



deployed for 15 months to Iraq and, upon his return, was subjected to threats and harassment from supervisors, George Willard and Robert Dyer. He first realized his condition was caused or aggravated by his employment on April 25, 2007. Appellant stopped work on May 14, 2007.

Appellant submitted a March 7, 2007 statement, releasing him from active army duty, a March 19, 2007 request for reinstatement from active duty, performance awards and letters of recommendation. In a June 19, 2007 report, Dr. Stephen H. Nightingale, Board-certified in internal medicine and pediatrics, placed appellant off work until his medical condition improved. He opined that appellant's work environment and issues were the "primary culprit" for his problems. Dr. Nightingale advised that these issues were present prior to appellant's deployment and suspected that the deployment was not the cause of his illness.

On November 20, 2007 the Office advised appellant of the evidence needed to establish his claim. It requested that the employing establishment submit additional evidence.

In a November 29, 2007 statement, Jean R. Forand, a supervisor, noted that appellant was instructed to report to the Bangor airport after an extended absence due to military service. Appellant was required to be retrained in all basic skills which would take place at the Boston, Massachusetts, training center. Ms. Forand explained that he was not qualified to screen passengers until after he was retrained as new procedures had been instituted during his absence.

In a November 29, 2007 statement, Mr. Willard noted that appellant did not describe specific instances of prohibited practices of reprisal and harassment. He denied that "I or anyone else to my knowledge within our organization has mistreated or harassed or committed any acts of reprisal against [appellant] while he has been employed...." Mr. Willard advised that all performance and conduct issues were addressed fairly and equitably in accordance with employment standards and that any concerns were addressed through local counseling with no adverse actions filed concerning appellant. He noted that appellant was in a duty status for 14 days after his return from military duty before leaving on extended sick leave. Mr. Willard noted a prior investigation concerning an allegation that appellant engaged in sexual misconduct; however, he was cleared of any wrongdoing and no further action was taken. Appellant was placed on a performance improvement plan (PIP) before his departure for military duty, based on documented unacceptable performance. When he returned to work in April 2007, the PIP was cancelled and he was to be retrained. Mr. Willard stated that, during the three days that appellant was on duty, he had one conversation with him. He advised appellant that the PIP was a closed matter and he thanked him.

In a December 5, 2007 statement, Mr. Dyer, a federal security director, confirmed that he met with appellant on about April 24, 2007 and advised him that the PIP would be removed and he was given a clean slate. The employing establishment provided copies of requests for medical records and a copy of written counseling and a November 22, 2005 PIP. The PIP from Mr. Willard listed several examples of unacceptable performance, which included an October 21, 2004 incident that resulted in ineffective communication regarding a personnel matter, a January 5, 2005 incident related to alleged selectee breaches, which resulted in a finding of no breach having occurred. Additionally, an incident on April 27, 2005 was noted in which it was alleged that appellant failed to maintain operational awareness. The plan listed a July 24, 2005 incident where he did not ensure proper coverage of work functions when an employee required

emergency leave followed by his own July 26, 2005 telephone call to report that he was sick and unable to work which Mr. Dyer deemed “suspicious.” Mr. Dyer noted that appellant was referred to an employee relations seminar on August 6, 2005 but declined to attend. He listed an August 16, 2005 incident, which involved check point procedures. Mr. Dyer noted that appellant failed to notify the security officer at the airport and instead contacted the sheriff’s department. He referenced a September 19, 2005 interview regarding an employee who filed an age and gender discrimination claim and appellant’s indication that he refused to work with a particular employee. He also noted that a verbal agreement was reached on October 13, 2005 that it would be best to relocate appellant to the Bangor site, where he would have a greater opportunity for success. Mr. Dyer also noted that appellant had chosen not to accept the relocation as he was being deployed to Iraq.

In a December 17, 2007 letter, Mr. Dyer denied that the employing establishment engaged in reprisal and harassment. In October 2003, appellant was the subject of an internal investigation due to allegations of sexual harassment and intimidation brought by a subordinate. There was no evidence of any wrongdoing by him. In 2004 and 2005, appellant received both verbal and written counseling from his supervisors to address performance issues, including, failure to complete required training, failure to follow instructions, failure to meet deadlines, failure to communicate and failure to maintain operational awareness. Mr. Dyer advised that the counseling was local and nonadverse. He noted the October 2005 PIP for unsatisfactory performance. However, in a performance review meeting held on December 29, 2005, just prior to appellant’s deployment to Iraq, it was noted that no improvement had been made and that the performance improvement efforts resumed after his return from military service. However, Mr. Dyer explained that, when appellant returned to duty on April 23, 2007, management decided not to resume the PIP due to the amount of time he had been away which required retraining. Since appellant returned from Iraq, he was given eight days of training in Boston, approval for five days of leave and all requests for sick leave and leave without pay in support of his medical condition. As of April 23, 2007, he was only in a duty status for 14 days, 11 of which were spent at a training facility geographically distant from his assigned-duty station and with minimal contact with his supervisor.

