

FEDERAL WORKERS' COMPENSATION ACT (FECA)
RESEARCH NOTES

ACT – 5 U.S. C. §§8101-8152. Regulations are at 20 C.F.R. §§10.0-10.826.

AOE/COE: The term "in the **performance of duty**" has been interpreted to be the equivalent of the commonly found prerequisite in workers' compensation law, "arising out of and in the course of employment." Bernard D. Blum, 1 ECAB 1, 2 (1947). The phrase "arising out of and in the course of employment" encompasses not only the concept that the injury occurred in the work setting, but also the concept that the employment caused the injury." George A. Fenske, Jr., 11 ECAB 471 (1960).

AOE/COE: 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).

Assaults: Sylvester Blaze, 37 ECAB 851 (1986) - an assault for private reason may be job-related if the employment becomes a contributing factor (citing Larson, vol. 1 Sec. 1100).

Co-employees, suits against: FECA does not bar suits against co-employees. Bates v. Harp, 573 F2d 930 (6th Cir., 1978); Heathcoat v. Potts, 790 F2d 1540 (11th Cir., 1986).

Exclusiveness of remedy – FECA bar does not preclude discrimination cases against the government. Sullivan v. US, 428 F.Supp. 79 (E.D. Wis. 1977). Dubee V. Henderson, 56 F. Supp. 2d 430 (D. Vt. 1999)(Postal employee was sexually harassed by a coworker. She began receiving OWCP benefits for the stress, then sued for sex harassment under Title VII and disability discrimination under the Rehab Act. US argued that FECA was the exclusive remedy. Court held discrimination falls outside the parameters of workers' compensation).

Factors of employment: Case holding that appellant's feeling of being harassed and/or discriminated against at work was work-related because (1) where the disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability is within FECA coverage; (2) where employee has alleged that the employment situation which caused his emotional reaction included actions taken by his superiors which the employee described as constituting harassment, the issue generally speaking is not whether in fact there was harassment, or discrimination, but whether the disabling emotional reaction was 'precipitated or aggravated by the conditions of the employment.' Leonard Dureseau, Jr., 39 ECAB 1062 (1988).

Factors of employment, shift changes - A shift change (*i.e.* from day to night work) can be a compensable factor of employment in emotional stress cases. Dodge Osborne, 44 ECAB 849 (1993)(but refusal to attempt to perform new duties means he can't claim the new duties were a compensable factor); Charles Jenkins, 40 ECAB 362 (1988).

Nature of FECA: FECA is a comprehensive workers' compensation law for federal employees that is designed to provide quick and uniform coverage for work-related injuries. Woodruff v. U.S. Dept. of Labor, OWCP, 954 F.2d 634 (CA 11, 1992). Policy behind FECA is similar to state workers' compensation laws -- to provide injured employees with more immediate and less expensive relief than a common-law tort action. Avasthi v. US, 608 F.2d 1059 (CA GA., 1979). Very nature of the Act bars recovery for anything other than injuries resulting in some form of disability or death. Guidry v. Durkin, 834 F.2d 1465 (CA 9, CA, 1987). Claims for discrimination, harassment and wrongful discharge are not the type covered by FECA. Metz v. US, 723 F.Supp. 1133 (D.Ct. MD, 1989).

Performance of duty: Disputes over denial of advanced sick leave or denials of promotions are not compensable work factors. Edgar Lloyd Pake, 33 ECAB 872 (1982).

Performance of duty: A USPS supervisor's mishandling of a situation at work can give rise to a claim. Altercation between claimant and a Postal Inspector, after supervisor told claimant the PM wanted to see him in his office, but when he got there it was a Postal Inspector who started asking him questions. He got upset because he was expecting the PM and "didn't know who this guy was", and a physical fight ensued. The investigation was caused by claimant's allegedly threatening to "shoot this place up. It will be like Edmond OK all over again." Robert J. Eglington, 40 ECAB 195 (1988).

Performance of duty – Sexual harassment is compensable if shown to have occurred (in absence of any EEOC determination). Donna J. DiBernardo, 47 ECAB 700 (1996):

Appellant also alleged that harassment and discrimination on the part of her supervisors and coworkers contributed to her claimed stress-related condition. 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 her regular duties, these could constitute employment factors. 9 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. 10 In the present case, appellant submitted affidavits in which a supervisor and several coworkers supported her claim that she was subjected to harassment in the form of **sexist jokes and comments, touching of a sexual nature and verbal sexual advances, including** instances, beginning in 1985, when a coworker harassed her by **calling her unlisted home telephone number**. Thus, appellant has submitted sufficient evidence to establish a compensable employment factor under the Act with respect to her exposure to this harassment in the workplace.

