

Emotional Claims for OWCP Litigation Group Conference 5/17/13

What is covered under FECA

- Anxiety about ability to perform. See Elmer G. Tardie, ECAB Docket 94-1107 (1996). Claimant was a perfectionist and had anxiety over producing the lowest error rate, meet standards, etc.
- Change in policy that increases difficulty of the job Donald E. Ewals, ECAB Docket No. 94-2604 (1997).
- Consequence of a work related injury In Arnold A. Alley 44 ECAB 912 (1993), the Board stated that an “emotional condition related to chronic pain and limitations resulting from an employment injury is covered under the act.” See also Charles J. Jenkins, 40 ECAB 362 (1988); Edith A. Berman, 6 ECAB 1028 (1964); Larson, Section 42.22(a).
- Harassment
  - Under FECA, harassment may be the basis of a successful claim even if the harassment is not alleged to have been based on race, gender, religion, etc.. L.T. and USPS, ECAB Docket 06-1974 (2007).
  - Harassment/Teasing by co-workers is compensable if it is borne out of work duties or arose because the employees were brought together by work. FECA PM 2-0804.12.
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- Illegal Harassment/Discrimination -
  - Office will generally accept the EEOC's determination that harassment has occurred. However, the Office must look at more than just the decision finding harassment. The decision must be based on the evidence of record. That is, the EEOC record must show the harassment occurred. Thomas L. Lineberg, ECAB Docket No. 03-1443 (Sept 12, 20013).
  - Office must make its own independent findings on discrimination and cannot simply find that because EEOC found no discrimination that there was no discrimination. Martha L. Cook, 47 ECAB 226 (1995) and Steven E. Heath, ECAB Docket 02-1028 (2003). Practically, however, OWCP rarely, if ever will go against EEOC's findings and will generally accept EEOC's findings as proof of discrimination. A later EEOC decision finding discrimination may serve as the basis of accepting a claim. Brenda Getz 39 ECAB 245 (1987); Rita L. Power, 35 ECAB 403 (1983). Also, an EEO settlement is not necessarily evidence of wrongdoing.
- Name Calling
  - Samson K. Mokuahi, Sr., ECAB Docket 96-1531 (1998) - claimant called a name meaning scum, dirt or less than human.

- Charles F. Johnson, III, ECAB Docket 97-2047 (1998) - memo from supervisor noted that a vendor referred to the claimant as a 'flaming queer.'
  - R.H. and USPS, ECAB Docket 08-646 (2008) - reference to claimant as trailer trash was not compensable.
- Order to violate a regulation or policy. Agency doctor was ordered to release an employee's medical records to a psychologist. Psychologist defined by agency rules to be a non-physician so doctor refused. Board found the order by the supervisor constituted error and thus within POD. K.B. and U.S. Postal Service, ECAB Docket No. 11-1249 (3/12/12).
  - Overwork - Although an employee may recover workers' compensation for being overworked, the employee must show how being overworked caused an injury. The proof must be in the form of medical evidence. Johnson-Carman, [104 LRP 17671](#) (ECAB 2004). Frank McDowell, 44 ECAB 522 (1993).
  - Shift change - change actually has to occur and the reaction has to be to the shift change. Depression over switching from day shift to night shift can be compensable Charles Jenkins, 40 ECAB 362 (1998).
  - Unwanted physical touching. Doesn't need to be violent or sexual. Jacqueline M. Johnson, ECAB Docket 98-2450 (2000).
  - Work beyond medical restrictions S.D. and USPS, ECAB Docket 07-104 (2007).
  - Wrongful personnel actions
    - Letters of warning David F. Clanciolo, 45 ECAB 731 (1994)
    - Unfair performance evaluations Janet I. Jones, 47 ECAB 385 (1996) - MSPB decision showed error
    - Wrongful termination - see Mary Alice Cannon, 32 ECAB 1235 (1981) where the husband of the claimant had a heart attack after receiving a personnel action that was later reversed.
  - Disclosure of confidential information J.C., ECAB Docket No. 11-1039 (ECAB 2/15/12).

### **What is not covered**

- Administrative actions unless proven 'error or abuse'. An employer's administrative decisions on personnel matters cannot form the basis for a workers' compensation claim unless the employer acts unreasonably in carrying out the functions. Lua and U.S. Postal Service, [2005 LRP 46158](#) (ECAB 2002). To recover for an emotional condition, the employee must show more than that she suffered an injury somehow related to work. Not every injury remotely related to work is compensable. If the worker's reaction to a reasonable administrative or personnel decision causes the emotional condition, she will not recover benefits. Roberson and U.S. Postal Service, [2005 LRP 45634](#) (ECAB 2002). There is no definition of "abusive" or "unreasonable" or "error" This is decided on a case-

by-case basis based on whether the Board feels the Agency acted unreasonably. *Troy R. Washum*, 44 ECAB 629 (1993).

- Desire of a claimant to perform a particular type of work *Brian M. McWilliams*, ECAB Docket 93-1933 (1995).
- Preference for particular work shift. A worker will not recover workers' comp for an emotional injury caused by shift changes, frustration over working in a particular environment, frustration over working in a particular position, and fear over a possible reduction in work force. The FECA considers feelings caused by such factors to be self-generated and not related to a worker's assigned duties. *Berg and Department of Veterans Affairs*, [2005 LRP 45860](#) (ECAB 2002).
- Denial of a promotion. *Tanya A. Gaines*, 44 ECAB 923 (1993). unless error or abuse
- Denial of training. *Mildred D. Thomas*, 42 ECAB 888 (1991). unless error or abuse.
- Not every statement uttered in the workplace, even if spoken in a loud and harsh tone, will give rise to coverage for workers' compensation for an emotional condition. *Hackenberg*, [2005 LRP 46841](#) (ECAB 2003). Very grey area. Very subjective.
- Monitoring an employee's job performance is an administrative function and is not within the coverage of the FECA. *Inzetta and U.S. Postal Service*, [103 LRP 55508](#) (ECAB 2003).
- Injuries sustained during investigations into alleged illegal or improper acts are not within performance of duty. *Jerry Mills*, 39 ECAB 326 (1987), *Jeremiah Bowles*, 38 ECAB 652 (1988), *Walter Asberry, Jr.*, 36 ECAB 686 (1985).
- stress from litigating OWCP claims.
- underwork/underutilization *Purvis Nettles*, 44 ECAB 623 (1993).