

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

S.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Brooklyn, NY, Employer**

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**Docket No. 11-1608
Issued: September 13, 2012**

Appearances:
Paul Kalker, Esq., 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, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 20, 2011 appellant, through his attorney, filed a timely appeal from a May 13, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his emotional condition claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 met his burden of proof to establish that he sustained an emotional condition in the performance of his federal duties.

FACTUAL HISTORY

On July 8, 2010 appellant, then a 49-year-old customer service supervisor at the employing establishment filed an occupational disease claim (Form CA-2) alleging that he was harassed in the workplace as of June 22, 2010. He alleged that, from June 15 to 22, 2010, he was

¹ 5 U.S.C. § 8101 *et seq.*

harassed by Rudy Marinacci, a postal service manager at Linden Hall Post Office, who refused to cooperate with him to accomplish his duties, refused to let him use the telephone, threatened him and assaulted him by spitting in his face, punching him in the nose and bumping against his stomach. Appellant stopped work on June 23, 2010 and notified his supervisor on July 12, 2010.

In a June 24, 2010 narrative statement, appellant alleged that on June 15, 2010 Mr. Marinacci, a postal service manager, asked him to conduct a predisciplinary interview (PDI) regarding Cathy Gibney in his capacity as a National Association of Postal Supervisors (NAPS) representative.² He told Mr. Marinacci that he would call him to discuss the matter, after he returned to his duty station. Appellant called Mr. Marinacci to discuss the pending PDI interview and Mr. Marinacci hung up on him twice. The following day, he had finished a hub run at the Linden Hall Post Office and stopped by Mr. Marinacci's office to discuss the requested PDI and to inform him of his schedule as he had a summons for jury duty. Appellant stated that Mr. Marinacci was nasty and belligerent towards him, instructed him to leave his office and then called the area manager of customer service operations, Dan O'Connor, to report that appellant would not leave Mr. Marinacci's office. Mr. Marinacci informed him that the PDI would be scheduled the next day regardless of whether he had jury duty. Appellant stated that Mr. Marinacci implicitly threatened him when he stated that he would be available to discuss the issue either before or after work or at the NAPS meeting on Tuesday. He stated that he called Mr. O'Connor to tell him what had transpired with Mr. Marinacci. Mr. O'Connor told appellant that he should request permission to discuss NAPS business in the future.

Appellant also alleged that, just prior to the NAPS meeting on June 22, 2010, he was walking in the Veterans of Foreign Wars parking lot when Mr. Marinacci bumped into his stomach and spit in his face. He then spit back at him and Mr. Marinacci punched him in the face. The fight was then broken up and the police were called.

In a June 24, 2010 statement, Jeff Goldman, President of the Flushing NAPS Branch, indicated that on June 22, 2010 he arrived early at approximately 6:30 p.m. for a 7:00 p.m. NAPS meeting. Appellant had informed him a few days earlier that Mr. Marinacci might be disruptive at the meeting to settle an issue with him. In the parking lot, Mr. Goldman saw Mr. Marinacci bump into appellant's stomach and spit in his face. Appellant spit back at Mr. Marinacci at which time Mr. Marinacci punched appellant in the face.

In a USPS Assault and Threat Specialty Report, a postal investigator noted that on June 22, 2010 prior to an off-duty NAPS meeting which was not held on postal property, Mr. Marinacci, a station manager, and appellant, an NAPS representative, were involved in a physical altercation. The New York police department and emergency medical services responded on the scene. Mr. Marinacci was arrested and charged with assault in the third degree.

By letter dated August 2, 2010, the employing establishment controverted the claim alleging that the incident did not occur in the performance of duty and that it was not related to factors of employment. It noted that appellant had not reported any instances of harassment by

² NAPS is a management association which is composed of managers, supervisors and postmasters working for all supervisory personnel in the United States Postal Service (USPS). Membership is voluntary. See <http://www.naps.org/>.

Mr. Marinacci prior to the June 22, 2010 incident and did not give his supervisors an opportunity to investigate any ongoing conflicts. The employing establishment stated that appellant was a supervisor at the employing establishment and Mr. Marinacci was a manager at the Linden Hall Post Office. Appellant's interactions with Mr. Marinacci were not directly related to work but occurred in his capacity as a representative for NAPS. It further stated that, on June 22, 2010, both individuals were off duty, off postal premises and were about to attend an NAPS meeting, of which participation and membership was voluntary and not a requirement of their USPS positions.

By letter dated August 5, 2010, OWCP informed appellant that the evidence of record was insufficient to support his claim. It requested that he provide additional factual and medical evidence within 30 days.

