

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

J.J., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, FEDERAL CORRECTIONAL
INSTITUTE, Fairton, NJ, Employer**

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**Docket No. 09-982
Issued: January 6, 2010**

Appearances:

*Thomas R. Uliase, Esq., 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 3, 2009 appellant, through counsel, filed a timely appeal from the merit decisions of the Office of Workers' Compensation Programs dated March 3 and November 5, 2008 denying appellant's claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant's claimed injury of December 16, 2007 was caused by his willful misconduct.

On appeal, appellant's attorney contends that appellant established that he sustained an injury in the course of employment. Counsel argues that the altercation had its origin with regard to work issues and that appellant was fulfilling the duties of his assignment when the altercation occurred. He contended that the affirmative defense of willful misconduct cannot remove appellant from the performance of duty. Counsel further contends that the correctional guard position by its very nature creates a hostile environment and that disputes between guards and inmates as well as among guards are common.

FACTUAL HISTORY

On December 19, 2007 appellant, then a 46-year-old correctional officer, filed a traumatic injury claim alleging that on December 16, 2007 he had an argument with another officer who pushed him and began hitting him on the head with a flashlight. He indicated that he sustained cuts on his head.

The employing establishment controverted the claim on the grounds that appellant caused the injury by his willful misconduct. It further contended that, at the time of his injury, he was not performing assigned duties and the injury was not in relation to his work. Specifically, the employing establishment, through Lieutenant (Lt.) Nolan, alleged that appellant's "antagonistic, aggressive, combative and hostile actions towards other staff directly resulted in his being injured." He contended that, although the actions of the other staff were inappropriate and excessive, appellant instigated the situation and became the victim of circumstances that he was ultimately responsible for creating. Specifically, Lt. Nolan indicated that appellant physically initiated contact with his alleged assailant by grabbing and punching the staff member responsible for his injury. He stated that it was this action that led to appellant being struck in the head with a flashlight. Lt. Nolan concluded that, although both officers were at fault, appellant's behavior prior to being injured was the primary factor for assigning blame.

By letter dated January 15, 2008, the Office asked appellant to submit further information and to answer a series of questions. In a response signed January 24, 2008, appellant submitted a more detailed description of the incident. He alleged that on December 16, 2007 at 3:55 a.m., he had a verbal argument with Officer Snyder in the lieutenant's office at which time Officer Snyder used profanity, racial references and called him names. Appellant then indicated that they moved outside the office at which time Officer Snyder pushed him into the door of the lieutenant's office causing a minor injury to his left elbow. He alleged that at that time he grabbed the door to pull it closed and Officer Snyder jerked the door from his hand and pushed him into the door. However, appellant indicated that he managed to get the door closed and locked. He continued that Officer White, a good friend of Officer Snyder, began arguing with him and grabbed his flashlight and shoved him and began hitting him over the head several times with enough force that caused him to need nine staples to his head. Appellant noted that blood was pouring into his eyes from the lacerations and he staggered out of the office to get away from Officer White. He alleged that the altercation was not personal but arose from the fact that Officer White brought up a work incident that happened over a year ago and was under investigation in the prison. When asked what other activities he was engaged in prior to the injury, appellant noted that at 9:30 p.m. on December 15, 2007 he arrived at the institution. He made a list for the officers to sign up for duties that night. Appellant indicated that at that time he had a few cross words with Officer Washington. He noted that from 10:30 p.m. to 3:45 a.m. he conducted counts, turned in count slips, conducted the institutional fire and security check and conducted the area shake downs. Appellant noted that at 3:45 a.m. he went to the lieutenant's office to get a cup of coffee.

