

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

D.S., Appellant

and

**U.S. POSTAL SERVICE, DOMINICK V.
DANIELS PROCESSING & DISTRIBUTION
CENTER, Kearney, NJ, Employer**

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**Docket No. 10-1189
Issued: February 22, 2011**

Appearances:

*Robert D. Campbell, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 24, 2010 appellant, through counsel, filed a timely appeal of the September 25, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 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 sustained an emotional condition in the performance of duty.

On appeal, counsel contends that statements of employees who had been harassed and discriminated against by a supervisor at the employing establishment are sufficient to establish that the same supervisor harassed and discriminated against appellant on the basis of his religion, ethnic origin, nationality and sex in issuing a letter of warning to him. He further contends that this evidence establishes that the supervisor's statement, which the Office relied upon in denying appellant's claim, was not truthful.

FACTUAL HISTORY

This case has previously been before the Board. In a July 14, 2009 decision, the Board set aside the Office's July 28, 2008 decision, which denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.¹ The Board found that his January 15, 2008 request for reconsideration of the Office's January 17, 2007 decision, which denied modification of its finding that he did not sustain an emotional condition while in the performance of duty, was timely filed. The Board remanded the case to the Office for further review under 20 C.F.R. § 10.607(a). The facts and history of the case as set forth in the prior decision are hereby incorporated.²

On remand, the Office conducted a merit review of appellant's January 15, 2008 request for reconsideration. In narrative statements dated December 20, 2004 and February 9 June 16, 2005, appellant contended that, on December 19, 2004, a M. Shah, supervisor, threatened to fire him. Mr. Shah harassed appellant in demanding that he ask for approval to go to the bathroom, dictating proper posture for his head while working, forbidding him from communicating with other employees and constantly observing him by walking past his work area, brushing his back and entering his letter case brushing his shoulder. Appellant contended that on December 19, 2004 Mr. Shah humiliated him when he loudly responded to his request to go to the bathroom with a derogatory comment. Other employees were not subjected to such restriction, public humiliation and ridicule. Appellant witnessed employees walk off the floor for over 45 minutes without permission from Mr. Shah while he had to always ask permission from him to go to the bathroom. He contended that Mr. Shah forced him to work in unsafe, hazardous and nonergonomic conditions and failed to provide him with safety information. On December 21, 2004 Mr. Shah issued a letter of warning to appellant for being in the bathroom too long on December 20, 2004 and because he was a white Irish American-Catholic male. Appellant contended that, on that date, Mr. Shah twice admitted to Sharon Tyrell, a union steward, that appellant was being disciplined based on his religion, national origin, race and sex. He further contended that Mr. Shah repeatedly ridiculed his work performance by stating that he was the slowest and worst employee despite his constant work performance. Appellant alleged that Mr. Shah grossly misrepresented the amount of mail he processed. Mr. Shah admitted to Ms. Tyrell that appellant did not go to the parking lot without permission. He gave him a pass to get a stronger pair of reading glasses. Mr. Shah admitted that he gave appellant permission to use the bathroom on December 20, 2004. He denied that a safety talk took place on that date.

In Equal Employment Opportunity (EEO) Information for Pre-Complaint Counseling form dated January 25, 2005, appellant alleged that he was subjected to discrimination based on being a white Irish-American Catholic male regarding the issuance of the December 21, 2004 letter of warning. In a final counseling interview dated April 5, 2005, the employing

¹ Docket No. 09-184 (issued July 14, 2009).

² On January 2, 2005 appellant, then a 47-year-old clerk, filed an occupational disease claim alleging that on December 20, 2004 he first became aware of his anxiety reaction and realized that this condition was caused by his federal employment. In a November 7, 2005 decision, the Office denied his claim, finding that he failed to establish a compensable factor of his employment. In a January 17, 2007 decision, it denied modification of the November 7, 2005 decision, again finding that appellant failed to establish a compensable employment factor.

establishment advised appellant that Mr. Shah denied his allegation of discrimination. The December 21, 2004 letter of warning was issued because he left his work assignment on December 20, 2004 for 35 minutes and went to a parking lot without permission. Appellant was charged with unauthorized absence from the workroom floor. The letter of warning was modified to a discussion.