In an August 15, 2010 psychiatric evaluation, Dr. Robert Conciatori, Board-certified in psychiatry, reported that appellant was harassed by Mr. Marinacci at work on June 15, 2010 and assaulted on June 22, 2010. Immediately, after the attack, appellant complained of insomnia and anxiousness. Dr. Conciatori noted that he treated appellant in 1994 for job stress and anxiety as a postal carrier which had since completely resolved. He diagnosed appellant with post-traumatic stress disorder and opined that the accident was causally related to his psychiatric pathology. Dr. Conciatori stated that appellant developed a maladaptive reaction pattern and impaired functioning due to the stressors of the accident.

In an August 17, 2010 narrative statement, appellant repeated his allegations and further stated that he had a preexisting job-related emotional condition dating back to 1994.

By letter dated September 16, 2010, the employing establishment stated that an attached statement from Mr. O'Connor showed that appellant gave no indication that he felt harassed or threatened by Mr. Marinacci. It further noted that appellant's interactions with Mr. Marinacci were in his capacity as a representative of NAPS and that he initiated those interactions for which he alleged a pattern of harassment.

In a September 20, 2010 statement, Mr. O'Connor stated that on June 16, 2010 he received a call from Mr. Marinacci who stated that appellant was in his office. Although Mr. Marinacci had informed appellant that he was not available to discuss the situation regarding the PDI matter and had asked appellant to leave, he had refused. Later that day, appellant called Mr. O'Connor and stated that Mr. Marinacci was being rude and would not discuss the PDI issue with him. Mr. O'Connor informed appellant that he did not have authority to go to Mr. Marinacci's office without making an appointment or without approval from an area manager. He informed appellant that he was on postal time and could not handle NAPS business without getting permission. Mr. O'Connor stated that at no time during their conversation did appellant state that he was being threatened or harassed, just that Mr. Marinacci was nasty and uncooperative. On June 8, 2010 appellant informed Mr. O'Connor that he could not handle the stress of the job anymore.

By decision dated January 28, 2011, OWCP denied appellant's claim finding that the evidence did not establish fact of injury. It noted that he did not establish that he was harassed or

threatened and the June 22, 2010 assault is not considered a factor of employment because it did not occur in the workplace.

By letter dated February 17, 2011, appellant, through his attorney, requested reconsideration of OWCP decision.

In support of his request, appellant submitted a February 16, 2011 transcript for the criminal court of the state of New York where Mr. Marinacci accepted a plea of disorderly conduct for the assault on appellant.

In a March 19, 2011 letter, Mr. Goldman stated that appellant reported that Mr. Marinacci became argumentative with him regarding Ms. Gibney's PDI and asked him to meet before or after work to resolve the issue and that he would be at the next NAPS meeting. He stated that appellant informed him that he was concerned about what Mr. Marinacci would do and informed the area manager, Mr. O'Connor, about the alleged threat and statement made.

In an April 12, 2011 letter, Robert Bilz, the Executive Vice-President of the Flushing NAPS Branch, stated that he had asked appellant to set up a meeting with Mr. Marinacci regarding predisciplinary interviews. On June 16, 2010 appellant called Mr. Bilz to inform him that Mr. Marinacci had acted nasty and belligerent towards him when he tried to schedule the PDI for Ms. Gibney. Mr. Bilz noted that appellant informed him that Mr. Marinacci challenged him to meet before or after work to settle the matter and that he would be at the next NAPS meeting.

By decision dated May 13, 2011, OWCP found that the January 28, 2011 decision improperly found that appellant had not established the factual basis of his claim³ and that he also established an injury of post-traumatic stress disorder as alleged. It found, however, that he did not establish that he was in the performance of his duties at the time that the accepted events occurred because he had not been granted official time for contacts with Mr. Marinacci prior to the June 22, 2010 incident, the assault occurred off the employer's premises prior to a union meeting and appellant was not performing any representational function entitling him to official time at the time of the assault.

LEGAL PRECEDENT

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition and rationalized medical opinion establishing that compensable employment factors are causally related to the claimed emotional condition.⁴ There must be

³ OWCP noted that the evidence of record established that there were events that were accepted to have occurred.

⁴ See *Debbie J. Hobbs*, 43 ECAB 135 (1991).

evidence that acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.⁵

Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of FECA.⁶ On the other hand, disability is not covered where it results from an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute a personal injury sustained while in the performance of duty within the meaning of FECA.⁷

Workers' compensation does not cover an emotional reaction to an administrative or personnel action unless the evidence shows error or abuse on the part of the employing establishment.⁸ As a rule, however, a claimant's allegations alone are insufficient to establish a factual basis for an emotional condition claim.⁹ Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.¹⁰ The primary reason for requiring factual evidence of allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by OWCP and the Board.¹¹

The Board has recognized the compensability of verbal altercations or abuse when sufficiently detailed by the claimant and supported by the record. This does not imply, however, that every statement uttered in the workplace will give rise to compensability.¹²

In the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his or her

⁵ See *Ruth C. Borden*, 43 ECAB 146 (1991).

