



retaliation for prior workers' compensation and Equal Employment Opportunity (EEO) claims.<sup>1</sup> The record reflects that appellant was off work from June 19, 2001 and returned to full-time work on July 1, 2002.

Appellant alleged that, after he returned to work on June 21, 2002, the employing establishment's management treated him adversely which he believed was inconsistent with past practices with other employees and which he alleged was due to his EEO and Office claims. Appellant stated that he was questioned on September 16, 2002 with regard to street observations and was given a letter of discipline as a result of this interview a month later. He believed that the reason for this discipline was because he had disputed the employing establishment's attempt not to allow him to return to work after he called in sick on October 15, 2002 for depression and anxiety. Appellant stated that Postmaster Larry J. Jacobs had wanted a physician's statement stating that he was not a hazard to himself or others before he would be allowed to return to work. He provided such a statement, but the employing establishment placed him in an emergency off-duty status the same day his physician advised that he could return to work. Appellant noted that the union initiated an investigation into the matter and alleged that he should have been sent for a fitness-for-duty examination as opposed to being placed in an emergency off-duty status. Appellant stated that he was issued a notice of removal on November 27, 2002 for the above occurrence.

In support of his claim, appellant submitted an October 24, 2002 report from Dr. Polly Lybrook, a Board-certified psychiatrist, who noted that he had been under her care for major depressive disorder since January 18, 2000 and was released to full-duty work on July 1, 2002. She noted that appellant missed two days of work in July 2002 which appeared to be precipitated by a denial of vacation time during the holiday period. She stated that appellant's primary stressor was the work environment and that he was reporting several episodes of being monitored, followed and under scrutiny which would be atypical for someone with 33 years of service. She opined that ongoing excessive micromanagement would likely exacerbate his stress and psychiatric symptoms.

The employing establishment controverted appellant's claim. It indicated that appellant was claiming mental stress stemming from the October 18, 2002 incident which led to a removal notice, which was issued in response to threats appellant made to another employee and was in keeping with the zero tolerance policy on violence in the workplace. The employing establishment stated that, on November 20, 2002, appellant received a notice of removal for engaging in threatening behavior and physically striking two employees, which was grieved to a 14-day suspension. It noted that appellant's denial of vacation time during the holiday period in July 2002 was not a question of being singled out; rather, during this time, appellant only had 8 hours of annual leave and had already been advanced 104 hours.

Documentation submitted included the November 20, 2002 notice of removal, appellant's responses to an investigative interview pertaining to his placement in an off-duty status after the

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<sup>1</sup> Appellant has a prior claim, A09-2014256, for an emotional condition for work factors which occurred in 2000 and 2001. By decision dated January 14, 2005, the Board affirmed the denial of benefits finding that appellant's allegations of harassment were not supported by the record and that the administrative actions claimed did not constitute any error or abuse. *Stephen F. Burns*, Docket No. 03-1133 (issued January 14, 2005).

October 18, 2002 incident, the employing establishment's policy on medical certification, time and attendance records; and statements from Postmaster Larry Jacobs and supervisors Glenn A. Teare, Jr. Christopher Jay Stillions and Dennis R. Lawyer<sup>2</sup> pertaining to the October 18, 2002 incident. Appellant called in sick on October 15, 2002 stating that he had anxiety and depression. On October 17, 2002 appellant had a telephone conversation with Postmaster Jacobs concerning his return to duty and was advised that, pursuant to employing establishment policy, medical documentation was required before he could return to duty. Mr. Jacobs stated that appellant became abusive during this conversation. On October 18, 2002 appellant reported for duty, without a medical certification. Mr. Jacobs and Mr. Teare met with appellant and a union steward, William Friel, to discuss his status. Appellant was argumentative and agitated during the meeting. At the conclusion of the meeting, Mr. Jacobs asked appellant to leave the premises and, when he refused to leave, Mr. Jacobs gave a direct order to leave the premises. Before appellant left the premises, he engaged in a number of gestures and physical actions such as raising his middle finger, grabbing the seat of his pants and shaking his buttocks, and elbowed Mr. Teare and bumped Mr. Lawyer with a lunch cooler while walking past them. Both Mr. Teare and Mr. Lawyer filed police reports over the incident. As appellant drove away, he circled the premises and returned, glared at the supervisors and then left.

By decision dated June 12, 2003, the Office denied appellant's claim on the grounds that he failed to establish any compensable factors of employment.<sup>3</sup>

### **LEGAL PRECEDENT**

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 her regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.<sup>4</sup> 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.<sup>5</sup>

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.<sup>6</sup> However, the Board has

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<sup>2</sup> Mr. Lawyer's work relationship is unknown.

<sup>3</sup> Appellant filed an appeal to the Board and requested an oral argument which was scheduled for March 17, 2005. Appellant did not appear for the oral argument.

<sup>4</sup> 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>5</sup> *Gregorio E. Conde*, 52 ECAB 410 (2001).

<sup>6</sup> See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon*, 42 ECAB 556 (1991).

held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative or personnel matter, coverage will be afforded.<sup>7</sup> In determining whether the employing establishment erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup>

### ANALYSIS

Appellant alleged that the employing establishment retaliated against him for his prior workers compensation claims and EEO claims and treated him differently from other employees. He noted a September 16, 2002 incident with regard to street observation; the events which transpired after he called in sick on October 15, 2002 which resulted in a November 20, 2002 notice of removal; and the denial of his request for annual leave in July 2002. The Office denied the claim finding that appellant did not establish any compensable employment factors. The Board must, therefore, initially review whether these alleged incidents and conditions of employment are covered employment factors under the Act.

