

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

S.C., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, WILLIAM P. HOBBY)
AIRPORT, Houston, TX, Employer)

Docket No. 08-68

Issued: April 15, 2008

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 9, 2007 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated November 20, 2006 that denied his stress-related claim and a September 12, 2007 decision that denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a stress-related condition in the performance of duty causally related to factors of his federal employment; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 13, 2006 appellant, then a 37-year-old deputy federal security director of operations, filed an occupational disease claim alleging that he sustained abdominal pain, ulcers, anxiety, stress and depression caused by working in a stressful environment. He stopped work on April 12, 2006 when he became ill and was taken to the emergency room and treated for stress-related symptoms.

In letters dated May 1, 2006, the Office informed appellant of the evidence needed to support his claim. It asked that the employing establishment respond to his claim. The employing establishment controverted the claim and submitted appellant's job description. Vernon J. Baker, federal security director, stated that on February 13, 2006 he received a Freedom of Information Act (FOIA) request and on February 14, 2006, notified appellant of the request and granted him two extensions to comply but he did not respond. Mr. Baker stated that on March 18, 2006 he was notified that the information was overdue and both he and Diane Silva contacted appellant, advising him that the materials were needed that day. He stated that appellant did not inform him that he was on leave and out of town and noted that appellant left work abruptly on April 12, 2006, stating that he was ill.

By decision dated August 10, 2006, the Office denied the claim, finding that appellant failed to establish that he sustained an emotional condition in the performance of duty.

On August 23, 2006 appellant requested reconsideration and referenced an Equal Employment Opportunity (EEO) Commission complaint that he had filed. In discharge instructions dated April 12, 2006, Dr. Victor Flagiello, a Board-certified osteopath specializing in family medicine, diagnosed abdominal pain and pancreatitis. In medical reports dating from February 22 to August 21, 2006, Dr. P.K. Roy, a Board-certified psychiatrist, noted appellant's complaints of stress due to working in a hostile environment. He diagnosed depression and anxiety.

Appellant submitted an e-mail dated April 12, 2006 sent by him requesting assistance regarding his complaints of a hostile work environment. He alleged that he was harassed by Mr. Baker and had been working in a hostile work environment since his arrival in 2003. Appellant noted that, on March 18, 2006, when he was out of town, he was contacted by Mr. Baker who notified him to respond to a FOIA request that day. He was forced to cancel his trip and return to Houston. Appellant stated that he had been on leave since March 5, 2006 and had not had the opportunity to review the request as he had not been at work except on March 16, 2006, when he was interviewed by a management inquiry team. He attempted to comply with the request on March 18, 2006 but could not locate the relevant information. Appellant was then out of the office again concerning a family emergency until April 6, 2006. When he returned, he found that his computer hard drive had been inappropriately confiscated. Appellant additionally stated that he was not privy to information, such as surveys conducted by the ombudsman's office, normally provided to senior management, and that Mr. Baker had not addressed appellant's complaints regarding false accusations and inappropriate remarks by staff and management. An EEO specialist responded that, if appellant felt he had been discriminated against, he should file an EEO claim. On April 13, 2006 appellant noted that he had been taken to the emergency room the previous day.

In a grievance memorandum dated April 16, 2006, addressed to Mr. Baker, appellant stated that he had no knowledge prior to Mr. Baker's telephone call regarding the FOIA request. He characterized Mr. Baker's request as malicious, in that it led to the early termination of his leave, did not provide him adequate time to complete a suitable search, and that other staff members were allotted more time to comply. Appellant reiterated his belief that his computer hard drive was inappropriately confiscated. On May 23, 2006 Mr. Baker advised appellant that in accordance with employing establishment policies, his concerns regarding the FOIA request were excluded from the grievance process. He was not aware that appellant's hard drive was being confiscated until internal affairs arrived at the employing establishment. Mr. Baker concluded that appellant should grieve this matter with internal affairs, who confiscated his hard drive.

By decision dated November 20, 2006, the Office denied modification of the August 10, 2006 decision.

