United States Department of Labor
Employees' Compensation Appeals Board

R.M., Appellant	)	
and	)	**Docket No. 22-0472**
	)	**Issued: October 16, 2023**
DEPARTMENT OF HOMELAND SECURITY, FEDERAL AIR MARSHAL SERVICE, Chantilly, VA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On February 10, 2022 appellant filed a timely appeal from a February 9, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish an emotional condition in the performance of duty, as alleged.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] The facts and circumstances as set forth in the Board's prior decision is incorporated herein by reference. The relevant facts are as follows.

On December 17, 2017 appellant, then a 47-year-old federal air marshal (FAM), filed an occupational disease claim (Form CA-2) alleging that, on October 6, 2017, the employing establishment involuntarily placed him on sick leave for 280 hours, and directed him to seek a psychiatric examination which revealed that he had an adjustment disorder caused by occupational stressors. He noted that he first became aware of his condition and its relationship to his federal employment on November 22, 2017. On the reverse side of the claim form, the employing establishment noted that appellant was last exposed to the conditions alleged to have caused his condition on October 7, 2017, and he returned to work on December 1, 2017.[3]

In a development letter dated December 27, 2017, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim, and attached a questionnaire for his completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor, and an explanation of appellant's work activities. It afforded both parties 30 days to submit the necessary evidence.

The employing establishment did not respond to OWCP's December 27, 2017 request for information.

In a January 7, 2018 letter, appellant responded to OWCP's development letter. He contended that the employing establishment retaliated against him by failing to submit documentation and medical evidence supporting his claim. Appellant further contended that on October 6, 2017 the employing establishment ordered him not to enter its facilities, and forced him to exhaust 280 hours of his sick leave until he was able to seek and personally pay a nonagency psychiatrist to examine his mental health. He asserted that the employing establishment also revoked his agency-issued firearm in public by sending two uniformed FAMs who wore body armor labeled "POLICE" and exposed firearms in exterior holsters in black Suburban vehicles equipped with red and blue emergency lights to a grocery store parking lot in his town. Appellant further asserted that the employing establishment immediately placed him back on full duties after it received a medical report by Dr. Kiran Iqbal, a Board-certified psychiatrist, who concluded that its directive was retaliatory. Additionally, he asserted that a current FAM told him that years ago the employing establishment had directed her onto paid leave and to undergo a paid psychiatric examination as a result of "four-hand gossip." She believed that the employing establishment was retaliating against him. Appellant had a 15-year ongoing whistleblower retaliation case against the employing establishment, and he prevailed against its appeal to the U.S. Merit Systems Protection Board (MSPB), U.S. Court of Appeals, and the U.S. Supreme Court. He noted that numerous mainstream media outlets had reported the Supreme Court's affirmation of his case, and

[2] Docket No. 19-1520 (issued September 15, 2021).

[3] On January 1, 2018 appellant filed a claim for compensation (Form CA-7) for disability from work from October 7 to November 30, 2017.

his 2003 protected disclosures which had alarmed congressional leaders. Appellant contended that since the employing establishment was forced to retroactively reinstate him in 2015, it used several methods to psychologically manipulate him. He stated that the supervisor filed a complaint accusing him of being a homicidal "racist." It was determined that the complaint was unfounded, and the supervisor had committed perjury in an affidavit. Even though appellant had no firearms, medical, or top-secret clearance restrictions, the employing establishment failed to give him substantive duties for six months. During four of those months, he sat in an empty and windowless room and behind a printer table with no partition, telephone, or drawers. Appellant noted that the employing establishment's criminal investigators were currently probing appellant for his 2010 disclosures regarding a FAM who was terminated, reinstated, and then again faced a second termination until she began having sexual relations with the married deciding official who had removed him from employment in 2006. He indicated that he was currently in his third involuntary redirected assignment after a supervisor complained that it was impossible for him to remain covert during flight missions. Appellant recounted that on May 24, 2016 a supervisor filed a complaint with an Equal Employment Opportunity Commission (EEOC) investigator indicating that his lack of substantive responsibilities was having a negative effect on him and other FAMs who observed him sitting around all day with nothing significant to do since he had been forced into an involuntary redirected assignment. One of appellant's rating supervisors who attempted to shield him from retaliation was demoted to a flying FAM. Appellant noted that his lateral and promotional applications had been rejected despite the testimony of his deciding official that he had an unblemished record and was consistently an exemplary officer, and his well-documented performance record. He contended that his fellow officers avoided him for fear of association. A previous rating supervisor warned him that the employing establishment had hoped that he would explode. Appellant recently reported substantive dangers to Terminal A in Ronald Reagan National Airport and commercial passenger airline cockpits and their pilots during flight, which had been investigated by the U.S. Office of Special Counsel (OSC) since 2016.