In a December 28, 2007 statement, appellant reiterated that he was subjected to reprisal, threats and harassment since October 2003 because he raised safety, security and employee misconduct issues. On October 13, 2005 Mr. Willard and Mike Valliere, managers, came to appellant’s duty station and gave him a verbal ultimatum to either transfer to Bangor or be terminated. Appellant stated that he was given no reason for the ultimatum except for a vague communication problem. He alleged that this was direct retaliation for raising misconduct violations. During the remainder of the meeting appellant raised “misconduct, falsification and other issues” as a supervisor; however, Mr. Willard and Mr. Valliere ignored or dismissed appellant’s concerns. He also alleged that he contacted Mr. Dyer to report the retaliation; however, Mr. Dyer indicated that Mr. Willard was “a fair man” and he never heard further from Mr. Dyer. Appellant refused to sign the transfer papers and Mr. Willard told him that “he would do whatever it takes to see that [appellant] was terminated.”

Appellant alleged that Mr. Willard stated that his National Guard duty was an inconvenience, as supervisors had to replace him during drill week. He also indicated that Mr. Willard assumed that he had called out sick because he did not want to work with

supervisor; Kris Smith past July 2005. Appellant alleged that, in a 20-year work history, he had never received a letter of counseling for work performance until working for the Bangor management. He alleged that he had never received a formal disciplinary action and that he was given the option to transfer after signing, for reporting violations in good faith to management or be terminated.

In a January 10, 2008 statement, appellant noted his history of commendations for his work performance and repeated his assertions about Mr. Willard and Mr. Dyer. The Office also received an undated response from appellant related to the 2003 allegation of sexual misconduct. Appellant alleged that he was not the subject of the misconduct as he merely reported the allegations; however, he was transferred and treated as if the allegations were made against him. He also submitted an undated comment related to an incident on January 6, 2005, related to a "shift summary." Appellant alleged that it was already filled out and despite notifying management, the pattern of filling out the logs continued. He alleged that the logs were filled out by Mr. Smith, who continued to violate standard practices; however, management failed to do anything. Appellant was punished instead and told that he needed to attend a three-day employee relations seminar on August 6, 2005.

Appellant alleged violations in protocol were made during screening of passengers and by Mr. Smith. On December 28, 2004 Mr. Smith stayed after logging out. Appellant alleged that, on December 29, 2004, a violation was made related to signing in and out on the shift summary by Mr. Smith. He also alleged that a violation had been made during the pat down of a selectee; however, his concerns were disregarded. On December 20, 2004 appellant was in a supervisor's meeting when he raised the issue, his concerns were disregarded. On January 3, 2005 it was brought to his attention by a screener that a male selectee was screened at baggage but, after entering the checkpoint, was exempted. When this was brought to the attention of the supervisor, he crossed off the individual as exempt from selectee status. Appellant alleged that no investigation was conducted and Mr. Smith made false statements.

Appellant referred to an October 9, 2004 incident where he was contacted at home, while on leave, by a manager and requested to come in as the schedule was mixed up and short. He asserted that he was unable to come in as his wife was working and he had two small children.

Appellant addressed several of the issues cited by Mr. Willard in the 2005 PIP. He noted that the cited April 27, 2005 operational awareness incident was deceptive. Appellant also alleged that the charge of not providing necessary coverage on July 24, 2005 was wrong as he contacted the screening manager and made necessary arrangements. On July 26, 2005 he called in sick for the first time in three years but this was wrongly characterized in his PIP and used to discredit him. Appellant alleged that Mr. Willard called his home and left a message while his wife was out shopping and while he was asleep. He returned the call in the afternoon and Mr. Willard questioned him as to where he was and why the telephone was not answered. Mr. Willard asked appellant to get a physician's note for being sick. Appellant alleged that this was very intimidating and threatening for one day of being sick. He noted that he had 302.30 hours of sick leave.

Regarding the August 16, 2005 incident in which appellant did not notify the airport security officer and instead contacted the sheriff's office, he alleged that the security guard was not available and his action was in accordance with standard procedures. Appellant stated that, on October 13, 2005, he was given a verbal ultimatum to transfer to another duty station or be terminated. He alleged that in March 2007 he sent a letter to the employing establishment informing it of his return from Iraq and two weeks later, he was advised that a "SMART AGREEMENT" would continue." Appellant asserted that this meant that things were "going back to the way it was before I left ... transfer or be terminated." He also alleged that Mr. Willard indicated that the PIP would resume when he returned.

