

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

L.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Tampa, FL, Employer**

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**Docket No. 06-1783
Issued: February 6, 2007**

Appearances:
Dean T. Albrecht, for the appellant
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 31, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 29, 2005 merit decision denying his emotional condition claim and the June 2, 2006 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied his request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 9, 2004 appellant, then a 47-year-old distribution clerk, filed a claim alleging that he sustained an emotional condition in the performance of duty because he was "harassed and intimidated by supervisors and managers." He claimed that he first became aware of his

condition on March 4, 2004 and first realized it was related to his employment on March 25, 2004. Appellant stopped work on March 4, 2004.

Appellant submitted several reports of Dr. Walter E. Afield, an attending Board-certified psychiatrist.

By decision dated November 12, 2004, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors.

Appellant submitted a statement in which he asserted that, on several occasions, supervisors would "isolate" him in one-on-one meetings and fabricate accounts of those encounters, including falsely charging him with yelling and acting hostile. He claimed that on May 17, 1997 George Strattis, a supervisor, harassed him regarding a medical condition covered under the Family Medical Leave Act. Appellant asserted that in mid 1997 Mr. Strattis instructed Tom Faught, another supervisor, to remove his name from the "overtime desired list" for several months. He claimed that between April and May 1998 several supervisors, including James Duff, Romel Martin and Bob Willetts, harassed him by accusing him of taking unauthorized leave or breaks and engaging in unsafe work practices. On May 13, 1998 appellant was falsely accused of having both feet off the floor. He alleged that on April 9, 1998 Mr. Duff threatened to discipline him for going to the restroom. Appellant asserted that on July 15, 1998 Mr. Willetts ordered him to go home without completing overtime work which was mandated by an Equal Employment Opportunity (EEO) Commission settlement. Mr. Willetts falsely accused him of saying "fuck you" despite the fact that a witness denied that he made such a statement. Appellant claimed that on October 28, 1998 Mr. Willetts harassed him by falsely accusing him of disrupting the mail dispatch operation.

Appellant asserted that on April 10, 1999 Holly Ribbe, a supervisor, wrongly issued him a letter of warning for failure to follow instructions and charged him with being absent without leave (AWOL) after he indicated on April 9, 1999 that he was not well enough to work an extra two hours of overtime. He contended that Ms. Ribbe refused to acknowledge leave documents which previously had been acceptable for past absences. Appellant alleged that on May 18, 1999 Kimberly Cribbs, a supervisor, racially discriminated against him by falsely accusing him of being disruptive in a meeting and by blocking an exit and refusing to allow him to leave. He claimed that on February 13, 2001 Chris Gabree, a supervisor, denied his request for annual leave despite the fact that an EEO decision allowed him to use the leave as requested. Appellant alleged that on November 16, 2001 Mr. Gabree threatened to place him on AWOL status if he did not sign a form that incorrectly listed absences on November 13 and 14, 2001 as unscheduled and stated that an EEO claim led to the absences being characterized as scheduled. He claimed that on December 5, 2003 management falsely indicated that he had an accident at work on November 16, 2003 and unfairly listed him as an "accident repeater."

Appellant submitted a December 2, 1997 EEO settlement agreement, which provided that he would be allowed to make up overtime work lost in mid 1997. The agreement indicated that its findings should not be construed as an admission of discrimination or wrongdoing by the

employing establishment.¹ In an undated EEO settlement agreement, the employing establishment granted appellant one day of incidental leave. The settlement was reached without prejudice to appellant or the employing establishment.

In a January 31, 2002 EEO settlement agreement, the employing establishment agreed to classify appellant's absences on November 13 and 14, 2001 as scheduled absences. The settlement was not intended to be "precedent setting in any other forum." In a July 23, 2004 settlement of a grievance with the employing establishment, it was agreed that appellant's name would be removed from the accident repeater program. The settlement was reached on a "nonprecedent basis."