Appellant submitted a May 24, 2016 e-mail and a nondisciplinary letter of counseling that was issued to a supervisory FAM for failing to follow policy. The supervisor had sent an inappropriate video to appellant who showed it to two employees.

OWCP received an August 12, 2016 letter in which U.S. Congressional representatives requested that the administrator of the employing establishment provide documents and communications related to its retaliation against appellant for being a whistleblower and denial of his promotion. It was noted that the MSPB found that the employing establishment had retaliated against appellant when he was removed from employment in 2006 and required him to be retroactively restored, effective April 11, 2006. In June 2015, appellant was reinstated in his former position. He had not received an annual in-position-increase since 2002 despite his supervisor's testimony that his performance was exemplary. Since February 26, 2016, appellant had been assigned to an empty room with no work duties while he was previously assigned to covert flying missions in the Middle East.

E-mails dated April 21, June 14 and 24, 2016 discussed appellant's reassignment on April 26, 2016, his lack of work duties, and the scheduling of training, and the denial of his April 13, 2016 request for reassignment following his completion of a detail assignment from February 26 to April 13, 2016. Additional e-mails either had illegible dates or were dated October 6 through December 7, 2017, and addressed appellant's surrender of his firearm and other

equipment on October 6, 2017, medical treatment and pay status, restoration of his sick leave, and request to be placed on administrative leave.

Appellant submitted a November 22, 2017 e-mail from Dr. Kathleen Christian, an employing establishment clinical psychologist, who had recently treated appellant. Dr. Christian announced her own retirement, noting that she was denied the ability to leverage her experience for the good of FAMs, and she had realized that she was part of a system that put their emotional well-being at risk.

In a form report dated November 28, 2017, Dr. Iqbal, Board-certified in child and adolescent psychiatry, indicated that appellant had occupational stress with adjustment disorder and anxiety. She found that appellant was psychologically suitable to perform Federal Air Marshal Duties.

OWCP received additional medical evidence.

By decision dated June 13, 2018, OWCP denied appellant's claim for an employment-related emotional condition, finding that he had not substantiated a compensable factor of employment. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

Appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on November 28, 2018. During the hearing, he testified that the employing establishment retaliated against him, and in June 2018 it had issued a second proposed notice of termination. Appellant further testified that an investigation of his retaliation complaint had been launched and his disclosure that he initially filed in 2003 regarding problematic cockpit security issues. He noted that this investigation resulted in his July 2003 termination. Appellant also testified that the employing establishment retaliated against him for making protected disclosures as a whistleblower against a special counsel who was arrested in 2006 by the Federal Bureau of Investigations for transferring his lesbian, gay, bisexual, and transgender employees.

By decision dated February 12, 2019, an OWCP hearing representative affirmed the June 13, 2018 decision, finding that the evidence of record was insufficient to establish a compensable employment factor.

On March 13, 2019 appellant requested reconsideration. In support of the request, he submitted a December 18, 2018 letter in which the Office of Special Counsel (OSC) advised appellant that it had transmitted his allegations of gross mismanagement and a substantial and specific danger to public health and safety by employees at the employing establishment to the Secretary of the Department of Homeland Security for a report pursuant to 5 U.S.C. § 1213(c).

OWCP, by decision dated June 7, 2019, denied modification of the February 12, 2019 decision.

On July 9, 2019 appellant appealed to the Board. By decision dated September 15, 2021,[4] the Board set aside the June 7, 2019 decision and remanded the case for further development, instructing OWCP to again request a detailed statement and relevant evidence and/or argument from the employing establishment regarding appellant's allegations.

