

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

R.V., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Seattle, WA, Employer**

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**Docket No. 11-54
Issued: September 28, 2011**

Appearances:
David Dillard, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 8, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) merit decision dated August 13, 2010 which denied his claim for an emotional condition. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

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

FACTUAL HISTORY

This is the second appeal in the present case. In a March 16, 2010 decision, the Board set aside OWCP decisions dated November 3, 2008 and March 6, 2009 and remanded the case for further development. The Board found that OWCP failed to make sufficient factual findings based on the evidence of record with regard to appellant's claim for an emotional condition. The

¹ 5 U.S.C. §§ 8101-8193.

Board also found that OWCP abused its discretion by denying his request for reconsideration of the merits. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and incorporated herein by reference.²

There was pertinent development prior to the Board's decision which is relevant to the present appeal before the Board. Relevant factual information consisted of a statement from appellant alleging that his emotional condition began in May 2006 when Gary Huffer and John Ardis, coworkers, hung signs on trailers that stated "Bob Sucks." Due to continuing problems with these coworkers, appellant bid out of the work section. On his new section, however, he asserted that he was harassed and verbally abused by Jim Fermo, a coworker and friend of Mr. Huffer and Mr. Ardis. On March 24, 2008 Mr. Ardis and Don Brady, another coworker, yelled and cursed at him when he was driving a forklift. On March 25, 2008 Mr. Brady called him a loser and stated "watch where you [a]re going you f--king moron." Appellant alleged that on April 8 and 21, May 6 and 8, 2008, Mr. Fermo had made sounds like a crying baby and told appellant to move his "f--king forklift. He alleged that on April 23, 2008 Mr. Fermo also called him "numb nuts" and "a--hole."

Appellant related that on May 8, 2007 he was in the employee parking lot backing up to park. Mr. Fermo drove behind him, honking his horn. After appellant clocked in, Mr. Fermo told him that he had better watch out when backing up and called him a "mother f--ker" and "f--king idiot." He suggested that they speak to the manager of distribution operations and Mr. Fermo again started verbally accosting him with profanity. Appellant told Mr. Fermo that he was not a supervisor and he went to work, subsequently notifying his supervisor of the incident.

On May 9, 2007 Mr. Fermo stated that he was driving in the employee parking lot on May 8, 2007 when he attempted to pass behind a car. The back up lights came on and the car started to move towards his truck. Mr. Fermo honked his horn and saw that the driver was appellant. After clocking in, he stated that he yelled at appellant that he drives his car just like his forklift. Mr. Fermo stated that appellant told him, "well, if you weren't doing 90 miles an hour in the parking lot you wouldn't have come so close to hitting me." He responded: "you [a]re the one who came close to hitting me, you dumb f--k." Mr. Fermo related that appellant became upset and responded: "What gives you the right, you're not my mother, or my f--king supervisor, you're a f--king nobody." Appellant turned and walked away, at which time Mr. Fermo stated, "You [a]re not going to cry, are you." Mr. Fermo reported laughing and proceeding to work.

Appellant alleged additional verbal abuse and threats by Mr. Fermo while working on September 25, 28, 29 and October 23, 2007. On May 20, 2008 while he talked to a coworker, Mr. Fermo approached on a forklift and yelled "get out of my way, you're blocking the way, you almost backed into me, watch what you're doing." Appellant stated that he reported the incidents to his supervisors, including Michael Hooker, supervisor of district operations.

The record reflects that the employing establishment investigated the incident in the parking lot. In a May 15, 2007 investigative interview, appellant noted the May 8, 2007 parking lot incident and Mr. Fermo addressing him with obscenities. He contended that Mr. Fermo

² Docket No. 09-1131 (issued March 16, 2010).

routinely created stress through threatening language that made it difficult for him to come to work. The May 18, 2007 memorandum of Audrey Lyn M. Baldivino, supervisor of distribution operations, noted that both employees used obscenities with regards to each other. She noted that both employees had ongoing problems and she advised them as to postal policies concerning violence in the workplace. Both employees were given an official discussion for misconduct and given an offer to seek the Employee Assistance Program (EAP).

Appellant submitted a report of threat/assault on October 23, 2007 alleging that Mr. Fermo called him a “f--king idiot.” The report noted that Mr. Fermo denied the obscenity but acknowledged referring to appellant as an idiot twice. In a December 14, 2007 investigative interview, Mr. Hooker noted that Mr. Fermo denied using obscenity towards appellant but contended that his remarks were intended as fitting putdowns of appellant.

