

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

JOSEPH S. FITZPATRICK, Appellant)	
)	
and)	Docket No. 05-1579
)	Issued: May 9, 2006
DEPARTMENT OF THE TREASURY, UNITED STATES MINT, San Francisco, CA, Employer)	
)	

Appearances:
Joseph S. Fitzpatrick, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 21, 2005 appellant filed a timely appeal of two decisions of the Office of Workers' Compensation Programs: a June 13, 2005 nonmerit decision and a March 7, 2005 merit decision that denied his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review both these Office decisions.

ISSUES

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether the Office properly refused to reopen his case for further review of the merits of his claim.

FACTUAL HISTORY

On September 25, 2003 appellant, then a 44-year-old machine operator, filed a claim for compensation for an occupational disease of depression, mental anguish and emotional distress. He attributed these conditions to a coworker wrongfully filing an Equal Employment Opportunity (EEO) complaint against him on May 28, 2003, a supervisor wrongfully attempting

to have him suspended on June 10, 2003, reassignment without just cause on August 26, 2003 and a September 15, 2003 denial of his request to use sick leave. Appellant stopped work on August 26, 2003 and did not return.

The June 10, 2003 notice of a proposed three-day suspension was for disruptive behavior, specifically a May 28, 2003 statement reported by Rosa Gallardo, the coworker who filed the EEO complaint against him. Appellant allegedly told her that she had better rearrange her life for filing this complaint, which she interpreted as a threat against her life. Also cited were appellant's efforts to aggravate Ms. Gallardo and interfere with her ability to do her work. This included pushing a cart with blanks as far as he could from where she was working, throwing an item of hers into the garbage, moving her towels and making inappropriate remarks about her inability to work full-time due to a work-related injury. In a July 15, 2003 decision, Rodolfo Padilla, industrial supervisor for coining, reduced the proposed suspension to a notice of warning.

In a July 20, 2003 letter to Paul Lewis, the acting chief of the coining division, appellant stated that on June 11, 2003 his supervisor, Archie Lee, indicated in a group meeting, that appellant would be fired for passing out the proposed suspension letter to his coworkers. On August 1, 2003 appellant filed an EEO complaint citing the June 10 and 11, 2003 incidents. In an August 18, 2003 letter to Mr. Padilla, Mr. Lewis and Mr. Lee it was recommended that appellant be reassigned to the day shift because he was disruptive. In an August 21, 2003 letter to Eric Valladares, the production manager, appellant complained that on the prior day, Mr. Lee stated that if employees had safety concerns they must report them to the safety representative, work leader or to Mr. Lee rather than to Steve Jones of the safety office. Appellant stated that he had reported safety violations to Mr. Jones on August 4 and 13, 2003 and that on August 20, 2003 Mr. Padilla insisted that appellant apologize to Mr. Lee about going over his head and that he refused. Appellant stated that the harassment from Mr. Lee had not stopped and requested that something be done. In an August 21, 2003 email, Mr. Padilla stated that at an August 20, 2003 meeting with appellant, he requested that appellant address his concerns through proper channels.

In an August 24, 2003 letter to Mr. Valladares, appellant responded to a proposal to place him in the packaging department or the pressroom. He requested that Mr. Lee be removed from material treatment contending his supervisor was the problem and that the packaging department position was a step down. He noted that the pressroom was supervised by Mr. Padilla who sided with Mr. Lee. Appellant also stated that he did not appreciate Sharon Balinton, a lead human resources specialist, telling him that if he continued to make complaints about Mr. Lee, he would be reassigned. Effective August 26, 2003 appellant was reassigned to the packaging division and Ms. Gallardo was reassigned to another division. On August 27, 2003 Mr. Valladares forwarded resignation forms to appellant, stating that this was pursuant to a telephone call that morning in which appellant requested to resign. In a September 5, 2003 letter, Larry Eckerman, the plant manager, stated that on August 27, 2003 appellant telephoned Mr. Valladares and told him that he was not returning to work. Mr. Valladares reasonably interpreted this to mean appellant was resigning, whereupon he was sent the appropriate forms. However, appellant returned to the employing establishment on September 2, 2003 and stated that he was not resigning and that Ms. Gallardo received preferential treatment in their reassignments, as his was a dead-end position. Mr. Eckerman stated that Ms. Gallardo's reassignment was based on her experience