Subsequently, OWCP received e-mails dated January 25, February 16, May 24, October 11, 2016, September 26, October 6, 9, 10, 11, 18, 19, 20, 25, 2017, April 25, 2018, a letter dated April 15, 2021, and memoranda dated March 13 and July 9, 2019 reiterating appellant's prior allegations.

The October 6, 2017 e-mail from S.K. documented that appellant came to his office that morning to be issued a cease and desist order in reference to an open investigation. Appellant appeared visibly upset and stressed while signing paperwork, and appellant asked for sick leave that day, which was granted.

OWCP also received additional medical evidence.

In an October 28, 2021 development letter, OWCP again requested that the employing establishment provide comments from a knowledgeable supervisor regarding appellant's allegations as instructed by the Board's September 15, 2021 decision. In a separate development letter of even date, it requested that appellant clarify recent evidence submitted, and advised him of the type of medical evidence necessary to establish his emotional condition claim. OWCP afforded both parties 30 days to respond.

In response to OWCP's development letter, appellant submitted a November 23, 2021 letter. He contended that during an investigative interview by the employing establishment, S.M., a supervisory FAM, related his awareness of appellant's emotional condition and need for a fitness-for-duty examination, but during his testimony before the MSPB on June 2, 2021 S.M. tried to conceal his observation of a panic attack experienced by appellant on October 4, 2017. Appellant further alleged that the employing establishment retaliated against him due to his June 9, 2015 nationally televised testimony before Congress regarding flight attendants being directed to use their bodies and drink-carts to guard routinely unlocked commercial passenger airliner cockpits. Following his testimony, he claimed that the employing establishment rejected his numerous requests for ground-based assignments because he wished to avoid flying undercover protection missions due to his national exposure. Appellant noted that he was directed to attempt to fly covertly from November 2015 to February 2016. On January 29, 2016 his first-line supervisor, T.S., warned him that terrorist organizations were trying to identify FAMs on the internet to place them on "KILL-LISTS." Appellant memorialized the warning and forwarded it to OSC who directed the employing establishment to place appellant on ground-based assignment as soon as possible. He contended that from February 29 through April 15, 2016 he was involuntarily assigned to the employing establishment's Transportation Security Operations Center (TSOC) Freedom Center. R.T. was appellant's supervisor at TSOC, and during an investigative interview she related that he had an emotional condition. On September 29, 2019 M.H., appellant's supervisor, told an MSPB judge that appellant was a huge threat to the employing establishment because he wanted to take it down. Appellant contended that his

[4] *Supra* note 2.

supervisor, J.M., reported to him that a lot of FAMs disliked him, and that J.M. affirmed this observation to employing establishment investigators.

Appellant also submitted exhibits A through I, consisting of communication between appellant and the employing establishment that discussed his request for a security and threat assessment due to being on a "KILL LIST," a video incident, his reinstatement to employment following his 2006 removal from work and successful whistleblower retaliation case against the employing establishment, and medical treatment.

In letters dated November 27 and December 21, 2021, appellant contended that he was fired on March 21, 2019 by C.P., a regional supervisory FAM-in-charge, despite an April 12, 2019 settlement agreement between the employing establishment and the OSC to reinstate his employment as a FAM. He noted that he was fired for posting emojis, while off duty, on a Facebook secret group page using his personal computer. The employing establishment investigated the incident and determined that the emojis were sexual in nature, and, thus, inappropriate. Appellant contended that since his reinstatement in 2015, there were at least 32 performance and misconduct allegations made against him by the employing establishment. He submitted e-mails, including an e-mail dated April 12, 2019, which listed the terms of the reinstatement agreement between the employing establishment and OSC.