By decision dated September 23, 2008, the Office denied the claim for compensation. It found that appellant did not establish any compensable employment factors.

Appellant's representative requested a telephonic hearing which was held on February 5, 2009. Appellant repeated his allegations and denied a prior history of psychiatric or emotional problems resulting from his civilian or military service. He alleged that his condition was solely due to his civilian employment. In November 2003, appellant reported a female screener's allegation that she was being harassed and intimidated by her supervisor. He alleged that management did not do anything and the employee pursued the Equal Employment Opportunity (EEO) process. As a result, appellant contended that he was singled out and transferred to another location for three weeks without a specific reason. He alleged that management portrayed the incident as if he was the one who was accused of harassment; when he had merely reported the employee's allegation. Appellant indicated that when he brought this up to his supervisors their response was "oh well." He alleged that he was treated as if he was having supervisory problems. Appellant also alleged that another supervisor was "allowed to get away with anything." He alleged that he was told by Mr. Willard that he "better remember where his loyalties are." When appellant continued to raise issues he was given a letter of counseling, but was not able to grieve it. He stated that, despite raising issues about improper actions by another manager, his complaints were not taken seriously. Appellant alleged retaliation when he was told that he could either transfer or be terminated because of a communication problem. He stated that he received a letter of counseling that affected his performance evaluation and he was given a "SMART" or transfer agreement; however, he was deployed to Iraq. Appellant returned to the employing establishment after his deployment and was told the "SMART" agreement would continue. He advised that he met Mr. Dyer who indicated that his lawyers reviewed his records for dismissal. Appellant alleged that this started to affect him and he asked if he could explain and put everything in writing. However, he indicated that Mr. Dyer dismissed this and stated that he could just call him on his cell phone. Appellant went to Boston for a week for retraining; however, when he returned he decided he "wasn't going to put up with the threats any longer and that he couldn't do his job if he couldn't report things to management without fear of retaliation."

By letter dated March 2, 2009, Mr. Dyer provided comments on the hearing transcript. He reiterated that the PIP was not resumed upon appellant's return from Iraq and denied that he had been subjected to reprisal and harassment. A November 26, 2003 letter to appellant from the employing establishment, addressed the allegation of sexual harassment, the investigation and finding that appellant had not engaged in sexual harassment or intimidation.

By decision dated April 1, 2009, the Office hearing representative affirmed the Office's September 23, 2008 decision.

### **LEGAL PRECEDENT**

Workers' compensation law does not apply to each and every illness that is somehow related to an employee's employment. There are situations where an injury or 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 his regular or specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.<sup>1</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 his frustration from not being permitted to work in a particular environment or to hold a particular position.<sup>2</sup>

An employee has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition, for which he claims compensation was caused or adversely affected by employment factors.<sup>3</sup> This burden includes the submission of a detailed description of the employment factors or conditions, which appellant believes caused or adversely affected the condition or conditions, for which compensation is claimed.<sup>4</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 the physician when providing an opinion on causal relationship and, which working conditions are not deemed factors of employment and may not be considered.<sup>5</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 the matter establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.<sup>6</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 126 (1976).

<sup>3</sup> *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

<sup>4</sup> *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

<sup>5</sup> See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

<sup>6</sup> *Id.*

## ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of harassment and retaliation by his supervisors. The Board must review whether the alleged incidents and conditions of employment are compensable employment factors under the terms of the Act.

Regarding appellant's allegations that the employing establishment improperly handled an investigation pertaining to a claim for harassment which he filed on behalf of an individual, engaged in improper disciplinary actions, wrongly requested information pertaining to his sick leave and ignored his concerns related to the improper actions of colleagues who were not following proper rules and procedures, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially-assigned work duties and do not fall within the coverage of the Act.<sup>7</sup> Although the handling of disciplinary actions, leave requests and investigations are generally related to the employment, they are administrative functions of the employer and not duties of the employee.<sup>8</sup> However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.<sup>9</sup>

Appellant alleged that, in November 2003, he reported a subordinate's complaints of harassment and intimidation by a supervisor. He alleged that management did not do anything and that he was subjected to retaliation when transferred to a different duty station without a specific reason and treated as if he were the one accused of harassment. However, Mr. Dyer denied that the employing establishment acted improperly and provided a November 26, 2003 letter, noting that the investigation findings had determined that appellant did not engage in sexual harassment or intimidation. Investigations are considered to be an administrative function of the employer as they are not related to an employee's day-to-day duties or specially assigned duties or to a requirement of the employment.<sup>10</sup> Additionally, while appellant may not have agreed with how the employing establishment handled the accusation, he has not shown error or abuse by the employing establishment in this matter. The Board has held that an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.<sup>11</sup>

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<sup>7</sup> See *Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

<sup>8</sup> *Id.*

<sup>9</sup> See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

<sup>10</sup> *K.W.*, 59 ECAB \_\_\_\_ (Docket No. 07-1669, issued December 13, 2007).