⁶ *Lillian Cutler*, 28 ECAB 125 (1976).

⁷ *Id.*

⁸ *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566, 572-73 (1991).

⁹ See *Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case the Board looked beyond the claimant's allegations of unfair treatment to determine if the evidence corroborated such allegations).

¹⁰ *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (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*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

¹¹ *Paul Trotman-Hall*, 45 ECAB 229 (1993) (concurring opinion of Michael E. Groom, Alternate Member).

¹² See *Joe M. Hagewood*, 56 ECAB 479 (2005). *David C. Lindsey*, 56 ECAB 263 (2005). The mere fact that a supervisor or employee may raise his or her voice during the course of an argument does not warrant a finding of verbal abuse.

master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.¹³

With respect to whether injuries arising in the course of union activities are related to employment, the general rule is that union activities are personal, that attendance at a union meeting, for example, is exclusively for the personal benefit of the employee and devoid of any mutual employer-employee benefit that would bring it within the course of employment. Larson notes, however, that it is being increasingly held that an activity undertaken by an employee in the capacity of union officer may simultaneously serve the interests of the employer.¹⁴

OWCP recognizes that certain representational functions performed by employee representatives of exclusive bargaining units benefit both the employee and the agency. Its stated policy is that employees performing representational functions entitling them to official time are in the performance of duty and entitled to all benefits of FECA if injured in the performance of those functions. Consistent with Larson, activities relating to the internal business of a labor organization, such as soliciting new members or collecting dues, are not included.¹⁵

When an employee claims to have been injured while performing representational functions, an inquiry should be made to the official superior to determine whether the employee had been granted official time or, in emergency cases, would have been granted official time if there had been time to request it. If so, the claimant should be considered to have been in the performance of duty.¹⁶ The Board has also explained that the fact that an employee was not granted official time to perform union duties does not necessarily bar a finding that his union activities were of mutual benefit to the employing establishment and that therefore he was injured in the performance of duty. Coverage under this standard must be determined on a case-by-case basis and appellant must factually establish the exact nature of the union duties he undertook and that his employer derived benefits from his union activities at that time.¹⁷

ANALYSIS

The Board finds that appellant did not meet his burden of proof to establish that he sustained an employment-related emotional condition.

Appellant alleged that he was harassed by Mr. Marinacci from June 15 to 22, 2010 when Mr. Marinacci hung up on him on the telephone and was rude and belligerent towards him after he came to his office to discuss a PDI issue. In its May 13, 2011 decision, OWCP found that

¹³ See *Vincent A. Rosenquist*, 54 ECAB 166, 168 (2002); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

¹⁴ Arthur Larson & Lex K. Larson, *The Law of Workers' Compensation* § 27.03(3) (2006).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.16 (July 1997).

¹⁶ *Id.* at Chapter 2.804.16.e.

¹⁷ See *Bernard Redmond*, 45 ECAB 298 (1994).

these events did not occur in the performance of appellant's duties because he was not performing any representational functions entitling him to official time. The Board finds, however, that contrary to OWCP's findings, that he was performing representational functions during his interactions with Mr. Marinacci prior to June 22, 2010.

In his June 24, 2010 narrative statement, appellant noted that Mr. Marinacci contacted him to conduct a PDI regarding Ms. Gibney. By letter dated April 12, 2011, Mr. Bilz, Vice-President of the Flushing NAPS Branch, reported that he instructed appellant to contact Mr. Marinacci to discuss PDI issues. The Board also notes that the employing establishment stated in a September 16, 2010 letter that appellant's interactions with Mr. Marinacci were in his capacity as a representative of NAPS. With regard to union activities, the Board has adhered to the principle that union activities in general are personal in nature and are not considered to be within the course of employment.¹⁸ However, the Board has found that the involvement of union activities does not preclude the possibility that compensable factors of employment have been alleged. The Board has recognized that in addition to the general rule that employees performing representational functions which entitle them to official time are in the performance of duty, an employee may also be found to be performing representation functions if the function is of mutual benefit to both the employer and employee.¹⁹ When appellant called Mr. Marinacci on June 15, 2010 and went to his office on June 16, 2010 he was on the premises of the employing establishment during the regular workday. His interactions with Mr. Marinacci prior to June 22, 2010 involved scheduling a PDI for Ms. Gibney at the request of Mr. Marinacci himself, as well as Mr. Bilz. The nature of the activity in which appellant was engaged was not a purely personal union matter; rather, he was performing a representational function, in regards to the PDI for Ms. Gibney, with mutual benefit to the union and his employer. A function he was in fact requested to perform by Mr. Marinacci.²⁰ Thus, appellant was engaged in a representational function while on official time and was in the performance of duty with respect to his interactions with Mr. Marinacci prior to June 22, 2010.