The Office also sent a letter on January 15, 2008 to the employing establishment requesting further information. In a response dated February 29, 2008, Peter D. Lawrie, the Occupational Safety and Environmental Health Manager for the employing establishment, noted that this case was still under active investigation by the Office of Internal Affairs but that he was presenting a summary that was the result of various summaries and excerpts provided by the

correctional officers on what transpired on the night of December 15, 2007 and the early morning of December 16, 2007. He noted that, on this shift, appellant was required to report to work at 10:15 p.m. the evening of December 1, 2007 and work until 6:15 a.m. the following morning. Appellant was supervised by Lt. Pagan until 12:00 a.m. and then by Lt. Nolan until 6:15 a.m. He stated that there was an altercation between him and Officer Washington that transpired at approximately 10:10 p.m. while Lt. Pagan was conducting his briefing. Appellant allegedly began walking away and making comments to the other officers such as, "You guys are all lazy. I do all the work around here. Why do you need him to tell us what needs to be done when I'm making a list of what you need to do." Lt. Pagan indicated that he gave appellant verbal counseling at the beginning of his shift. Specifically, he stated that he told appellant to keep his comments to himself at which point appellant indicated that he would. Lt. Pagan also wrote that, in addition to this incident, approximately one hour later while he was speaking on the telephone he overheard appellant use profanity and insult Officer Washington by calling him lazy. The report indicated that Officer Washington commented that appellant did not know what he was talking about and, if he had a problem, he could speak to the lieutenants or the captain. At that point, Lt. Pagan hung up the telephone and advised, "Knock it off [appellant] ... you are stepping way over the line." He spoke with appellant who indicated that he was just "fooling around." Lt. Pagan made it clear to appellant that this was unacceptable behavior and not to do this to anyone else and appellant agreed. He asked appellant if he wanted to go home but appellant declined. Lt. Pagan also reported that he spoke with Lt. Washington about the incident, and that, although he seemed upset, he mentioned that he would stay away from appellant. The employing establishment noted that Lt. Pagan's statement of the events was supported by the statements of Officers Washington and Snyder. Mr. Lawrie continued that later that night, between 3:15 a.m. and 3:45 a.m., another incident escalated resulting in appellant's injury. He mentioned that six correctional officers were in the lieutenant's office when an altercation transpired. Mr. Lawrie indicated that he reviewed the memoranda prepared by Lt. Nolan and the two responding officers, Harkcom and Washington. He noted that several officers stated that, as the officers were preparing to eat, appellant made a profane comment to Officer Bartholomew. Officer Snyder walked into the office, heard the comment, and stated "Why don't you stop bullying Bart." Mr. Lawrie indicated that, according to several accounts, appellant started berating Officer Snyder and called him various names and used obscenities. Officer Snyder responded that appellant was a bully and did not bother him. Appellant responded with a religiously insensitive comment and the confrontation escalated. At one point, appellant locked Officer Snyder outside at which point Officer White walked up to appellant and asked for the keys to let Officer Snyder inside. Mr. Lawrie indicated that appellant stated that he was the only one with keys and was not letting him in. Appellant then started harassing Officer White, who stated "I'm not Impellizzari,¹ I'm not one for you to push around." At this point appellant pushed his chest into Officer White's chest. Officer White tried pushing him away with both hands, then appellant struck Officer White in the head with his right hand. Both started wrestling and Officer White struck appellant in the head with a 12-inch flashlight. The other officers intervened and one of them summoned help on his hand-held radio. Officers Washington and Harkcom and Lt. Nolan responded to the call and appellant was taken to the hospital. Mr. Lawrie concluded by saying that six eyewitnesses supported that appellant acted outside of his employment and was not performing official duties at the time of the injury. He noted that it was the position of the agency that appellant precipitated the injury by verbal

¹ Impellizzari is a reference to a previous altercation involving appellant that was under investigation.

abuse of staff members. Mr. Lawrie noted that a criminal investigation into this matter was continuing.

By decision dated March 3, 2008, the Office denied appellant's claim, finding that the evidence did not establish that appellant sustained an injury while in the performance of duty. It found the evidence supports that the cause of appellant's injury was his own misconduct because he had continued verbally abusing his coworkers despite his supervisor's verbal warnings, and that this conduct removed him from the performance of duty.