<sup>11</sup> See *Michael Thomas Plante*, 44 ECAB 510, 515 (1993).

Appellant alleged that he was placed on a PIP, which contained inaccurate and misleading information including that he had failed to maintain operational awareness, had communication issues. He alleged that he was given the option to transfer or be terminated and told that his PIP would resume upon his return from Iraq. Matters relating to a request for a different job, promotion or transfer are not compensable factors of employment absent a showing of error or abuse as they do not involve the employee's ability to perform his or her regular or specially assigned work duties but rather constitute his or her desire to work in a different position.<sup>12</sup> Furthermore, both Mr. Willard and Mr. Dyer explained that there were performance issues and in November 2005, appellant was placed on a PIP. They noted that appellant was deployed to Iraq and upon his return, it was decided that the PIP would not be resumed and he was given a "clean slate." The record also indicates that, prior to appellant's deployment to Iraq and as part of the PIP, he was offered a voluntary transfer to another worksite that would allow him a greater opportunity for success but that he declined the opportunity. The mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse.<sup>13</sup> Mr. Willard also indicated that all performance and conduct issues were addressed in a fair and equitable fashion and no adverse actions were filed against appellant. The Board notes that there is no showing of error or abuse with regard to the removal of the PIP. Appellant has not established a compensable factor in this regard.

Appellant alleged that Mr. Willard called him at home on July 26, 2005, when he took sick leave. He alleged that Mr. Willard characterized his sick leave as "suspicious" in his PIP and was being used to discredit him. However, the Board notes that matters involving leave would be administrative matters.<sup>14</sup> Other than appellant's objection to being called at home when he had sick leave, he has not submitted evidence showing how the employing establishment acted improperly toward him in this matter. Thus, he did not establish any compensable factors of employment with regard to these matters.

Appellant also cited numerous concerns related to the actions of other supervisors and their failure to follow procedures. He alleged that, despite reporting the problems, he was ignored and his complaints were not taken seriously. For example, appellant reported violations of safety and security to management, including an instance where another supervisor, Mr. Smith, would log out, but continued to stay on duty or instances where he would fill out the logs. Appellant also reported to management violations that were made with regard to the pat down of a selectee and despite reporting his concerns, no investigation was made and his concerns were disregarded. He also alleged that Mr. Smith was allowed to get away with anything. The Board has found that an employee's complaints concerning the manner in which a supervisor performs his duties as a supervisor or the manner in which a supervisor exercises his supervisory discretion fall, as a rule, is 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

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<sup>12</sup> *Hasty P. Foreman*, 54 ECAB 427 (2003).

<sup>13</sup> *Supra* note 11 at 510, 516.

<sup>14</sup> *See for example, David C. Lindsey, Jr.*, 56 ECAB 263 (2005) (generally, actions of the employing establishment in matters involving the use of leave are not considered compensable factors of employment as they are administrative functions of the employer and not duties of the employee). *See Linda J. Edwards-Delgado*, 55 ECAB 401 (2004).



duties and that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.<sup>15</sup> Although appellant is a supervisor, his allegations relate to his dissatisfaction with how other supervisors and managers performed their duties instead of a reaction to specific regular or specially assigned duties that he performed. Appellant presented no evidence or witness statements to support that his supervisors erred or acted abusively with regard to these allegations. He has not established that these matters rise to the level of compensable employment factors.

Appellant also alleged that, as a result of his complaints and concerns, he was subjected to retaliation and harassment. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.<sup>16</sup> However, for 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 of harassment or discrimination are not compensable under the Act.<sup>17</sup> The Board notes that Mr. Dyer, the director, and Mr. Willard, a supervisor, provided reasonable explanations for their actions and denied that appellant was subjected to any type of reprisal or retaliation. They also confirmed that appellant had not been subjected to any adverse actions. Furthermore, Mr. Willard explained that, upon appellant's return from Iraq, he had one conversation with appellant. He noted that he thanked appellant for his service and advised appellant that the PIP was a closed matter. Mr. Willard also explained that he sought to handle all performance and conduct issues equitably through counseling and with no adverse actions. Mr. Dyer likewise explained how the employing establishment and Mr. Willard sought to work with appellant to assist him consistent with employing establishment policies. Appellant has not submitted sufficient evidence to establish that he was harassed or retaliated against by his supervisors.<sup>18</sup> Thus, he has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.<sup>19</sup>

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<sup>15</sup> See *Marguerite J. Toland*, 52 ECAB 294 (2001).

<sup>16</sup> *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

<sup>17</sup> *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

<sup>18</sup> See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

<sup>19</sup> As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

**CONCLUSION**

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 1, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 23, 2010  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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