In a January 15, 2022 letter, M.M., an acting branch manager, responded to OWCP's October 28, 2021 development letter. He related that in April 2006, appellant was removed for misconduct, but after a decade of litigation, appellant was reinstated in May 2015 based on a U.S. Supreme Court decision. M.M. noted that on August 23, 2015, appellant was transferred to the Washington field office, as requested. In February 2016 appellant's request to stop performing the primary duty of flying missions because he had become too famous due to his U.S. Supreme Court case, subsequent media coverage, and appearance before a congressional committee, was granted and he accepted a 45-day detail to the emergency preparedness section (EPS). On March 16, 2016 appellant showed his EPS supervisor a video depicting a person inside a moving subway car who forced the door open and leapt onto a platform before being consumed by fire. M.M. noted that appellant thought the video was funny because a passenger was recently killed by fire and smoke on a local subway train. However, M.M. found the video terrifying, disturbing, and disgusting. Appellant responded that he grew up color blind and he was aware of rumors that the supervisor had exchanged sexual favors with a training officer years ago to have her records altered. He also sent the video to a dozen current and former federal law enforcement officials, six of whom were African American. Upon completion of an investigation of this incident in June 2016, no disciplinary action was taken against appellant. Upon completion of his 45-day detail in April 2016, appellant was assigned to the visible intermodal prevention and response (VIPR) team. In July 2016 he requested to deploy on VIPR missions. A position was created for him, and he was selected for the position over other FAMs who were scheduled to rotate into VIPR. Multiple FAMs complained that appellant disrupted operations; disparaged the employing establishment, other team members, and nonemploying establishment stakeholders; displayed a negative attitude; spent long periods of time on his personal cell phone; failed to engage with other FAMs on missions; repeatedly made derogatory sexual comments to female FAMs; related that management could not do anything to him due to his whistleblower status; and related that he was going to bring down the employing establishment. As a result of appellant's behavior, team members reported that they were frightened to be alone with him, and feared he would do

something detrimental to the team. On an almost weekly basis, appellant's supervisor advised him to cease his behavior. M.M. indicated that appellant admitted that he posted disparaging comments and emojis about employees in July, August, and September 2017 on a Facebook group page called "Flying Pigs." An investigation of these incidents revealed additional misconduct by appellant, which included a repeated pattern of making misogynistic statements about female FAMs, promoting salacious rumors about FAMs and supervisory managers, and accessing pornography on his agency-issued telephone. Appellant developed a ruse to gain unescorted access to the building where an investigative interview related to his Facebook posts was being conducted and he took pictures of a visitor's log because he saw the name of an employee who he believed complained about his Facebook posts. Despite signing a nondisclosure agreement following his investigative interview, he contacted potential witnesses in the ongoing investigation and posted false warnings and intimidating and threatening messages on Facebook and to personal e-mail addresses of FAMs. As a result, on October 6, 2017 appellant was issued a cease and desist order. In response, he alleged that he had a stress-related condition for which he sought medical treatment on multiple occasions and took anti-anxiety and anti-depression medications. In November 2017, appellant submitted an employing establishment medical evaluation form completed by a psychiatrist regarding his work capacity and it was determined that he could return to full duty. On June 8, 2018 the employing establishment issued a notice of proposed removal for inappropriate comments. On March 21, 2019 the employing establishment issued a notice of decision removing appellant from employment. The employing establishment noted that appellant had pending claims involving a complaint filed with the EEOC and MSPB.

M.M. denied appellant's allegation that the employing establishment retaliated against him for being a whistleblower and asserted that all of the above-noted actions taken against him were for nonretaliatory reasons. He further denied that appellant was incorrectly placed on sick leave from October 7 through November 30, 2017 until he was cleared to return to work by a psychiatrist, noting that appellant suffered panic attacks for which he made numerous hospital visits and took medications. Additionally, M.M. denied that appellant's agency-issued firearm was incorrectly revoked pending medical clearance for his return to work. He noted that following the issuance of the October 2016 cease and desist order, the employing establishment medical unit found that appellant was not cleared for duty status and recommended that management secure his firearm. M.M. noted that the firearm was reissued to him when he was medically cleared to return to duty. He also denied that the employing establishment failed to submit paperwork for appellant's Form CA-2 claim, noting that his claim was submitted on December 22, 2017, and his supporting medical documentation was submitted on January 10, 2018. Additionally, M.M. denied making numerous attempts to psychologically manipulate appellant in 2016 following his reinstatement in 2015. Contrary to appellant's allegation that he was accused of being a homicidal "racist" by a supervisor regarding the video incident, M.M. referenced the supervisor's above-noted reaction. He also referenced an October 10, 2021 EEOC decision, which indicated that even if the supervisor made the comment, it did not constitute harassment or amount to an adverse employment action. Further, contrary to appellant's allegation that he was not given substantive duties for six months, M.M. referenced appellant's above-noted approved requests to be reassigned commencing February 2016. He also denied that appellant was investigated for 2010 disclosures regarding a FAM who was terminated, assigned for a third time to an involuntary redirected assignment, accused by a supervisor of being a bad example to other FAMs, and had a prior supportive supervisor demoted. M.M. explained that appellant was returned to full-duty work based on a psychiatrist's report and not retaliation. He indicated that appellant's allegation that a