In a December 22, 2004 letter, Timothy Neilan, director of the union, stated that he had been informed that on December 20, 2004 Mr. Shah related more than once that appellant was disciplined because he was a white Irish-American Catholic. He requested that the employing establishment immediately remove appellant from his supervisory position based on his comment.

In a May 4, 2005 narrative statement, Veronica Morey, an employee, related that she had a problem with the way Mr. Shah allowed a mail handler to decide who gets what type of mail. She stated that such action created a hostile work environment. Ms. Morey contended that Mr. Shah's attitude towards women was disrespectful as he treated them like second-class citizens. Mr. Shah also showed favoritism by allowing certain people to do whatever they wanted while others had to toe the line.

In a May 5, 2005 narrative statement, Loretta P. Allen, an employee, contended that Mr. Shah's new seating arrangement did not show any respect towards employees. Also, on May 5, 2005 Ametria A. Jones, an employee, contended that the new seating arrangement caused a hostile work environment. Mr. Shah harassed and disrespected her by always staring at her and claiming that she was not working. Ms. Jones believed that he did not want women to speak back to him.

Medical records dated February 17, 2004 to November 8, 2006 advised that appellant had an emotional condition causally related to his employment and intermittent periods of total disability.

In a May 31, 2005 statement, Mr. Shah contended that he treated appellant with the same dignity and respect as the other employees. He denied that appellant asked him for permission to go the bathroom, telling him how to position his hand while working, forbidding him from communicating with other employees and making physical contact with him. Mr. Shah also denied making any remarks regarding his sex, religion or national origin. He contended that this allegation was made by appellant and the union in response to the letter of warning he issued. Mr. Shah noted that at 8:00 a.m. on December 19, 2004 appellant arrived at work. Appellant complained about the lighting. He took another seat and requested to go to the bathroom. Appellant returned 20 minutes later. Mr. Shah had an official discussion with appellant on December 19, 2004 for being away from the workroom floor for approximately 45 minutes. At 11:00 a.m. appellant was given a PS Form 7020 in response to his request to go to the parking lot to get a different pair of glasses. When he returned to the workroom floor at 11:45 a.m., the PS Form 7020 was not signed by security personnel. Appellant only processed 43 pounds of mail in 7 hours which represented 1 3/4 hours of work by other employees and he took several bathroom breaks and left his letter case to frequently talk to Ms. Combe, a coworker. He received a letter of warning because he was away from the workroom floor for 35 minutes on

December 20, 2004. Appellant only processed 30 pounds of mail during his first 5 hours of work which was the equivalent of 1¼ hours of work by other employees.

In support of his timely request for reconsideration, appellant had submitted signatures of employees who he alleged had been treated with disrespected or discriminated against by Mr. Shah based on their sex, religion, ethnic origin or nationality. Also submitted was a summary of a town hall meeting in August 2007 held by Frank Bonglovanni, plant manager, to address employees' problems at work and their questions regarding communication between craft employees and supervisors, service scores, budget and safety issues, work procedures, employee accountability, disrespect by supervisors and equipment failure.

In a September 25, 2009 decision, the Office denied modification of its prior decisions, finding that appellant did not sustain an emotional condition in the performance of duty. Appellant failed to submit sufficient evidence to establish any compensable employment factors.

LEGAL PRECEDENT

A claimant 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 factors of his federal employment.³ To establish that he sustained an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.⁴

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 or her 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.⁵ 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 or her frustration from not being permitted to work in a particular environment or to hold a particular position.⁶

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially

³ *Pamela R. Rice*, 38 ECAB 838 (1987).