The majority of appellant's allegations concern administrative or personnel matters, unrelated to his regular or specially assigned work duties. Such matters are generally related to the employment, but are administrative functions of the employer, not duties of the employee. Coverage will only be afforded regarding such matters only if error or abuse by the employing establishment is established.<sup>11</sup> Regarding appellant's allegations that he was required to provide medical certification before he could return to work and that he was unfairly denied leave during the July 2002 holiday, the Board has held that the handling of leave requests are administrative functions of the employer, not duties of the employee.<sup>12</sup> The record shows that medical

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<sup>7</sup> See *William H. Fortner*, 49 ECAB 324 (1998).

<sup>8</sup> *Ruth S. Johnson*, 46 ECAB 237 (1994).

<sup>9</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

<sup>10</sup> *Id.*

<sup>11</sup> *Janet I. Jones*, 47 ECAB 345 (1996).

<sup>12</sup> *James P. Guinan*, 51 ECAB 604, 607 (2000); *John Polito*, 50 ECAB 347, 349 (1999).

certification was required by employing establishment policies. The record further shows that, at the time appellant's request for annual leave was denied, appellant had already been advanced 104 hours of annual leave. Appellant has produced no contrary evidence to show that the employing establishment acted abusively or unreasonably in these administrative matters pertaining to leave.

Appellant alleged that he was improperly placed in an emergency off-duty status and issued the November 20, 2002 notice of removal, which was reduced to a 14-day suspension. The Board has held that reactions to disciplinary matters such as letters of warning and inquiries regarding conduct pertain to actions taken in an administrative capacity and are not compensable unless it is established that the employing establishment erred or acted abusively in such capacity.<sup>13</sup> The evidence establishes that appellant reported to duty without medical certification on October 18, 2002 after he was advised by Postmaster Jacobs that such documentation was required. The record reflects that appellant returned to work, became argumentative during the an October 18, 2002 meeting and, after Postmaster Jacobs issued a direct order to leave the premises, he engaged in a number of gestures and physical actions which Mr. Teare and Mr. Lawyer believed were deliberate and threatening. Appellant submitted no evidence to refute the statements regarding his conduct on October 18, 2002 which prompted the November 20, 2002 notice of removal. Appellant's responses to the investigative interview do not refute the finding that he engaged in threatening behavior and physically struck two employees. Although the employing establishment indicated that the notice of removal was subsequently reduced to a 14-day suspension; the mere fact that personnel actions were later modified or reduced, does not, in and of itself, establish error or abuse.<sup>14</sup> Appellant has not established that the employing establishment erred or acted abusively in placing him on emergency off-duty status, in issuing the November 20, 2002 notice of removal, or in conducting an investigation into the October 18, 2002 incident.

Regarding appellant's allegations that the employing establishment questioned him with regard to street observations on September 16, 2002 and subsequently issued a letter of discipline, the monitoring of activities at work are administrative functions of the employer and not duties of the employee and are only considered compensable if the employing establishment acts unreasonably or abusively.<sup>15</sup> Appellant has submitted insufficient evidence to support that this incident occurred to establish that the employing establishment erred or acted abusively in this administrative function. Although appellant expressed his belief that the letter of discipline was issued because he disputed the employing establishment's attempt to not allow him to return to work after he called in sick on October 15, 2002, there is no evidence to support his allegation.

Appellant alleged harassment and retaliation by the employing establishment due to his prior workers' compensation claims and EEO involvement. The Board has held that actions of an employee's supervisor which the employee characterizes as harassment or discrimination may constitute factors of employment giving rise to coverage under the Act. However, for

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<sup>13</sup> *Sherry L. McFall*, 51 ECAB 436, 440 (2000).

<sup>14</sup> *See Garry M. Carlo*, 47 ECAB 299 (1996).

<sup>15</sup> *See generally Dennis J. Balogh*, *supra* note 8; *Brian H. Derrick*, 51 ECAB 417 (2000).

harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions alone of harassment or discrimination are not compensable under the Act.<sup>16</sup> The Board finds that appellant has not provided sufficient evidence, such as witness statements, to establish that the alleged retaliation or harassment actually occurred with respect to the above administrative functions of the employing establishment.<sup>17</sup> Allegations alone are insufficient to establish a factual basis for an emotional condition claim.<sup>18</sup> Additionally, to the extent that appellant is alleging stress from pursuing claims before the Office, the Board has held that this does not constitute a compensable employment factor.<sup>19</sup> The Board finds that appellant has not established a compensable employment factor under the Act with respect to the claimed harassment.

### **CONCLUSION**

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty as he failed to substantiate any compensable factor of employment. As appellant did not establish any compensable factor of employment, the medical record need not be addressed.<sup>20</sup>

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<sup>16</sup> *Peter D. Butt, Jr.*, 56 ECAB \_\_\_\_ (Docket No. 04-1255, issued October 13, 2004); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

<sup>17</sup> *See William P. George*, 43 ECAB 1159, 1167 (1992).

<sup>18</sup> *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).

<sup>19</sup> *See John D. Jackson*, 55 ECAB \_\_\_\_ (Docket No. 03-2281, issued April 8, 2004).

<sup>20</sup> *See Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 12, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 19, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member