Appellant submitted numerous witness statements that were originally submitted in connection with EEO claims and grievances filed against the employing establishment. In an April 20, 1998 statement, Randy Porter, a coworker, stated that Mr. Duff responded in the affirmative on April 9, 1998 when appellant asked him whether all employees were required to inform him when they were going to the restroom. He stated that he had worked for the employing establishment since 1980 and was not aware of any policy requiring employees to inform supervisors when they went to the restroom. Mr. Porter indicated that appellant told him that he was going to the restroom but that Mr. Duff did not ask him where appellant had gone. He stated that Mr. Duff's actions were "just a continuation of tour I harassment." In an October 30, 1998 statement, Mr. Porter stated that on October 28, 1998 Mr. Willets continuously followed and watched appellant while he was pulling mail.

In an October 30, 1998 statement, James G. Porter, a coworker, stated that on October 24, 1998 appellant was harassed because he was the only employee out of 10 to be ordered to move to a specific mail case. He asserted that on October 28, 1998 management "stared" at appellant while he was working but did not devote similar attention to other employees. Mr. Porter indicated that appellant's method of working the aisles out of order was an accepted work method. In a May 17, 1999 statement, he stated that on April 9, 1999 he heard appellant's conversation with Ms. Ribbe at the mail case but he did not hear their conversation at the front desk time clock. Mr. Porter asserted that appellant did not become "loud or obnoxious or intimidating." In a September 12, 2001 statement, he stated that appellant did not act disruptive during a September 11, 2001 safety meeting conducted by Patricia Papageorge because he did not raise his voice, use profanity or show disrespect for Ms. Papageorge. Mr. Porter claimed that appellant was subjected to racial discrimination because white coworkers who spoke in louder voices and were more aggressive at meetings were not called disruptive.

In a November 16, 2001 statement, Greg Porter, a coworker, indicated that on November 16, 2001 Mr. Gabree stated that he wanted to speak to appellant up front and noted that appellant requested that a union representative be present. He noted that Mr. Gabree refused appellant's request and threatened to discipline him if he did not comply with his request. Mr. Porter noted that neither appellant nor Mr. Gabree raised his voice, but asserted that Mr. Gabree's manner was "threatening and hostile."

¹ The record contains a June 5, 1998 settlement agreement indicating that the employing establishment would treat appellant with dignity and respect, but the subject matter of the agreement is unclear from the record.

In a an undated statement, Allan Schwartz, a coworker, stated that on July 15, 1998 Mr. Willets seemed to be in a “mad almost hostile state of mind” and engaged in threatening behavior by pointing his finger about six to eight inches from appellant’s face. He indicated that Mr. Willets forced appellant to go home despite the fact that other clerks were given two additional hours to work. In an August 11, 1998 statement, Mr. Schwartz stated that “on the night in question” he sat two or three seats from appellant and did not hear him use any profanity during his conversation with Mr. Willets.

In an undated statement, Howard Owens, a coworker, stated that on April 9, 1999 Mr. Ribbe gave less than an hour’s notice to employees who were required to work two hours of overtime that day and noted that he told appellant that he needed to “find a seat” after he indicated that he could not stay. Mr. Owens stated that Ms. Ribbe told appellant to clock out after he indicated that he was going home. In a May 22, 1999 statement, Bobbie Ginsburg, a coworker, noted that during a May 18, 1999 safety meeting appellant stated that it was “ludicrous” to require wearing identification badges for safety purposes when extramarital affairs in the workplace posed a greater threat to security. Ms. Ginsburg stated that Ms. Cribbs responded that appellant’s concerns were “ludicrous.”

In a November 16, 2001 statement, Elaine Bobo, a supervisor, stated that appellant advised her that he applied more than 24 hours in advance for leave to be taken on November 13 and 14, 2001. She indicated that another supervisor told her that he would consult Mr. Gabree regarding the matter. In a statement dated November 16, 2001, Mr. Gabree noted that he checked with the personnel office of the employing establishment and collected information which supported his determination that appellant’s absences on November 13 and 14, 2001 were unscheduled.

Appellant requested a hearing before an Office hearing representative regarding his claim. At the hearing held on July 12, 2005 he provided further details about the claimed employment factors described in his earlier statement.

By decision dated and finalized September 29, 2005, the Office hearing representative affirmed the November 12, 2004 decision. He found that the new evidence submitted by appellant did not establish a compensable employment factor.

