

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

G.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Medford, OR, Employer**

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**Docket No. 09-764
Issued: December 18, 2009**

Appearances:
John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 27, 2009 appellant filed a timely appeal from a February 6, 2008 decision of the Office of Workers' Compensation Programs that denied her emotional condition claim and a December 1, 2008 decision that denied further merit review. 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 her burden of proof to establish that she sustained an emotional condition causally related to factors of her federal employment; and (2) whether the Office properly refused to reopen her claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant's attorney contends error and abuse as appellant's managers arbitrarily denied leave, the difficulty of her job duties increased, she was harassed and that her medical restrictions were ignored.

FACTUAL HISTORY

On December 8, 2004 appellant, then a 36-year-old supervisor of customer services, filed an occupational disease claim alleging an emotional condition due to factors of her federal employment. She realized her condition was employment related on July 21, 2004, the day she stopped work. The employing establishment controverted the claim.

On December 8, 2004 appellant stated that on July 21, 2004 she was taken off work by her physician due to abusive action by her managers at the employing establishment. On that day, she left work at 2:15 p.m. after working 8 hours and 15 minutes. At 3:30 p.m. appellant received a telephone call from a clerk advising her that Terry Wood, the postal manager, had asked him to call her because she was supposed to close the office that day. She stated that she had not been told that she was supposed to close the office. Appellant returned to the employing establishment at approximately 4:00 p.m. and was subsequently ordered off the premises by Mr. Wood. She noted that she was processing a claim of discrimination before the Equal Employment Opportunity (EEO) Commission.

In reports dated December 6 and 7, 2004, Dr. Kristine Groskopp, an osteopath specializing in family practice, advised that appellant had been under her care for 15 years and was presently on medical leave due to an adjustment disorder with mixed stressors of anxiety and depression. Appellant also had chronic cervical and upper thoracic strains/sprains exacerbated by work stressors. Dr. Groskopp advised that appellant could return to work but should not work with her current supervisor or postmaster. On February 10, 2005 G. Howard Davol, Ph.D., a clinical psychologist, advised that appellant was first seen on June 18, 2004. At that time, he diagnosed adjustment disorder with mixed anxiety and depressed mood. Appellant reported a history that she was required to give a statement regarding a coworker's EEO action and was thereafter retaliated against by her managers. She related that on July 21, 2004 she was threatened by Mr. Woods. Dr. Davol advised that appellant's emotional condition had improved since she was off work and that she was to avoid future contact with Mr. Wood and James Foucault, the postmaster.

In a February 4, 2005 statement, appellant reiterated that in April 2002 she was required to give a statement as part of an EEO complaint filed by a coworker. In October or November 2003, Mark Weiss, a postmaster, informed her that Mr. Foucault told him that he would get appellant for her participation. Thereafter, appellant became anxious and began to fear for her job. In April 2004, she was involuntarily moved to another office. In May and July 2004, Mr. Foucault and Mr. Wood investigated appellant for being absent without leave (AWOL). Appellant alleged that Mr. Wood hovered over her in a threatening manner when she filled out a form and badgered her regarding a CA-2 claim form. When she asked him why, he ordered her out of the building. Appellant contended that she was retaliated against for her required participation in the EEO activity. She attached statements from coworkers.

In an August 2004 statement, Paul Kelly advised that, between 3:15 and 3:25 p.m. on July 21, 2004, he answered the telephone and Mr. Wood inquired if appellant was present. Mr. Kelly checked the employing establishment and reported that she was not. Mr. Wood told him to call appellant and tell her that she was to close the office that day and should come back in. He noted that he would return in about 30 minutes. Mr. Kelly stated that he called appellant

at home about 3:30 p.m. and related what Mr. Wood had stated. Appellant noted that she had no understanding of being assigned to close that evening and requested that Mr. Wood call her upon his arrival. When Mr. Wood arrived, Mr. Kelly told him what appellant had stated and Mr. Wood told him that he would list her as AWOL and “deal with it in the morning.” Mr. Kelly then called appellant and told her what Mr. Wood stated. He advised her to come into the office. Appellant subsequently returned to the office and had a 20-minute conversation with Mr. Wood. Mr. Kelly did not overhear their discussion but he saw appellant complete a form and leave. Mr. Wood later told Mr. Kelly that he and appellant had a “falling out.” In a July 16, 2004 statement, Mick Tilton noted that he heard Mr. Wood say that appellant was AWOL and he would deal with her in the morning.