current FAM was directed onto sick leave status and to undergo a psychiatric examination was vague because he did not identify the employee or the specific circumstances of her case. M.M. submitted evidence in support of his letter.

By *de novo* decision dated February 9, 2022, OWCP again denied appellant's claim, finding that he had not established a compensable factor of employment and, therefore, had not sustained an emotional condition in the performance of duty.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim,[6] including that he or she sustained an injury in the performance of duty, and that any specific condition or disability from work for which he or she claims compensation is causally related to that employment injury.[7] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[8]

To establish an emotional condition causally related to factors of a claimant's federal employment, he or she must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to the condition; (2) rationalized medical evidence establishing an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the emotional condition is causally related to the identified compensable employment factors.[9]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to a claimant's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the purview of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable.[10] However, disability is not compensable when it results from factors such as an

[5] *Supra* note 1.

[6] *L.N.*, Docket No. 22-0126 (issued June 15, 2023); *S.S.*, Docket No. 19-1021 (issued April 21, 2021); *O.G.*, Docket No. 18-0359 (issued August 7, 2019); *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[7] *L.N., id.; S.S., id.; G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[8] 20 C.F.R. § 10.115; *R.S.*, Docket No. 20-1307 (issued June 29, 2012); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Michael E. Smith*, 50 ECAB 313 (1999).

[9] *See S.K.*, Docket No. 18-1648 (issued March 14, 2019); *C.M.*, Docket No. 17-1076 (issued November 14, 2018); *Debbie J. Hobbs*, 43 ECAB 135 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

[10] *A.C.*, Docket No. 18-0507 (issued November 26, 2018); *Pamela D. Casey*, 57 ECAB 260, 263 (2005); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

employee's fear of a reduction in force, or frustration from not being permitted to work in a particular environment, or to hold a particular position.[11]

An employee's emotional reaction to administrative or personnel matters generally falls outside of FECA's scope.[12] Although related to the employment, administrative and personnel matters are functions of the employer rather than the regular or specially assigned duties of the employee.[13] However, to the extent the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[14] 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.[15]

For harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact, occur.[16] Mere perceptions of harassment or discrimination are not compensable under FECA.[17] A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.[18] Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[19]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish an emotional condition in the performance of duty, as alleged.

Appellant's primary allegation when he filed his claim was that he had been improperly placed on involuntary sick leave on October 6, 2017. During the development of his claim appellant made numerous other allegations regarding the handling of his workers' compensation

[11] *Cutler, id.*

[12] *G.R., D*ocket No. 18-0893 (issued November 21, 2018); *Andrew J. Sheppard*, 53 ECAB 170, 171 (2001); *Matilda R. Wyatt,* 52 ECAB 421, 423 (2001); *Thomas D. McEuen,* 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[13] *David C. Lindsey, Jr.*, 56 ECAB 263, 268 (2005); *McEuen, id.*

[14] *Id.*

[15] *A.O.,* Docket No. 19-1612 (issued April 8, 2021); *D.I.*, Docket No. 19-0534 (issued November 7, 2019); *T.G.*, Docket No. 19-0071 (issued May 28, 2019).

[16] *O.G.*, Docket No. 18-0350 (issued August 7, 2019); *K.W.*, 59 ECAB 271 (2007).

[17] *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *M.D.*, 59 ECAB 211 (2007); *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[18] *B.T.*, Docket No. 20-1627 (issued January 11, 2023); *J.F.*, 59 ECAB 331 (2008); *Robert Breeden*, 57 ECAB 622 (2006).