and on appellant's objection to working with Mr. Padilla. In a September 12, 2003 letter to Mr. Eckerman, appellant contended that his reassignment was unfair and that he had not requested to resign on August 27, 2003. In a September 16, 2003 letter, Danny Tang, appellant's supervisor in the packaging division, noted that his requests for annual leave from August 26 to 28 and September 2 to 9, 2003 were approved and that, on September 15, 2003, Mr. Valladares telephoned appellant and instructed him to return to work because his September 15, 2003 request for annual leave through September 19, 2003 was not made in advance and did not meet the definition of an unusual circumstance. Mr. Tang stated that on September 16, 2003 appellant called him and requested sick leave for September 15 to 19, 2003. Mr. Tang requested medical documentation showing that appellant could not work.

In an affidavit prepared for his EEO complaint, appellant testified that Ms. Gallardo's allegations that he harassed her were false and that Mr. Lee did not like him asking for a replacement for Ms. Gallardo when she was on limited duty. In a September 25, 2003 affidavit, Ms. Balinton testified that the proposed suspension was based on Ms. Gallardo's assumption that she had been threatened by appellant, statements of witnesses who saw her reaction after the alleged threat and a witness to appellant's anger. Ms. Balinton stated that appellant distributed copies of the proposed suspension and left one on a table in the lunchroom. The reassignment was made to separate the two employees and end their dispute. However, appellant continued to complain after the notice of warning. In an October 3, 2003 affidavit, Mr. Padilla testified that he mitigated the suspension to a warning because there were no witnesses to the alleged threat but there were other behavioral problems with appellant. Mr. Padilla had an August 20, 2003 discussion with appellant about going through the proper channels and chain of command with his complaints. In an October 8, 2003 affidavit, Mr. Valladares stated that there was not enough direct evidence for a suspension but that appellant was taking notes on Ms. Gallardo's activities, which was disruptive. Mr. Valladares denied the allegation that he told employees they could not speak to Mr. Jones about safety matters but provided other alternatives. He added that the filing of EEO complaints by appellant and Ms. Gallardo indicated that they could not work together. In an October 8, 2003 affidavit, Mr. Lewis testified that he agreed with the decision to separate appellant and Ms. Gallardo. In an October 17, 2003 affidavit, Mr. Lee testified that in the June 11, 2003 group meeting he discussed the new policy on distribution of inappropriate material but did not state or imply any violation by appellant. Appellant did not follow the chain of command to report safety concerns and that Mr. Lee had no reason to disbelieve Ms. Gallardo's allegation that appellant threatened her, given his observations and the prior complaints about appellant, which included taking notes on other employees' activities.

By decision dated February 10, 2004, the Office denied appellant's claim for an emotional condition on the basis that he had not established any compensable factors of employment. Appellant requested a hearing, which was held on December 1, 2004. He testified that on May 28, 2003 he learned of the EEO complaint against him and that, in anger, he said to Ms. Gallardo something to the effect that she could write as many complaints as she wanted for the rest of her life. He contended that she filed the EEO complaints to get back at him because she told him she had hurt herself at home rather than at work and that his coworkers were lazy.

The employing establishment submitted additional evidence. On November 17, 2004 it terminated appellant's employment for being absent without leave from November 17 to December 21, 2003 and for death threats made against his supervisor and a coworker to his

psychiatrist on December 22, 2003. On May 19, 2004 the employing establishment implemented an EEO administrative judge's decision that appellant was not harassed because of his race or sex. On February 27, 2004 the Superior Court of California issued an order prohibiting appellant from harassing Ms. Gallardo.