In an October 28, 2004 statement, James D. Halstead, a carrier and union vice president, described a meeting with Postmaster Foucault in mid-October 2004 in which appellant was characterized as a snake in the grass. He noted that she currently had active EEO complaints against management. In a December 6, 2004 statement, Curtis Weaver, a supervisor, advised that on April 12, 2004 he was called to see if appellant had reported to work. In April he was questioned by Postmaster Foucault as to whether appellant had stopped by. On May 19, 2004 Mr. Weaver was summoned to a meeting with Postmaster Foucault and Mr. Wood which appellant was not asked to attend. On June 3, 2004 the postmaster asked if Mr. Wood had spoken with appellant about her attire. On June 21, 2004 Mr. Weaver discovered a copy of interview questions regarding appellant’s May 2004 interview supposedly asked of him by Mr. Wood. Mr. Weaver advised that he was never asked such questions.

In a December 6, 2004 statement, Mark Weiss, a postmaster, advised that in November 2003 he had a conversation with Postmaster Foucault concerning statements provided by subordinate managers in an EEO case of a postal employee. He noted that Postmaster Foucault expressed disbelief regarding comments made about him by subordinate management. Mr. Weiss subsequently informed Mr. Wood of this conversation and was told that the postmaster was reviewing comments made by appellant in the EEO case and had become upset. He opined that the postmaster subsequently raised a number of issues against appellant.

In an undated statement, Mr. Wood advised that appellant was last seen at 1:30 p.m. on July 21, 2004. He had notified her earlier that day that she was to supervise the floor the entire day as he had administrative work that had to be done and left the premises around 11:30 a.m. By the time Mr. Wood returned, appellant had already left. He stated that she had no intention of working when she returned as she was wearing shorts and a tee-shirt. Appellant immediately filed a 3971 form claiming sick leave due to stress. Mr. Wood denied immediately ordering her from the building but stated that she attempted to stir up a problem on the workroom floor by yelling and accusing him of hurting her. He attached a prior statement outlining the events of July 21, 2004. Mr. Wood stated that he advised appellant that she needed to stay at work until he returned. He called the office at 4:00 p.m. but was informed by Mr. Kelly that she left at 1:30 p.m. Mr. Wood instructed Mr. Kelly to call her and see when she was returning because she had to close. He stated that he called appellant and she denied that he told her she had to close. Appellant returned to work casually dressed and turned in a leave slip. Mr. Wood also submitted a July 21, 2004 letter addressed to appellant in which he advised her that she would need to open and close the rest of the week. Appellant was informed that her work schedule was 6:00 a.m. to close Wednesday through Saturday.

In an October 5, 2005 decision, the Office found that appellant failed to establish any compensable factors of employment.

Appellant requested a hearing which was held on March 20, 2007. Mr. Halstead, her representative, submitted a portion of the EEO deposition testimony dated February 14, 2007 in which Mr. Wood described the events of July 21, 2004. He told appellant that she would have to close that day but noted that he did not call her at home. In a March 19, 2007 statement, appellant stated that Mr. Wood did not call her on July 21, 2004.

In a June 15, 2007 decision, an Office hearing representative affirmed the October 5, 2005 decision, finding that appellant failed to establish any compensable factors of employment.

On October 31, 2007 appellant requested reconsideration. Counsel for appellant in the EEO action submitted materials related to her claim which resulted in a jury verdict in her favor. He noted that she brought a complaint alleging illegal retaliation and reprisal by Postmaster Foucault beginning in 2004. The jury returned a verdict in the amount of \$258,640.00, of which \$250,000.00 was for damages for emotional distress and \$8,640.00 was for back pay. Counsel noted that the acts of reprisal were detailed in the pretrial order and that the jury found her participation in protected activity was a motivating factor for the defendant subjecting her to adverse employment actions.¹

The jury verdict found that appellant was not subjected to adverse action when detailed to Central Point in April 2004, in not being allowed to return to work under medical restrictions, or in being separated in November 2005.² However, appellant's participation in protected activity was a motivating factor of the defendant leading up to her stopping work on July 21, 2004 and in denying her requests for benefits from July 2004 through early 2005. As to her claim of FMLA interference and retaliation, the jury found that she did not establish that it was a negative factor in any employment action.

By letter dated January 7, 2008, the employing establishment contended that the jury verdict was limited in scope as to any adverse finding. It contended that the verdict did not state with any specificity the particular issues or incidents that formed the basis of this finding,

¹ The pretrial order addressed a 2002 complaint brought against Postmaster Foucault by the Supervisor of Distribution Operations and comments provided to an investigator during April and May 2002 from 12 EAS level supervisors. Appellant was among the supervisors interviewed and her comments summarized in the investigation report. The pretrial order noted that the U.S. Department of Labor found that the withholding of appellant's annual and/or sick leave payments was in violation of the Family and Medical Leave Act (FMLA). It was noted that Postmaster Foucault was aware of appellant's participation in protected activity by October 2003 and began retaliating against her in April 2004. As of July 21, 2004, appellant had accrued 462.2 hours of sick leave and 200 hours of annual leave. She was granted leave under FMLA but the employing establishment began deducting the balance from her sick leave until she had 14.2 hours left on November 5, 2004. As of that date appellant was carried as AWOL while the employing establishment deducted six hours of annual leave each week from her leave balance. The U.S. Department of Labor subsequently advised Postmaster Foucault that the employing establishment was in violation of the FMLA.