Following OWCP’s November 3, 2008 decision denying his claim, appellant requested reconsideration and submitted a March 18, 2008 Equal Employment Opportunity (EEO) settlement agreement withdrawing his complaint of discrimination. It stipulated that management would have a general standup with supervisors on how to conduct an official discussion; management would arrange for a speaker from the district to discuss harassment and violence in the workplace; and appellant was paid \$3,000.00 for medical co-pays and time off.

Appellant submitted a July 22, 2008 witness statement from Dave Dillard, a coworker and union steward, who noted that, on July 21, 2008, appellant approached him in the cafeteria to discuss a grievance settlement and Mr. Brady proceeded to sift through the plastic recycling bin taunting appellant. On December 5, 2008 Mr. Dillard was in the cafeteria when appellant approached and Mr. Fermo stated “duh-ta-doh.” In a December 5, 2008 letter to OWCP, Gene Rezac, a union branch president, noted that in early 2006, he spoke with Mr. Ardis and Mr. Huffer, who admitted that some of appellant’s claims were true but they also asserted that their actions were correct. Mr. Rezac noted that appellant’s problems escalated when he began working in the same section as Mr. Fermo. In further conversations with Mr. Fermo about acting out toward appellant, Mr. Fermo was forthright about his dislike for appellant. Mr. Rezac stated that “Mr. Fermo has personally described to me in some detail and with obvious satisfaction his recollection of several of his attacks on [appellant].” I have continually chastised him for this and instructed him to refer his concerns to a supervisor rather than verbally harangue another employee. At one point this year, Mr. Fermo even admitted that he had called [appellant] a “f--king idiot” for yielding to traffic on his forklift and had called him a “f--king moron” for getting too close to his own forklift. He asserted that there was nothing wrong with what he said since he felt appellant was dangerous in the work environment. In a November 11, 2008 statement, Alan Williams, a coworker, noted working with appellant from 1999 to 2004. He observed numerous conflicts between appellant and Mr. Huffer and Mr. Ardis without resolution by management. Appellant submitted a statement from Walter A. Menzl, a coworker, dated December 10, 2008. He witnessed Mr. Fermo drive by on a forklift and make derogatory remarks to appellant.

In a March 6, 2009 decision, OWCP denied appellant’s reconsideration request without a merit review of the claim.

After the Board's March 16, 2010 decision, OWCP, in a decision dated August 13, 2010, noted evidence and assertions from appellant but denied modification of the prior decision. It found that he established no compensable factors of employment.

LEGAL PRECEDENT

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

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,⁴ the Board explained that there are distinctions to the type of employment situations giving rise to a compensable emotional condition arising under FECA. 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 under FECA.⁵ When an employee experiences emotional stress in carrying out his employment duties, and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of an in the course of employment. This is true when the employee's disability results from his emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.⁶ 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 under FECA. 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 FECA. 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.⁷

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, OWCP, 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.⁸ If a claimant does implicate a factor of

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

⁴ 28 ECAB 125 (1976).

⁵ See *Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

⁶ *Lillian Cutler*, *supra* note 4.

⁷ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, *supra* note 4.

⁸ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

employment, OWCP 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, OWCP must base its decision on an analysis of the medical evidence.⁹

ANALYSIS

Appellant has not alleged that that his regular or specially assigned duties caused his emotional condition. Instead he asserts that harassment and verbal abuse from coworkers caused his condition. Therefore, appellant has not alleged a compensable factor under *Cutler*.¹⁰ In its prior decision, the Board remanded the case for OWCP to make further consider and make findings regarding appellant's allegations.

Appellant alleged that he was harassed, verbally abused and threatened by his coworkers and worked in a hostile environment and management failed to effectively resolve the issues. He noted several incidents, specifically indicating that in May 2006 Mr. Huffer and Mr. Ardis, coworkers, hung signs on trailers that said "Bob Sucks;" on March 24, 2008 Mr. Ardis and Mr. Brady yelled and cursed at him when he was driving a forklift, on March 25, 2008 Mr. Brady called him a loser and stated "watch where you're going you f---ing moron," on April 8 and 21, May 6 and 8, 2008, Mr. Fermo had made sounds like a crying baby and told appellant to move his "f---ing forklift;" on April 23, 2008 Mr. Fermo also called him "numb nuts" and "a--hole;" and on May 8, 2007 he was in the employee parking lot backing up to park and Mr. Fermo drove behind him, honking his horn and called him a "mother f--er," "f--king idiot" and "f--king pussy." Similarly appellant alleged additional verbal abuse and threats by Mr. Fermo on September 25, 28, 29 and October 23, 2007 and on May 20, 2008 Mr. Fermo approached appellant who was on a forklift and yelled "get out of my way, you're blocking the way, you almost backed into me, watch what you're doing."