Performance of duty - Letters of warning and employee's emotional reaction to them can be a compensable factor of employment under FECA. David F. Cianciolo, 45 ECAB 731 (1994).

Performance of duty: Where OWCP is awaiting an *EEO decision* dealing with same issues and denies the claim, a later decision in favor of claimant (even if a settlement) may be relevant evidence. Getz, 39 ECAB 245 (1987); Rita L. Power, 35 ECAB 403 (1983).

Performance of duty, verbal abuse - Verbal abuse can be a compensable factor. Ann L. Norris, 90-165 (7/8/91); Neil F. Carney, 36 ECAB 289 (1984); Rita L. Power, 35 ECAB 403 (1983). So can difficult relations with supervisors when sufficiently detailed and supported by evidence. Samuel F. Manguin, Jr., 42 ECAB 671 (1991).

Refusal of employee to accept suitable employment – The refusal of an OWCP claimant to accept suitable employment when offered will result in termination of eligibility for benefits. 5 U.S.C. §8106(c). When a job offer is made to a disabled employee or former employee by his [former] employing agency, the suitability of the job offer to the employee's disability is determined by OWCP. The job offer must contain a description not only of the job's duties, but also of its physical requirements. Prior to the job being found suitable or unsuitable by OWCP, under the workers' compensation law [FECA] the employee is under no obligation to accept the job offer. The OWCP procedures require that the employee at first be given 30 days to respond to their preliminary determination that the job is suitable and, thereafter, if in light of the employee's response OWCP still feels the job is suitable, the employee is given an additional 15 days to accept the job offer without penalty. Should the employee fail to accept the job offer after these procedures have been followed, he forfeits all monetary workers' compensation benefits for life. 20 C.F.R. §§10.500-10.517. Charlene R. Herrera, 44 ECAB 361 (1993); FECA Procedure Manual 2-813 to 2-814.

Refusal of employing agency to provide RTW or rehab - The refusal of the EA to allow claimant to return to work or to provide her with voc rehab is not itself an injury in performance of duty. Emotional reaction to this is self-generated and not compensable under FECA. Failure of EA to comply with 5 USC 8151(b)(2) does not fall within FECA coverage. There is no requirement to provide voc rehab to every employee who is permanently disabled due to a compensable condition under the Act. Billie M. Gentry, 38 ECAB 498 (1987).

Relevant authorities: In construing similar provisions of the FECA, the Board will give considerable weight to the logical and reasonable conclusions reached by Federal and State courts. Viola Davidson (John O. Lynch), 4 ECAB 260 (1951); however, the Board has noted that the decisions of other administrative agencies or courts are not binding on whether an individual is disabled under the

FECA. Constance G. Mills, 40 ECAB 317 (1988).

Resignation: Employee's resignation may not be a bar to subsequent claim for temporary total disability, when the employee made efforts to find suitable other employment with the employing agency before resigning. Catherine G. Hammond, 41 ECAB 375, 385-87 (1990).

Res judicata – A U.S. District Court decision on factual and legal questions arising under 5 USC §8132 in a third-party action involving a FECA-covered injury are res judicata on the ECAB. William K. Price, 25 ECAB 18 (1973).

Restoration rights: Employee who suffers a work-related injury has specific job restoration rights under the workers' compensation law. 5 U.S.C. §8151:

§ 8151. Civil service retention rights

(a) In the event the individual resumes employment with the Federal Government, the entire time during which the employee was receiving compensation under this chapter [5 USCS §§ 8101 et seq.] shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service.

(b) Under regulations issued by the Office of Personnel Management--

(1) the department or agency which was the last employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of commencement of compensation or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the United States, the right to resume his former or an equivalent position, as well as all other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled, including the rights to tenure, promotion, and safeguards in reductions-in-force procedures, and

(2) the department or agency which was the last employer shall, if the injury or disability is overcome within a period of more than one year after the date of commencement of compensation, make all reasonable efforts to place, and accord priority to placing, the employee in his former or equivalent position within such department or agency, or within any other department or agency.

Restoration rights: New v. Dept. of Veterans Affairs, 142 F.3d 1259 (Fed. Cir. 1998) – employing agency's refusal to restore the employee after termination for excessive absences violates restoration rights, since absence was substantially related to work injury.

