating under the assumption that the prevailing regulation prohibited 10 consecutive visits from a civil servant to his fiancée (now his wife), a civilian Naval employee living in government housing. He stated that there was another regulation, of which he was not aware, which states that such visits could not exceed 10 calendar days in a given year. Counsel alleged that appellant was charged with criminal conduct for this violation and subjected to an investigation by the Naval Inspector General's office. Even though appellant was ultimately cleared of wrongdoing in the course of this investigation, the Chief of Staff stated that he engaged in "criminal" conduct at a November 15,

2002 meeting.[1] The stress of this investigation caused stress and depression, which led to appellant's applying for a disability retirement.

Appellant's wife, a civilian accounting officer with the employing establishment, testified that she was told by Henry Salazar and her supervisor, Comptroller of Ship Repair Activity in Yokosuka, Japan, that someone from appellant's senior management at CNFJ told him that appellant "was depressed because he could not perform sexually with his new wife." Mr. Salazar submitted a statement following the hearing, which corroborated this statement from appellant's wife.[2] Appellant argued that it established that Mr. Crecelius had wrongfully disclosed confidential information.

By decision dated September 27, 2005, an Office hearing representative affirmed the September 30, 2003 decision.

LEGAL PRECEDENT

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition and rationalized medical opinion establishing that compensable employment factors are causally related to the claimed emotional condition.[3] There must be evidence that implicated acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.[4] In other words, in order to discharge his burden to establish her occupational disease claim for an emotional condition, appellant must submit rationalized medical evidence establishing that she has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.[5]

If a claimant does implicate a compensable factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Only when the matter asserted is a compensable factor of employment and the evidence establishes the truth of the

[1] The November 15, 2002 meeting with the Chief of Staff at which he referred to "criminal activity" is memorialized by a document appellant submitted after the hearing. This document also contains the regulation prohibiting appellant's visits to his fiancée, which states, "A sponsor drawing any type of housing allowance may visit another MFH sponsor, not to exceed 10 days per calendar year."

[2] Mr. Salazar stated: "In or around December 2002, Bill Relyea, the Comptroller of Commander Fleet Activities, Japan, made what I thought was an inappropriate remark regarding my subordinate's husband. The substance of the remark was, 'According to management officials at CNFJ, where [appellant] was employed, [appellant] was depressed because he could not perform sexually with his new wife.' I informed [appellant's wife] about the comment and later learned [appellant] had been required to provide confidential medical information to his superiors at CNFJ, Mr. Crecelius. Neither Mr. Relyea nor myself are in [appellant's] chain of command. I believe the divulging of this medical information was highly inappropriate; if not illegal. Nobody outside of [appellant's] chain of command should have been made aware of such confidential medical information under any circumstances."

[3] *See Debbie J. Hobbs,* 43 ECAB 135 (1991).

[4] *See Ruth C. Borden,* 43 ECAB 146 (1991).

[5] *See William P. George*, 43 ECAB 1159, 1168 (1992).

matter asserted may the Office then base its decision to accept or reject the claim on an analysis of the medical evidence.[6]

ANALYSIS

The Board finds that the record does not establish that the administrative and personnel actions taken by management in this case were in error and are, therefore, not considered factors of employment. An employee's emotional reaction to an administrative or personnel matter is not covered under the Federal Employees' Compensation Act, unless there is evidence that the employing establishment acted unreasonably.[7] In the instant case, appellant has presented insufficient evidence that the employing establishment acted unreasonably or committed error with regard to the incidents of alleged unreasonable actions involving personnel matters on the part of the employing establishment.

Appellant alleged that he was wrongly denied a promotion to the business manager position, the Board has held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment as they do not involve the employee's ability to perform his or her regular or specially assigned work duties but rather constitute his or her desire to work in a different position.[8] An employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.[9] While appellant did file a valid complaint against the employing establishment for erroneously hiring Mr. Crecelius, who was not qualified for the business manager position, he has failed to submit evidence establishing that the employing establishment erred in not choosing him for the position. Appellant has also alleged that Mr. Crecelius acted improperly in his administrative capacity by preventing him from attending training classes,[10] forcing him to supervise a recalcitrant employee and refusing to reimburse him for parking fees, hotel bills, travel claims and damages for moving expenses. However, as appellant has failed to show that these actions demonstrated error or abuse on the part of Mr. Crecelius, they are not compensable.

Appellant has failed to substantiate his allegation that he was retaliated against for whistle-blowing activities. He stated that Mr. Crecelius retaliated against him for filing a wrongful personnel practice complaint by creating a hostile work environment, but has submitted no corroborating evidence, such as witness statements, to establish the truth of these allegations.[11] Appellant has not established a compensable employment factor under the Act in

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[6] *Id.*

[7] *See Alfred Arts,* 45 ECAB 530, 543-44 (1994).

[8] *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

[9] *See Michael Thomas Plante*, 44 ECAB 510, 515 (1993).

[10] The Board has held that an employing establishment's refusal to give an employee training as requested is an administrative matter, which is not covered under the Act unless the refusal constitutes error or abuse. *Lorraine E. Schroeder,* 44 ECAB 323, 330 (1992).

[11] *See Larry J. Thomas*, 44 ECAB 291, 300 (1992).

this respect. In addition, he has failed to provide factual support for his allegation that Mr. Crecelius failed to meet a mandatory requirement to provide him with performance standards. Regarding appellant's allegation that Mr. Crecelius acted unreasonably by informing appellant that he was only meeting 25 percent of his expectations, appellant has shown no error or abuse in Mr. Crecelius' discharge of this administrative function.[12] Disciplinary matters consisting of counseling sessions, discussions or letters of warning for conduct pertain to actions taken in an administrative capacity and are not compensable as factors of employment.[13] Appellant failed to demonstrate that Mr. Crecelius was doing anything other than discharging his supervisory duties by informally warning him that he was not performing his job in a satisfactory manner.