⁴ *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

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

⁶ *Gregorio E. Conde*, 52 ECAB 410 (2001).

assigned work duties of the employee and are not covered under the Act⁷ 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.⁸ 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.⁹

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.¹⁰ 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.¹¹

ANALYSIS

Appellant did not attribute his emotional condition to his regular or specially assigned duties of being a clerk. Rather, he attributes his emotional condition to several actions taken by employing establishment management. Appellant contended that he was harassed and discriminated against by Mr. Shah. The Board notes that harassment or verbal abuse may give rise to coverage under the Act. However, there must be evidence that harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. A claimant must establish a factual basis for allegations that the claimed emotional condition was caused by factors of employment.¹² Appellant alleged that Mr. Shah harassed and discriminated against him on the basis of his religion, ethnic origin, race and nationality as a white Irish-American Catholic male in issuing a letter of warning to him on December 21, 2004. He further alleged that he constantly monitored his work performance and ridiculed him. Appellant also alleged that Mr. Shah required him to obtain permission to go to the bathroom. He contended that Mr. Shah instructed him to use proper posture for his head while working.

⁷ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

⁸ See *William H. Fortner*, 49 ECAB 324 (1998).

⁹ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹⁰ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹¹ *Id.*

¹² *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, *supra* note 4 (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, *supra* note 3 (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

Appellant further contended that Mr. Shah forbade him from communicating with other employees. Lastly, he contended that Mr. Shah brushed against his back and shoulder. Appellant filed an EEO complaint alleging that Mr. Shah discriminated against him for being a white Irish-American Catholic male in issuing the December 21, 2004 letter of warning.

The Board notes that appellant's allegations pertain largely to the administrative actions taken by management personnel at the employing establishment. It is well established that the issuance of a letter of warning,¹³ monitoring of work,¹⁴ establishment of rules and procedures and filing of a grievance¹⁵ by the employing establishment relate to an administrative function of the employer and are not compensable unless the employee establishes error or abuse. The list of employees and the narrative statements from Ms. Morey, Ms. Allen and Ms. Jones which contended that they were disrespected or discriminated against by Mr. Shah do not establish that appellant was harassed or discriminated against. These individuals did not provide any specific examples of how he was harassed or discriminated against by the employing establishment.

Similarly, the town hall meeting summary which addressed employees' work-related problems and questions does not provide any specific examples of appellant being harassed and discriminated against by the employing establishment. Mr. Neilan requested that the employing establishment immediately remove Mr. Shah from his position after being informed that appellant had been disciplined based on his being a white Irish-American Catholic, but did not indicate whether he had heard the statement by Mr. Shah. Although the letter of warning was reduced to a discussion, the Board has held that the mere fact that personnel actions are later modified or rescinded does not, in and of itself, establish error or abuse on the part of the employing establishment.¹⁶ Further, Mr. Shah denied harassing or discriminating against appellant by issuing the December 21, 2004 letter of warning. He stated that appellant was away from the workroom floor for 35 minutes on December 20, 2004. Mr. Shah indicated that he only processed 30 pounds of mail during his first 5 hours of work which was the equivalent of 1¼ hours of work by other employees. He denied making any physical contact with appellant. The Board finds that appellant has failed to establish that the employing establishment committed error or abuse in handling the above-noted administrative functions. Therefore, appellant has failed to establish a compensable factor of employment.

As appellant failed to establish that his emotional condition was causally related to a compensable factor of employment, the Office properly denied his emotional condition claim.¹⁷

Appellant contends on appeal that the signatures of employees and narrative statements of employees who had been harassed and discriminated against by Mr. Shah establish that he

¹³ *Joe M. Hagewood*, 56 ECAB 479 (2005).

¹⁴ *See Brian H. Derrick*, 51 ECAB 417 (2000).

¹⁵ *Michael A. Salvato*, 53 ECB 666, 668 (2002).

¹⁶ *Paul L. Stewart*, 54 ECAB 824 (2003).

¹⁷ As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record. *Marlon Vera*, 54 ECAB 834 (2003).

also was harassed and discriminated against by Mr. Shah. As stated, this evidence does not specifically identify any incidents witnessed by the employees involving the harassment and discrimination of appellant by Mr. Shah. Statements of individuals who generally discuss harassment or working condition under Mr. Shah are not of sufficient specificity to support appellant's claim.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the September 25, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 22, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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