To the extent that incidents alleged as constituting harassment by coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.¹¹ However, for harassment to give rise to a compensable disability under FECA, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under FECA.¹²

In such cases, the Board has reviewed the evidence of record to determine whether the allegations of the claimant are substantiated by reliable and probative evidence. In this case, appellant has submitted reliable and probative evidence delineating with specificity certain incidents of harassment with supporting witness statements. Appellant submitted a July 22, 2008 witness statement from Mr. Dillard, a coworker and union steward, who noted that, on July 21, 2008, while speaking with appellant regarding a grievance settlement, Mr. Brady proceeded to

⁹ *Id.*

¹⁰ *Supra* note 4.

¹¹ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹² *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991). *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).

sift through the plastic recycling bin taunting appellant. On December 5, 2008 Mr. Dillard noted sitting in the cafeteria when appellant approached and heard Mr. Fermo stated “duh-ta-doh.” Similarly, in a November 11, 2008 statement, Mr. Williams, a coworker, noted working with appellant from 1999 to 2004 and observing numerous conflicts between appellant and Mr. Huffer and Mr. Ardis without resolution by management. Likewise, a December 5, 2008 letter from Mr. Rezac, local union branch president, noted that in early 2006, he spoke with Mr. Ardis and Mr. Huffer, who admitted that some of appellant’s claims were true. Mr. Rezac noted that Mr. Fermo personally described in detail and with obvious satisfaction his recollection of several of his attacks on appellant. He noted that at one point this year, Mr. Fermo admitted that he had called appellant a “f--king idiot” for yielding to traffic on his forklift and had called him a “f--king moron” for getting too close to his own forklift. Similarly, in a December 10, 2008 statement, Mr. Menzl, a coworker, noted witnessing Mr. Fermo drive by on a forklift and make derogatory remarks to appellant.

Mr. Fermo did not dispute that incidents took place in which he cursed at appellant. On May 8, 2007 he noted yelling at appellant that he drove his car just like his forklift and calling him a “dumb f--k.” Appellant’s allegations were further supported by the employing establishment. A May 15, 2007 investigative interview, appellant noted that on May 8, 2007 Mr. Fermo drove up behind him while in the parking lot and honked his horn and called him a “stupid mother f---er” and “f--king moron.” Additionally a May 18, 2007 memorandum from Ms. Baldivino, a supervisor, noted that the employing establishment investigated the May 8, 2007 matter and corrective action was taken with both employees in the form of an official discussion regarding harassment and misconduct in the workplace. Further, a March 18, 2008 EEO settlement agreement noted that upon withdrawal of appellant’s complaint management would have a general standup with supervisors on how to conduct an official discussion; management would arrange for a speaker to discuss harassment and violence in the workplace; and appellant would be paid \$3,000.00 for medical co-pays and time off. While a settlement, in and of itself, does not establish any impropriety, in this situation it tends to support that interactions, such as those between appellant and Mr. Fermo, had reached a level for which management intervention was needed.

Included in appellant’s allegations of harassment were his assertions that he was verbally abused by Mr. Fermo. The Board finds the confirmed utterances noted above by Mr. Fermo also constitute verbal abuse and are compensable factors of employment. 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 coverage under FECA.¹³ The Board has generally held that being spoken to in a raised or harsh voice does not of itself constitute verbal abuse or harassment.¹⁴ The record as set forth above supports instances of verbal

¹³ *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

¹⁴ *T.G.*, 58 ECAB 189 (2006).

altercations on May 8, 2007 which rose to the level of verbal abuse and fell within the coverage FECA.¹⁵

As appellant has established compensable employment factors, OWCP must base its decision on an analysis of the medical evidence. As OWCP found that there were no compensable employment factors, it did not analyze or develop the medical evidence. The case will be remanded to OWCP for this purpose.¹⁶ After such further development as deemed necessary, OWCP should issue an appropriate decision on this matter.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the August 13, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded to OWCP for further development in accordance with this decision.

Issued: September 28, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

¹⁵ 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).

¹⁶ See *Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).