By letter dated March 7, 2008, appellant, through his attorney, requested a hearing. At the hearing held on July 15, 2008, appellant noted that he first started employment with the employing establishment on June 14, 1992 as a correctional officer. He discussed his prior injuries on the job. Appellant then discussed the job. He indicated that, on that shift, as had been his past practice, he made a list of all of the officers on the shift that night and they would sign the list regarding duties. Appellant noted that the institution was on lock down for an incident that happened earlier that week. He noted that he asked Officer Washington what he wanted to do that night and he stated that he wanted to be left alone and that this led to a brief verbal altercation, after which appellant did counts and a fire and security check. Appellant testified that at about 3:45 a.m. he went to the office for coffee and that when Officer Snyder came in he looked at appellant and called him a "punk" and that when he asked why Officer Snyder stated it was because appellant called him a profane name, which appellant denied. He noted that Officer Snyder continued with name calling. Appellant indicated that Officer Snyder, a Muslim, got upset when appellant stated that he was going home and eat pork sandwiches. He testified that at that point he went outside the office with Officer Snyder at which point Office Snyder shoved him through the door. Appellant indicated that he quickly grabbed the door and jumped back inside and pulled the door closed and locked it to keep Officer Snyder from getting to him. At that point he indicated that Officer White demanded his keys but appellant responded that he wanted Officer Snyder to cool down. Appellant testified that Officer White looked at him, and made various profane comments. He noted that the argument got hot and heavy and involved a lot of name calling and cussing, that Officer White grabbed the flashlight and shoved appellant back and hit appellant with the flashlight. Appellant indicated that he started bleeding and could not see anything and that Officer White hit him a few more times. He indicated that he grabbed the flashlight out of Officer White's hand and staggered to the front door. Appellant noted that Officers Washington and Harkcom told him to put the light down and then they started trying to stop appellant's bleeding. He did note that Lt. Pagan told him to be quiet earlier that night and he agreed.

By decision dated November 5, 2008, the hearing representative affirmed the Office's March 3, 2008 decision.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty, unless the injury is caused by willful misconduct of the employee.² Willful misconduct is generally regarded as deliberate conduct involving premeditation, obstinacy or intentional wrongdoing

² 5 U.S.C. § 8102(a)(1).

with the knowledge that it is likely to result in serious injury, or conduct that is in wanton or reckless disregard of probable injurious consequences.³

An allegation of willful misconduct is in the nature of an affirmative defense. The adjudicating agency has the burden, if it makes such an allegation, to prove that there was willful misconduct and that such misconduct caused the injury. If the adjudicator believes that the evidence in the case record justifies a finding of the injury being caused by willful misconduct of the claimant, he or she has the responsibility of making such a finding in the original adjudication of the case.⁴

ANALYSIS

The Board has carefully considered the accounts of what happened on the shift from December 15 through 16, 2007 and finds that the weight of the evidence supports a finding of willful misconduct. Appellant's attorney makes various arguments to the effect that appellant was in the performance of duty when he was injured. However, the Board has held that willful misconduct is a statutory exclusion to coverage. Accordingly, even if appellant sustained an injury in the performance of duty, there is no coverage under the Act if the injury was caused by appellant's willful misconduct.⁵

This case can be distinguished from other cases where the Board rejected the argument that a claimant's actions amounted to willful misconduct which removed him from the performance of duty. In *Barry Himmelstein*, claimant was injured in a physical altercation that started after appellant shoved a hamper at another employee.⁶ In that case, the Board rejected the argument raised by the employing establishment that appellant's claim be denied due to willful misconduct. However, the reason the Board rejected this argument was because the Office did not invoke an affirmative defense in initial adjudication of the claim. In the instant case, the Office received notification that the employing establishment was claiming willful misconduct on the part of appellant one week after the claim was filed and the case was adjudicated with the willful misconduct defense at the forefront. In *Allan B. Moses*, this Board found that, as the Office did not invoke the affirmative defense of willful misconduct in the original adjudications of the claim, it was precluded from doing so on reconsideration.⁷ In *Janet D. Yates*, an emotional condition claim, appellant was involved in a dispute with a coworker over a piece of mail. In *Yates*, the other party was the first to use profanity and appellant responded in kind. The Board found that appellant's behavior did not amount to willful misconduct but rather was an angry reaction to her coworker's response. The Board noted that her actions did not constitute willful misconduct but rather were a spontaneous reaction or impulse rather than any deliberate behavior.⁸ However, appellant's actions in this case were deliberate as he had been

³ *J.S.*, 60 ECAB ____ (Docket No. 08-1654, issued February 2, 2009); *Abraham Finkelstein*, 4 ECAB 130 n.8 (1951).