In an undated statement, received by the Office on July 3, 2007, appellant requested reconsideration. He alleged that materials he provided showed that it became increasingly difficult for him to perform his work duties beginning in 2005 due to distractions, interference and restrictions placed on him by management. Appellant alleged that he was harassed by Rufus Davison and Mr. Baker, that he was the brunt of gossip, and that he did not receive e-mails when he should and that he was wrongfully terminated. He referenced a February 8, 2006 e-mail in which Mr. Baker stated:

“The situation here at Hobby is shameful. It points to the age-old premise that [b]lacks can[no]t work together and SHOULD NOT be put in management positions because we are n[o]t smart enough or whatever reason. Have I made some mistakes here, yes. I [a]m not perfect, and we work in a nonperfect environment. As [b]lack men in an organization such as this we are the laughing stock of TSA and what do you think our employees and staff [think]. We are assisting them in proving their opinions of blacks as a whole. We are our own worse enemy.”

Appellant also submitted copies of e-mails and policies that concerned a reorganization of the employing establishment, his complaints regarding derogatory e-mails and voice mails left on his telephone.¹ The affidavits from Rose O'Neill, Athena Perkins, Kenneth Jolley, Helen Williams and Yolanda Robinson, coworkers, attested that they had witnessed appellant being harassed by Mr. Baker and Mr. Davison, who would refer to him in a disparaging, crude manner and send rude and unprofessional e-mails. They stated that appellant's attendance records were more closely scrutinized than others and that he was required to document his absences when others were not. His coworkers indicated that he was inappropriately excluded from meetings and e-mails, that his security clearance was inappropriately removed, that his subordinates were disrespectful to him, that he was forced to cancel leave, and a pay raise was inappropriately

¹ Many of appellant's allegations and the supportive documentation provided are in reference to events that occurred after the claimed emotional condition. The record supports that the employing establishment was subject to a mandated realignment in 2006. At that time appellant was separated subject to a reduction-in-force, effective September 30, 2006.

cancelled. Ms. Perkins addressed a telephone conversation regarding appellant's sexual orientation. Mr. Jolley noted that he heard disparaging voice mails left on appellant's telephone, that he overheard Ron Peay curse at appellant, and that appellant's computer was inappropriately confiscated. Ms. Williams noted that she witnessed Mr. Davison following appellant around the office and airport in a motor vehicle, that appellant had to hide to avoid Mr. Davison, that she overheard heated discussion between appellant and Mr. Davison, and that Mr. Davison prevented appellant from speaking with his subordinates.²

In a nonmerit decision dated September 12, 2007, the Office denied appellant's reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

To establish a stress-related condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or stress-related 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 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 as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.⁵ There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.⁶ When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.⁷ A claimant must support his or her allegations with probative and reliable evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.⁸

² Appellant, Mr. Baker and Mr. Davison are African American.

³ *Leslie C. Moore*, 52 ECAB 132 (2000).

⁴ 28 ECAB 125 (1976).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ See *Robert W. Johns*, 51 ECAB 137 (1999).

⁷ *Lillian Cutler*, *supra* note 4.

⁸ *Roger Williams*, 52 ECAB 468 (2001).

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.⁹ Where 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.¹⁰

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred. Where an employee alleges harassment and cites specific incidents, the Office or other appropriate fact finder must determine the truth of the allegations. The issue is not whether the claimant has established harassment or discrimination under EEO standards. Rather, the issue is whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹¹

ANALYSIS -- ISSUE 1

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

Other than generally alleging harassment, appellant submitted no description of claimed employment factors at the time he filed his claim and did not respond to the Office's May 1, 2006 development letter. With his August 23, 2006 reconsideration request, appellant alleged that he was inappropriately contacted by Mr. Baker on March 18, 2006 while he was on leave regarding a FOIA request. Mr. Baker, however, advised that appellant was initially asked to comply with the request on February 14, 2006 and was given several extensions. Generally, complaints about the manner in which a supervisor performs his or her duties or the manner in which a supervisor exercises his or her discretion fall, as a rule, outside the scope of coverage provided by the Act. This principle recognizes that a supervisor or manager in general must be allowed to perform his duties and employees will, at times, dislike the actions taken. Mere disagreement or dislike of a supervisory or managerial action will not be compensable, absent evidence of error or abuse.¹² Absent error or abuse, the assignment of work is an administrative function of the employer and the manner in which a supervisor exercises his or her discretion

⁹ *Charles D. Edwards*, 55 ECAB 258 (2004).

¹⁰ *Kim Nguyen*, 53 ECAB 127 (2001).

¹¹ *James E. Norris*, 52 ECAB 93 (2000).