Given that appellant has established that he was in a representational function on June 15 and 16, 2010, the question becomes whether he was harassed when Mr. Marinacci hung up the telephone on him, was rude and belligerent towards him and asked him to leave his office. The Board has recognized the compensability of verbal altercations or abuse when sufficiently detailed by the claimant and supported by the record. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under FECA.²¹ The mere fact that an employee may raise his or her voice during the course of a conversation does not warrant a finding of verbal abuse.²² Appellant has not established that his interactions with Mr. Marinacci rose to the level of a verbal altercation which would be covered as a compensable factor of employment.

¹⁸ *Jimmy E. Norred*, 36 ECAB 726 (1985).

¹⁹ *Larry D. Passalacqua*, 32 ECAB 1859, 1862 (1981).

²⁰ *Kelly Y. Simpson*, Docket 04-1809 (issued October 26, 2005).

²¹ *Peter D. Butt*, Docket No. 04-1255 (issued October 13, 2004).

²² *Joe M. Hagewood*, *supra* note 12.

Appellant further alleged that Mr. Marinacci made an implicit threat towards him by stating that they could meet before or after work to discuss any matters and that he would see him at the next NAPS meeting. 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.²³ In the present case, the employing establishment denied that appellant was subjected to harassment and he has not submitted sufficient evidence to establish that he was harassed by Mr. Marinacci in the performance of duty. Statements by Mr. Goldman and Mr. Bilz note that appellant informed them that Mr. Marinacci asked him to meet before or after work to resolve issues. Mr. Goldman and Mr. Bilz were not actually present to hear any statements by Mr. Marinacci and are repeating appellant's factual assertions. Further, Mr. O'Connor stated that at no time during his conversation with appellant did appellant inform him that he was being threatened or harassed, just that Mr. Marinacci was nasty and uncooperative. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.²⁴ Thus, appellant has not established a compensable factor under FECA with respect to the claimed harassment.

The Board notes that appellant has established that he was assaulted in a parking lot by Mr. Marinacci on June 22, 2010 prior to an NAPS meeting. The employing establishment controverted the claim stating that, at the time of the assault, both individuals were off duty, off postal premises and were about to attend an NAPS meeting, of which participation and membership was voluntary and not a requirement of their USPS positions. As attendance at this meeting was voluntary and not a requirement of his employment, the Board finds that appellant was not in the performance of duty at the time of the assault.²⁵

Appellant's attorney argues that appellant was serving in a representative capacity, with benefit accruing to both the agency and employees of the agency and for such reason must be considered in the performance of duty on June 22, 2010. The assault occurred in a Veterans of Foreign Wars parking lot prior to the NAPS meeting. This was not on postal property and the parking lot was not within the control of the employing establishment.²⁶ Moreover, there is no indication that appellant was attending the meeting to act in a representational function other than for his own personal benefit and devoid of any mutual employer-employee benefit.²⁷ If it is appellant's claim that he was attending the meeting in a representational function, he has failed to introduce evidence of the exact nature of the duties he was performing at the time of the meeting.²⁸

²³ See *supra* note 11.

²⁴ *James E. Norris*, 52 ECAB 93 (2000).

²⁵ *Paula G. Johnson*, 53 ECAB 722 (2002).

²⁶ *Michael Hazzard*, Docket 05-1514 (issued November 4, 2005).

²⁷ *Kelly Y. Simpson*, *supra* note 20.

²⁸ *Dwight D. Henderson*, 46 ECAB 441 (1995).

While appellant has established that he was engaged in a representational function prior to June 22, 2010, the Board finds that he has failed to present the necessary evidence regarding the nature of his representational duties for the June 22, 2010 NAPS meeting to establish that he was in the course of employment when his injury occurred.²⁹

While Dr. Conciatori's August 15, 2010 psychiatric evaluation establishes a diagnosis of post-traumatic stress disorder, appellant has failed to submit sufficient probative evidence to establish a compensable factor of employment. Thus, appellant failed to establish that he sustained an emotional condition in the performance of duty.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emotional condition causally related to factors of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated May 13, 2011 is affirmed, as modified.

Issued: September 13, 2012
Washington, DC

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

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

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

²⁹ *Supra* note 17.