⁴ *Paul Raymond Kuyoth*, 27 ECAB 498, 505 (1976), *reaff'd on recon*, 27 ECAB 253 (1976).

⁵ *J.S.*, *supra* note 3.

⁶ 42 ECAB 423 (1991).

⁷ 42 ECAB 575 (1991).

⁸ 49 ECAB 240 (1997).

abusing his coworkers for the entire shift. Furthermore, in this case, he instigated the altercation by his behavior, and his behavior was generally much more aggressive than that of the claimant in *Yates*.

Appellant's behavior in the instant case is more in line with the Board's cases that find that a claimant's willful misconduct barred the claim. In *J.S.*, the Board found that the claimant's claim was barred by willful misconduct because her injuries occurred when she refused to cooperate with a police officer from the employing establishment. In that case, she was injured while trying to shut the door on the police officer who was investigating her for a security violation.⁹ In *Theodore Karntslais*, an argument ensued in the men's room between the claimant and another employee with regard to some missing office equipment. A fight ensued in which the evidence indicated that the claimant was the aggressor. The Board found that, based on the reliable evidence, the claimant's conduct of starting a fight that was likely to have injurious consequences removed him from the performance of duty and made the injury not compensable under the Act.¹⁰ In *Soo F. Dong*, the claimant had a dispute with the security guards when she failed to submit proper identification upon entering the building. The accounts of eyewitnesses describe how she began to strike at the security guards, even with a shoe, in resistance to their requests. The Board found that the claimant's willful misconduct removed her from the performance of duty and affirmed the denial of benefits.¹¹

In the instant case, the employing establishment invoked the affirmative defense of "willful misconduct." The Board finds that appellant's actions established wanton or reckless disregard of probable injurious consequences.¹² The weight of the evidence establishes that appellant was the aggressor in the altercation that took place on December 16, 2007. The evidence establishes that appellant had been making abusive comments to several of his colleagues for the entire shift. In fact, appellant's superior warned him that his behavior was not acceptable. Immediately prior to his injury, appellant got into a fight with Officer Snyder followed by an intense verbal confrontation with Officer Washington. In the altercation with Officer White, appellant was the first to resort to physical contact. Pursuant to the credible evidence submitted by the employing establishment, appellant pushed his chest into Officer White's chest. Appellant's attorney argues that the nature of appellant's job as a corrections officer created a hostile environment. However, it was not the nature of appellant's employment that was cause of the incident but rather his persistent misbehavior and wanton disregard for the consequences of his actions.

The Board finds that appellant engaged in willful misconduct not only in his actions immediately prior to the fight but in his persistent conduct throughout the day. Appellant ignored a warning from his superior and continued to badger his colleagues with insults, insensitive religious comments and profanity. He attempted to instigate a fight with Officer Snyder and antagonized Officer Washington with abusive comments, profanity and insensitive comments with regard to his religion. According to the statement submitted by the

⁹ *J.S.*, *supra* note 3.

¹⁰ 49 ECAB 603 (1998).

¹¹ 47 ECAB 800 (1996).

¹² *J.S.*, *supra* note 3.

employing establishment, appellant shoved Officer White and the altercation escalated to the point where Officer White hit appellant with the flashlight. His general conduct and instigation of a fight that was likely to have injurious consequences removed him from the performance of duty. Hence, appellant's injury is not compensable under the Act.

CONCLUSION

The Board finds that appellant's claimed injury of December 16, 2007 was caused by his willful misconduct.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 5 and March 3, 2008 are affirmed.

Issued: January 6, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board