On April 1, 2006 appellant requested reconsideration of his claim. He submitted an April 6, 2006 letter in which his representative discussed his claimed employment factors. Appellant argued that the witness statements and grievance settlements contained in the record showed that the employing establishment engaged in harassment, discrimination and other forms of wrongdoing.

By decision dated June 2, 2006, the Office denied appellant’s request for further review of the merits of his claim.

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 duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.² 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.³

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.⁴ This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁵

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 factors of employment and may not be considered.⁶ 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.⁷

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. The Office denied his emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that various supervisors subjected him to harassment and discrimination. He claimed that between May 1997 and May 1998 several supervisors harassed him by accusing him of taking unauthorized leave and breaks and engaging in unsafe work

² 5 U.S.C. §§ 8101-8193.

³ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁵ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁶ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁷ *Id.*

practices, including an occasion on May 13, 1998 when he was falsely accused of having both feet off the floor. Appellant asserted that on April 9, 1998 Mr. Duff threatened to discipline him for going to the restroom and that on July 15, 1998 Mr. Willets ordered him to go home without completing overtime work mandated by an EEO settlement and falsely accused him of saying “fuck you” to him. He alleged that on October 28, 1998 Mr. Willets harassed him by falsely accusing him of disrupting the mail dispatch operation and by overly scrutinizing his work. Appellant claimed that on May 18, 1999 Ms. Cribbs racially discriminated against him by falsely accusing him of being disruptive in a meeting and by blocking an exit and refusing to allow him to leave.

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from appellant’s performance of his regular duties, these could constitute employment factors.⁸ 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 of harassment or discrimination are not compensable under the Act.⁹

The employing establishment denied that appellant was subjected to harassment or discrimination and he has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors.¹⁰ Appellant filed EEO claims and grievances against the employing establishment regarding most of these matters but the record does not contain any decision associated with these claims and grievances which shows that the employing establishment committed harassment or discrimination as alleged.

Appellant alleged that supervisors made statements and engaged in actions which he believed constituted harassment and discrimination but he did not provide sufficient evidence to establish that the statements actually were made or that the actions actually occurred.¹¹ Although he submitted statements in which coworkers alleged that supervisors committed harassment or discrimination against him, these statements were either vague in nature or described actions which did not clearly constitute harassment or discrimination.

For example, Randy Porter stated that Mr. Duff told him on April 9, 1998 that appellant and all other employees were required to inform him that they were going to the restroom. Randy Porter asserted that he was not aware of any policy requiring employees to inform supervisors when they were going to the restroom, but the mere fact that he denied knowledge of such a policy does not show that the policy did not exist or that Mr. Duff’s actions constituted harassment. Another coworker, James Porter, asserted that in October 1998 supervisors scrutinized and “stared” at appellant when he worked and that he was the only employee out of 10 to be ordered to move to a specific mail case. However, this statement does not clearly show

⁸ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

⁹ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁰ *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

¹¹ *See William P. George*, 43 ECAB 1159, 1167 (1992).

that these actions were discriminatory in nature and were not a legitimate part of the supervisors' duties. He indicated that on April 9, 1999 he heard appellant's conversation with Ms. Ribbe and that appellant did not become "loud or obnoxious or intimidating." However, Mr. Porter admitted that he did not hear the entire conversation. He also asserted that appellant was no more disruptive during a September 11, 2001 safety meeting than other employees were in prior meetings, but he did not describe appellant's words and actions at the meeting in any detail or otherwise show that he was unfairly criticized.

Another coworker, Greg Porter, stated that on November 16, 2001 Mr. Gabree acted in a "threatening and hostile" manner after appellant requested a union representative. He acknowledged that Mr. Gabree did not raise his voice and he did not explain what aspect of Mr. Gabree's words or actions led him to use this description of his demeanor. With respect to the alleged July 15, 2001 incident, Mr. Schwartz stated that Mr. Willets seemed to be in a "mad almost hostile state of mind," pointed his finger close to appellant and forced him to go home despite the fact that other clerks were given two additional hours to work. However, Mr. Schwartz' description of the incident is vague and the employing establishment has indicated that appellant voluntarily left work. Mr. Schwartz stated that he did not hear appellant use any profanity during his conversation with Mr. Willets, but it is unclear whether he was present for the entire conversation.¹²

Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant also claimed that his supervisors engaged in wrongdoing with respect to taking disciplinary actions, handling leave requests and giving work assignments. He asserted that in mid 1997 Mr. Strattis instructed another supervisor to remove his name from the overtime desired list for several months. Appellant claimed that Ms. Ribbe wrongly issued him a letter of warning for failure to follow instructions and charged him with being AWOL after he indicated on April 9, 1999 that he was not well enough to work an extra two hours of overtime. He alleged that on February 13, 2001 Mr. Gabree denied his request for annual leave despite the fact that an EEO decision allowed him to use the leave as requested. Appellant claimed that on November 16, 2001 Mr. Gabree threatened to place him on AWOL status if he did not sign a form that incorrectly listed absences on November 13 and 14, 2001 as unscheduled. He asserted that on December 5, 2003 management falsely indicated that he had an accident at work on November 16, 2003 and unfairly listed him as an accident repeater.

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, wrongly denied leave and improperly assigned work duties, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's

¹² Ms. Ginsburg, a coworker, noted that, during a May 18, 1999 safety meeting, appellant stated that it was "ludicrous" to require wearing identification badges for safety purposes when extramarital affairs in the workplace posed a greater threat to security. She indicated that Ms. Cribbs responded that appellant's concerns were "ludicrous." However, not every statement uttered in the workplace will give rise to coverage under the Act and Ms. Cribbs' expression of disagreement with appellant's comments in this manner would not rise to the level of harassment. See *Mary A. Sisneros*, 46 ECAB 155, 163-64 (1994); *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

regular or specially assigned work duties and do not fall within the coverage of the Act.¹³ Although these matters are generally related to the employment, they are administrative functions of the employer and not duties of the employee.¹⁴ 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.¹⁵

Appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. He submitted several settlement agreements associated with EEO claims and grievances he filed against the employing establishment and some of these agreements resulted in alterations of management's actions. For example, appellant was allowed to make up overtime work lost in mid 1997, his absences on November 13 and 14, 2001 were reclassified as scheduled absences and his name was removed from the accident repeater program. However, the mere fact that personnel actions were later modified or rescinded does not, in and of itself, establish error or abuse.¹⁶ The Board notes that all of the settlement agreements indicated that the findings were made without prejudice to the employing establishment and were not to be construed as an admission of wrongdoing by the employing establishment.

Several of the coworkers witness statements submitted by appellant concerned these administrative matters, but none of the statements clearly showed that the employing establishment had engaged in wrongdoing. For example, Mr. Owens stated that on April 9, 1999 Ms. Ribbe gave less than an hour's notice to appellant and other employees who were required to work two hours of overtime that day. However, the employing establishment has indicated that the shorter notice period was necessitated by an emergency situation and appellant has not submitted evidence showing that error or abuse occurred. Appellant has not established a compensable employment factor under the Act with respect to administrative matters.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.¹⁷

¹³ See *Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

¹⁴ *Id.*

¹⁵ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁶ *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

¹⁷ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹⁸ the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹⁹ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.²⁰ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.²¹ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.²²

ANALYSIS -- ISSUE 2

In support of his reconsideration request, appellant submitted a letter in which his representative discussed his claimed employment factors. He argued that the witness statements and grievance settlements contained in the record showed that the employing establishment engaged in harassment, discrimination and other forms of wrongdoing. The submission of this argument would not require reopening of appellant's claim as it is similar to the argument and accompanying evidence, previously considered by the Office.

Appellant has not established that the Office improperly denied his request for further review of the merits of its September 29, 2005 decision under section 8128(a) of the Act, because the argument he submitted did not to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constitute relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty. The Board further finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹⁸ U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

¹⁹ 20 C.F.R. § 10.606(b)(2).

²⁰ 20 C.F.R. § 10.607(a).

²¹ 20 C.F.R. § 10.608(b).

²² *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 2, 2006 and September 29, 2005 decisions are affirmed.

Issued: February 6, 2007
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