Suitable job offers: Maggie L. Moore, 43 ECAB 819, 823 (1992) (Maggie Moore III) holds that claimant has a property interest in not having his or her benefits terminated and "In addition, a claimant who has sustained an employment related injury has a vested interest in not being coerced into accepting a job that may aggravate his or her condition or cause re-injury." See similar holding in unpublished decision in Sandra J. Corson, Dkt#95-1933 (07/02/98).

Suitable job offers - requirements

EXCERPT FROM FECA PROCEDURE MANUAL, 02-0814 (04 Sep 96)

4. Offers of Employment.

a. Offer of Modified Duty by Agency. If the agency can provide alternative employment, it will make an offer of light duty to the claimant. A job offer may be solicited by the Rehabilitation Specialist (RS), Rehabilitation Counselor (RC), Staff Nurse (SN), or by the claimant.

(1) Any such offer must be in writing and must include the following information:

(a) A description of the duties to be performed.

(b) The specific physical requirements of the position and any special demands of the workload or unusual working conditions.

(c) The organizational and geographical location of the job.

(d) The date on which the job will first be available.

(e) The date by which a response to the job offer is required.

(2) The agency should also provide pay rate information for the offered job. The agency should not include any information in the job offer regarding election of OPM benefits, since obtaining an election is solely the responsibility of OWCP. A copy of the job offer should be sent to OWCP when it is made and the claimant's response should be provided to OWCP by the agency when it is received.

If the job offer is made by a non-Federal employer, the RS/RC will provide the information listed in items (1)(a) to (e), as well as pay rate information.

b. Preliminary Assessment of Position. On receipt of a copy of the written job offer, the Claims Examiner (CE) should review it and consider the factors listed below in making a preliminary assessment of whether the offered job is suitable. If none of these factors applies to the case and the claimant has accepted the job, a formal finding of suitability need not be made.

(1) A job which involves less than four hours of work per day where the claimant is capable of working four or more hours per day will be considered unsuitable.

(2) A job which represents permanent seasonal employment will generally be considered unsuitable unless the claimant was a career seasonal or temporary employee when injured. In locations where year-round jobs are scarce, however, a seasonal position may be considered suitable for an employee who previously held a year-round job. In either case, the job must reasonably represent the claimant's WEC.

(3) A temporary job will be considered unsuitable unless the claimant was a temporary employee when injured and the temporary job reasonably represents the claimant's WEC. Even if these conditions are met, a job which will terminate in less than 90 days will be considered unsuitable.

(4) If medical reports in file document a condition which has arisen since the compensable injury, and this condition disables the claimant from the offered job, the job will be considered unsuitable (even if the subsequently-acquired condition is not work-related).

Termination as affecting OWCP benefits

FECA Procedure Manual 2-0814-12 Termination of Employment

12. Termination of Employment. A reemployed claimant may face removal from employment due to closure of an installation, cessation of special ("pipeline") funding, or termination of temporary employment, or reduction in force (RIF). (A true RIF affects full-duty and light-duty workers alike. If it is not clear whether the claimant's situation involves a RIF or the withdrawal of light duty, the CE should request the personnel document on which the removal was based.) Such occurrences are not considered recurrences of disability (see FECA PM 2-1500.3b), and the CE should take action according to whether a formal LWEC determination has been made.

- a. LWEC Determination Made. When a formal loss of wage-earning capacity (LWEC) has been determined (by Form CA-1047, CA-1048 or narrative decision), the claimant has the burden, with respect to any subsequent loss of earnings, to show that one of the accepted reasons for modifying an LWEC applies. These reasons are: the original LWEC rating was in error; the employee's medical condition has changed; or the employee has been vocationally rehabilitated, either through vocational training or self-rehabilitation, and the wage-earning capacity has increased as a result.

Therefore, the status of an employee with an established wage-earning capacity who is removed because of a RIF or closure does not change with regard to receipt of FECA benefits. If a formal claim for recurrence is filed, it should be denied unless the claimant has shown a material change in his or her medical condition as defined in paragraph 11 above.

Waiver of rights invalid - 20 CFR §10.15: "Sec. 10.15 May compensation rights be waived? No employer or other person may require an employee or other claimant to enter into any agreement, either before or after an injury or death, to waive his or her right to claim compensation under the FECA. No waiver of compensation rights shall be valid."