[19] *T.Y.*, Docket No. 19-0654 (issued November 5, 2019); *G.S.*, Docket No. 09-0764 (issued December 18, 2009).

claim,[20] request for medical documentation,[21] disciplinary matters and disputes regarding leave,[22] work assignments,[23] filing of grievances and EEO complaints,[24] workplace investigations,[25] denial of promotions,[26] request for a security and threat assessment, and termination of his federal service[27] relate to administrative or personnel management actions. Administrative and personnel matters, although generally related to employment, are administrative functions of the employer rather than the regular or specially-assigned work duties of the employee. For an administrative or personnel matter to be considered a compensable factor of employment, the evidence must establish error or abuse on the part of the employer.[28]

Regarding appellant's primary allegation that he was forced to take involuntary sick leave as of October 6, 2017, the employing establishment has explained that appellant became visibly upset during a meeting that day and that appellant requested to take sick leave that day. Employing establishment official M.M. has also noted that appellant was placed on sick leave until he was cleared to return to work by a psychiatrist because appellant advised him that he experienced panic attacks for which he sought medical treatment on numerous occasions and took medications. Appellant has not submitted evidence of error or abuse by the employing establishment in this administrative matter.[29]

While appellant submitted letters and e-mails that, concerned some of the additional alleged administrative matters, this evidence did not demonstrate that employing management officials committed error or abuse. M.M. noted that there was no delay in filing appellant's occupational disease claim as it was submitted on December 22, 2017, and his supportive medical documentation was submitted on January 10, 2018. Additionally, the Board notes that the record does not contain corroborating evidence finding that the employing establishment committed error

[20] *F.R.*, Docket No. 20-0793 (issued December 13, 2022); *K.W.*, Docket No. 20-0832 (issued June 21, 2022); *M.B.*, Docket No. 20-1407 (issued May 25, 2022); *B.Y.*, Docket No. 17-1822 (issued January 18, 2019).

[21] *B.T., supra* note 18; *D.W.*, Docket No. 19-0449 (issued September 24, 2019); *W.M.*, Docket No. 15-1080 (issued May 11, 2017*); James P. Guinan*, 51 ECAB 604, 607 (2000); *John Polito*, 50 ECAB 347, 349 (1999).

[22] *M.C.*, Docket No. 18-0585 (issued February 13, 2019); *C.T.*, Docket No. 08-2160 (issued May 7, 2009).

[23] *F.R., supra* note 20; *M.B., supra* note 20; *R.D.*, Docket No. 19-0877 (issued September 8, 2020); *S.B.*, Docket No. 18-1113 (issued February 21, 2019); *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

[24] *B.T., supra* note 18; *M.H.*, Docket No. 21-1297 (issued December 20, 2022); *B.O.*, Docket No. 17-1986 (issued January 18, 2019); *James E. Norris*, 52 ECAB 93 (2000).

[25] *F.R., supra* note 20; *M.B., supra* note 20; *J.T.*, Docket No. 20-0390 (issued April 2, 2021).

[26] *C.J.*, Docket No. 22-0600 (issued November 10, 2022); *D.G.*, Docket No. 17-0514 (issued May 4, 2018); *J.M.*, Docket No. 16-0312 (issued June 22, 2016); *Martha L. Watson*, 46 ECAB 407, 418 (1995).

[27] *B.T., supra* note 18; *P.M.*, Docket No. 14-0188 (issued April 21, 2014); *C.T.*, Docket No. 09-1557 (issued August 12, 2010).

[28] *Thomas D. McEuen, supra* note 12.

[29] *Id*.

or abuse.[30] MM. also noted that it issued a notice of proposed removal to appellant on June 8, 2018 for inappropriate comments, and issued a termination notice of his employment on March 21, 2019. He explained that appellant admitted to posting disparaging comments and emojis about employees on a Facebook page called "Flying Pigs," and an investigation of this incident revealed that appellant repeatedly made misogynistic statements about female FAMs, promoted salacious rumors about FAMs and supervisory managers, and accessed pornography on his agency-issued cell phone. Additionally, M.M. noted that appellant's team members complained about his behavior, which included making disparaging comments about his team members and nonemploying establishment stakeholders, and derogatory sexual comments to female FAMs, spending long periods of time on his personal cell phone, failing to engage with other FAMs on missions, and threatening to bring down the employing establishment. He related that appellant was counseled by his supervisor regarding his behavior on a weekly basis. M.M. noted that no disciplinary action was taken against appellant following an investigation of the March 16, 2016 video incident. He reiterated that appellant's transfer requests were granted following his reinstatement to work in May 2015 and again in February 2016. Additionally, as noted above, M.M. related that although appellant was relieved of his agency-issued firearm following the issuance of the October 6, 2017 cease and desist order, the firearm was reissued to him following his medical clearance to return to work. Based on M.M.'s statements, the Board finds that appellant has not substantiated error or abuse committed by the employing establishment in the above-noted matters and, therefore, he has not established a compensable employment factor.