¹² *T.G.*, 58 ECAB ____ (Docket No. 06-1411, issued November 28, 2006).

falls outside the ambit of the Act.¹³ Although the handling of leave requests and attendance matters are generally related to employment, they too are administrative functions of the employer and not duties of the employee,¹⁴ and perceptions of unfair treatment are not enough to establish error or abuse. A claimant must submit proof that management did in fact commit error or abuse.¹⁵ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁶ The Board finds that Mr. Baker exercised reasonable supervisory discretion in asking that appellant comply with the FOIA request on March 18, 2006. Mr. Baker had initially requested the information on February 14, 2006 and did not know appellant was out of town on March 18, 2006. Appellant therefore failed to establish a compensable factor of employment in this administrative matter.¹⁷

Appellant indicated that he had filed a grievance and/or EEO claim. In assessing the evidence, the Board has held that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.¹⁸ In this case, appellant submitted insufficient evidence. He included an e-mail in which he outlined his concerns regarding Mr. Baker's actions on March 18, 2006 and an allegation that his computer hard drive had been inappropriately confiscated. Appellant included a response from an EEO representative advising him that, if he felt he had been discriminated against, he should file an EEO claim. He also submitted a grievance memorandum dated April 16, 2006 addressed to Mr. Baker regarding the FOIA request and seizure of his computer. Mr. Baker responded that his request was in compliance with established policies and that he was unaware that appellant's computer was being confiscated and that this was done by internal affairs. Based on the evidence of record appellant has not established a compensable employment factor pertaining to these matters.

Appellant generally alleged that he was harassed at the employing establishment. Mere perceptions of harassment or discrimination are not compensable under the Act.¹⁹ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence.²⁰ Appellant submitted no evidence with his August 23, 2006 reconsideration request to substantiate harassment by Mr. Baker or any

¹³ *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

¹⁴ *Joe M. Hagewood*, 56 ECAB 479 (2005).

¹⁵ *L.S.*, 58 ECAB ____ (Docket No. 06-1808, issued December 29, 2006).

¹⁶ *Peter D. Butt, Jr.*, 56 ECAB 227 (2004).

¹⁷ *Kim Nguyen*, *supra* note 10.

¹⁸ *Michael L. Deas*, 53 ECAB 208 (2001).

¹⁹ *James E. Norris*, *supra* note 11.

²⁰ *Id.*

coworker or other member of employing establishment management. He therefore failed to establish a factual basis for his claim of harassment by probative and reliable evidence.²¹

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.²² Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).²³ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.²⁴ Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.²⁵

ANALYSIS -- ISSUE 2

The Board finds that the Office improperly denied appellant's request for a merit review pursuant to section 8128(a) of the Act.

The Board finds that appellant submitted new and relevant evidence not previously considered by the Office, meeting the requirements of section 10.606(b)(2). Appellant alleged that he was harassed by Mr. Baker, Mr. Davison and Mr. Peay, and submitted numerous e-mails and other documentation, including a February 8, 2006 e-mail addressing comments by Mr. Baker and e-mails in which Mr. Davison allegedly used unprofessional, crude language. He also submitted five affidavits from coworkers in support of his allegations of harassment at the employing establishment. However, the Office did not reopen appellant's claim for further merit review.²⁶ The Board finds that appellant submitted new supportive factual evidence with his July 2007 reconsideration request. The Office therefore erred in denying further merit review.²⁷

²¹ *Id.*

²² 5 U.S.C. § 8128(a).

²³ 20 C.F.R. § 10.608(a).

²⁴ *Id.* at 10.608(b)(1) and (2).

²⁵ *Id.* at § 10.608(b).

²⁶ The Board notes that the memorandum discussing the evidence submitted on appeal includes language weighing the evidence and its relevancy which is properly the subject of a merit review. *See Donald T. Pippin*, 54 ECAB 631 (2003).

²⁷ *See F.D. (S.D.)*, 58 ECAB ____ (Docket No. 06-1937, issued March 9, 2007).

As appellant submitted new and relevant evidence not previously considered by the Office, the case will be remanded for a decision on the merits of whether the evidence supports his claim that he sustained a stress-related condition in the performance of duty.²⁸

CONCLUSION

The Board finds that the Office properly denied the claim by its November 20, 2006 merit decision. The Office abused its discretion in denying appellant's request for a merit review pursuant to section 8128(a) of the Act.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 20, 2006 be affirmed. The decision dated September 12, 2007 is set aside and the case remanded to the Office for proceedings consistent with this decision of the Board.

Issued: April 15, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

²⁸ *Annette Louise*, 54 ECAB 783 (2003).