The Board notes that matters pertaining to use of leave are generally not covered under the Act as they pertain to administrative actions of the employing establishment and not to the regular or specially assigned duties the employee was hired to perform.[14] However, error or abuse by the employing establishment in an administrative or personnel matter or evidence that the employing establishment acted unreasonably in the administrative or personnel matter, may afford coverage.[15] In the present case, the record does not substantiate appellant's allegation that Mr. Crecelius arbitrarily and unfairly denied him sick leave and overtime pay. Appellant also alleged that Mr. Crecelius discriminated against him by altering the work schedule of his assistant while denying him the same privilege. However, assignment of a work schedule is an administrative function and not a work factor and is not compensable absent a showing of error or abuse. Accordingly, appellant has presented no evidence that the employing establishment acted unreasonably or committed error with regard to these incidents of administrative managerial functions.

The Board has held that investigations, which are an administrative function of the employing establishment, that do not involve an employee's regularly or specially assigned employment duties are not considered to be employment factors.[16] However, the Board has also found 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 determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[17] Although appellant has made allegations that the employing establishment erred and acted abusively in conducting its investigation of his alleged violation of Navy housing regulations and that it wrongly charged

[12] *Drew A. Weismuller*, 43 ECAB 745 (1992); *Kathi A. Scarnato*, 43 ECAB 220 (1991).

[13] *Barbara J. Nicholson*, 45 ECAB 803 (1994); *Barbara E. Hamm,* 45 ECAB 843 (1994).

[14] *Elizabeth Pinero*, 46 ECAB 123 (1994).

[15] *Margreate Lublin*, 44 ECAB 945 (1993).

[16] *Jimmy B. Copeland*, 43 ECAB 339, 345 (1991).

[17] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

him with a crime, he has not provided sufficient evidence to support such a claim.[18] A review of the evidence indicates that appellant has not shown that the employing establishment's actions in connection with its investigation of him were unreasonable.[19]

The Board finds that appellant has failed to adequately support his allegation that Mr. Crecelius improperly revealed confidential information from appellant's medical records. Mr. Salazar generally supported appellant's wife's statement that he had been told by someone at CNFJ senior management that appellant was depressed due to a sexual dysfunction condition. Mr. Crecelius had access to appellant's medical records but appellant has not provided sufficient evidence to establish that Mr. Crecelius was the source of this information.

Accordingly, a reaction to such factors did not constitute an injury arising within the performance of duty; such personnel matters were not compensable factors of employment in the absence of agency error or abuse.

The Board finds that appellant has failed to substantiate his allegations that management engaged in harassment. Appellant generally alleged that Mr. Crecelius harassed him, but did not provide sufficient evidence or a description of specific incidents he believes constituted harassment.[20] Mere perceptions of harassment are not compensable; a claimant must establish a basis in fact for the claim by supporting his allegation with probative and reliable evidence. Generally, stated assertions of dissatisfaction with a certain superior at work are not sufficient to support a claim for an emotional disability.[21] Appellant failed to establish that Mr. Crecelius treated him in a demeaning, condescending manner, deliberately embarrassed and caused him humiliation in front of his coworkers, nor has appellant provided evidence that Mr. Crecelius made derogatory remarks against appellant's coworkers, which instilled a fear in appellant that Mr. Crecelius would subject him to the same abusive treatment. Appellant has additionally failed to provide sufficient support for his allegations that Mr. Crecelius tolerated a coworker calling appellant a "cryp," a derogatory term for appellant's disability and made jokes about appellant's inability to walk long distances because of his disability. The Office properly found that these allegations were not established as factual by the weight of evidence of record. Further, although the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to

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[18] The record contains a copy of a February 28, 2003 Equal Employment Opportunity Commission settlement between appellant and the employing establishment. Appellant had formally alleged that the Chief of Staff had called him a "criminal" during the November 15, 2002 meeting regarding his response to his proposed separation letter. He had also alleged that the Chief of Staff seemed to indicate it was acceptable for people doing bible studies to exceed the CNFJ's 10-day visitation limitation but considered his visit to his fiancée's government quarters as criminal. The complaint was concluded as "unresolved."

[19] The fact that the employing establishment ultimately concluded based on this investigation that appellant was not guilty of any wrongdoing, is not compensable. The mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse. *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

[20] *See Joel Parker, Sr.*, 43 ECAB 220 (1991). (The Board held that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[21] *See Curtis Hall,* 45 ECAB 316 (1994).

coverage under the Act.[22] Appellant has not shown how such isolated comments would rise to the level of verbal abuse or otherwise fall within the coverage of the Act.[23]

The Board notes that, since appellant has not established a compensable work factor, the medical evidence will not be considered.[24]

CONCLUSION

The Board finds that the Office properly found that appellant failed to meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the September 27, 2005 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: August 17, 2006
Washington, DC

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

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

[22] *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

[23] *See, e.g., Alfred Arts*, 45 ECAB 530, 543-44 (1994) and cases cited therein (finding that the employee's reaction to coworkers' comments such as "you might be able to do something useful" and "here he comes" was self-generated and stemmed from general job dissatisfaction). *Compare Abe E. Scott*, 45 ECAB 164, 173 (1993) and cases cited therein (finding that a supervisor's calling an employee by the epithet "ape" was a compensable employment factor).

[24] *See Margaret S. Krzycki*, 43 ECAB 496 (1992).