Appellant has also attributed his emotional condition in part to *Cutler*[31] factors. In this regard, he alleged that even though he had no firearms, medical or top-secret clearance restrictions he was not assigned substantive duties for six months. Appellant also alleged that he had not received the necessary training for a reassigned position. The Board has held that an employee's emotional reaction to being made to perform duties without adequate training is compensable.[32] However, appellant submitted no evidence supporting his allegations that he neither received substantive duties for six months, nor received training for his reassigned position. M.M. explained that appellant was reassigned on several occasions commencing February 2016, as he requested, and performed his assigned duties. He further explained that appellant's agency-issued firearm was revoked from him following his reaction to the issuance of the October 2016 cease and desist order and subsequent recommendation from the employing establishment medical unit that evaluated appellant for an emotional condition. M.M. noted, however, that the firearm was later reissued to appellant when he was medically cleared to return to duty. Without evidence substantiating that appellant was not provided with substantive work duties or the requisite training

[30] *A.F.*, Docket No. 20-0525 (issued September 14, 2020); *R.B.*, Docket No. 19-1256 (issued July 28, 2020); *J.E.*, Docket No. 17-1799 (issued March 7, 2018).

[31] *Supra* note 10.

[32] *P.B.*, Docket No. 19-1673 (issued December 1, 2021); *D.T.*, Docket No. 19-1270 (issued February 4, 2020); *S.S.*, Docket No. 18-1519 (issued July 17, 2019); *C.T.*, Docket No. 09-1557 (issued August 12, 2010); *Donna J. Dibernardo*, 47 ECAB 700 (1996).

to perform his position, appellant has failed to meet his burden of proof to establish a compensable factor of employment under *Cutler*.

Appellant also alleged that he was harassed and subjected to reprisals for being a whistleblower by the employing establishment and prevailing against its appeal to the MSPB, U.S. Court of Appeals, and the U.S. Supreme Court. The issue of whether a claimant has established harassment or retaliation under FECA is whether the claimant has submitted sufficient evidence to establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.[33] For harassment to give rise to a compensable disability under FECA, there must be evidence that harassment did, in fact, occur.[34] Although appellant alleged that management engaged in actions, which he believed constituted harassment and reprisals, he provided no corroborating evidence to establish his allegations.[35] M.M. maintained that the actions taken against appellant were based on nonretaliatory reasons and not to psychologically manipulate him. He noted that an October 10, 2021 EEOC decision found that even if a supervisor called appellant a homicidal "racist" following the March 16, 2016 video incident, the statement did not constitute harassment or an adverse employment action. Based on the evidence of record, the Board finds that appellant has not established, with corroborating evidence, that he was harassed and subjected to reprisals by the employing establishment.

As the Board finds that appellant has not met his burden of proof to establish a compensable employment factor, it is not necessary to consider the medical evidence of record.[36]

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 has not met his burden of proof to establish an emotional condition in the performance of duty, as alleged.

[33] *D.G.,* Docket No. 22-0654 (issued May 11, 2023); *L.Y.*, Docket No. 20-1108 (issued November 24, 2021); *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[34] *Id*.

[35] *See B.T., supra* note 18; *William P. George*, 43 ECAB 1159, 1167 (1992) (claimed employment incidents not established where appellant did not submit evidence substantiating that such incidents actually occurred).

[36] *See B.T., id*.; *P.B.*, Docket No. 19-1673 (issued December 1, 2021); *B.O., supra* note 24 (finding that it is not necessary to consider the medical evidence of record if the claimant has not established any compensable employment factors). *See also Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

ORDER

IT IS HEREBY ORDERED THAT the February 9, 2022 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 16, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board