By decision dated March 7, 2005, an Office hearing representative found that appellant's allegations involved administrative matters in which no error or abuse was established. By letter dated March 16, 2005, appellant requested reconsideration, contending he was the victim and that his illness was incurred due to stress in his employment. Appellant stated that someone was going to pay severely for these injustices and that he was "keeping copies of this letter in order to provide possible victims related to/from my illness ... recourse for those injured or killed by my uncontrollable manner." By decision dated June 13, 2005, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

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 work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation 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 his frustration from not being permitted to work in a particular environment or to hold a particular position.¹ 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. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of personnel matters, coverage may be afforded.² The Board has held that actions of an employee's supervisor which the employee characterizes as harassment or discrimination may constitute factors of employment giving rise to coverage under the Act. However, for harassment or 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 alone of harassment or discrimination are not compensable under the Act.³

ANALYSIS -- ISSUE 1

Ms. Gallardo's EEO complaint against appellant did not arise out of appellant's day-to-day duties, any specially assigned duties or a requirement imposed by his employment.⁴ Rather, the complaint arose out of appellant's behavior towards her. The June 10, 2003 proposal to

¹ *Lillian Cutler*, 28 ECAB 125 (1976).

² *Michael Thomas Plante*, 44 ECAB 510 (1993).

³ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁴ *Wilbert Kimbrough*, 39 ECAB 425 (1988).

suspend appellant and the July 15, 2003 notice of warning are disciplinary actions, which are administrative functions of the employer and are not compensable without a showing of error or abuse.⁵ The mere fact that such actions were later modified does not in and of itself establish error or abuse.⁶ Appellant has not shown error or abuse in the employing establishment's disciplinary actions. The evidence of record supports that appellant threatened Ms. Gallardo, given the court order to not harass her, his termination for making death threats and the language contained in his March 16, 2005 letter. Mr. Lee addressed remarks about distributing inappropriate material at the June 11, 2003 meeting but noted the remarks were not directed at appellant. This evidence does not establish error or abuse in telling an employee not to distribute inappropriate material.

The August 20, 2003 meeting about using the proper channels to address safety concerns was administrative in nature. Appellant has not shown that this directive by Mr. Valladares was erroneous or abusive. Appellant's reassignment is an assignment of work duties, which is also an administrative function of the employer.⁷ There is no evidence that the employing establishment acted unreasonably by reassigning appellant and Ms. Gallardo to separate locations due to their ongoing disputes and appellant's continuing complaints against his supervisor.⁸ There is also no evidence that the employing establishment acted unreasonably in sending appellant forms to resign his position on August 27, 2003. The employing establishment's request for medical documentation for the sick leave requested for September 15 to 19, 2003 is reasonable and thus does not constitute a compensable factor of employment.⁹ Appellant also has not shown that any of these or other employing establishment actions constituted harassment. In summary, he has not established any compensable factors of employment.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

⁵ *Sharon R. Bowman*, 45 ECAB 187 (1993).

⁶ *Michael Thomas Plante*, *supra* note 2.

⁷ *James W. Griffin*, 45 ECAB 774 (1994).

⁸ In determining whether the employing establishment erred or acted abusively, the Board examines whether it acted reasonably. *Richard J. Dube*, 42 ECAB 916 (1991).

⁹ *See Helen Castillas*, 46 ECAB 1044 (1995).

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim.

ANALYSIS -- ISSUE 2

Appellant's March 16, 2005 request for reconsideration was not accompanied by any new evidence. This letter merely contended that his claim was compensable, which does not show that the Office erroneously applied or interpreted a specific point of law, nor does it advance a relevant legal argument not previously considered by the Office. The Office properly refused to reopen appellant's case for further review of the merits of his claim.

CONCLUSION

Appellant did not establish and compensable factors of employment and did not meet the requirement to obtain a review of the merits of his claim.

ORDER

IT IS HEREBY ORDERED THAT the June 13 and March 7, 2005 decisions of the Office of Workers, Compensation Programs are affirmed.

Issued: May 9, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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