² On May 19, 2008 the federal magistrate denied appellant's motion that she be reinstated at the employing establishment with back pay and that the jury found she was not entitled to front pay based on her loss of employment. The court denied the employing establishment's motion to withdraw the award of back pay.

especially regarding the incident of July 21, 2004. The employing establishment noted that the EEO claim was focused on Postmaster Foucault while the July 21, 2004 incident involved Mr. Wood.

In a February 6, 2008 decision, the Office denied modification of the prior decision. It noted that the EEO verdict merely found in appellant's favor but did not explain how the events of July 21, 2004 were due to retaliation.

On August 26, 2008 appellant, through her representative, requested reconsideration. She contended that the jury instructions and EEOC verdict established she was retaliated against at the employing establishment leading up to the incident of July 21, 2004. Appellant alleged that her job duties were unreasonably altered and interfered with such that her performance was undermined. She contended that she was excluded from meetings, locked out of her office, falsely accused of misconduct and performance deficiencies, and insulting remarks were made about her in front of colleagues and subordinate employees. Appellant alleged that she was not paid for all the time she worked or at the correct rate of pay; was paid sick leave or annual leave improperly and that she was characterized as AWOL on time and attendance records including July 21, 2004.

In a February 5, 2006 statement, Mr. Kelly noted that he was questioned by Mr. Halstead concerning the events of July 21, 2004. He stated that appellant's body language on that day was subdued and fearful and that Mr. Wood stood far closer than necessary for a professional conversation. Mr. Kelly looked intimidating and threatening and seemed to be trying to provoke a reaction from appellant. Upon further recall, he heard appellant repeatedly ask for a CA-2 form but was denied. Appellant also submitted treatment records from Dr. Davol dated June 18 to September 2, 2004 and copies of evidence previously of record.

In a December 1, 2008 decision, the Office denied appellant's reconsideration request, finding the evidence and argument submitted was duplicative or irrelevant and insufficient to warrant further merit review.

LEGAL PRECEDENT -- ISSUE 1

To establish her claim that she sustained an emotional condition in the performance of duty, a claimant must submit: (1) medical evidence establishing that she has an emotional or stress-related disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her stress-related condition.³ If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor.⁴ When the matter

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

⁴ *Dennis J. Balogh*, 52 ECAB 232 (2001).

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.⁵

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*,⁶ 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.⁷ There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.⁸ 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.⁹ 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.¹⁰

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 Federal Employees' Compensation Act.¹¹ 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.¹²

For discrimination to give rise to a compensable disability, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such action occurred. A claimant must establish a factual basis for his or her allegations that discrimination occurred with probative and reliable evidence.¹³ With regard to emotional claims arising under the Federal Employees' Compensation Act, the term discrimination or

⁵ *Id.*

⁶ 28 ECAB 125 (1976).

⁷ 5 U.S.C. §§ 8101-8193.

⁸ See *Robert W. Johns*, 51 ECAB 137 (1999).

⁹ *Lillian Cutler*, *supra* note 6.

¹⁰ *Roger Williams*, 52 ECAB 468 (2001).

¹¹ *Charles D. Edwards*, 55 ECAB 258 (2004).

¹² *Kim Nguyen*, 53 ECAB 127 (2001). See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

¹³ *James E. Norris*, 52 ECAB 93 (2000).

harassment as applied by the Board is not the equivalent of that as defined or implemented by other agencies, such as the EEO Commission which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers' compensation under the Federal Employees' Compensation Act, the term "harassment" is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by co-employees or workers. Mere perceptions and feelings of harassment will not support an award of compensation.¹⁴

ANALYSIS -- ISSUE 1

The Board finds that appellant has established several compensable factors of employment. The case is not in posture for decision as the Office has not evaluated the medical evidence submitted in support of her claim.

Appellant alleged retaliation by her managers at the employing establishment following her participation in protected activity by providing statements in April 2002 pertaining to the EEO claim of a fellow supervisor. On November 21, 2007 a jury returned a verdict in favor of appellant on her claim that reprisal based on her participation in protected activity was a motivating factor leading to her stopping work on July 21, 2004 and in the management's denial of her requests for benefits from July 2004 through early 2005. The jury found that she was not subjected to an adverse action when detailed to the Central Point office in April 2004, in not being allowed to work under her medical restrictions or in being separated from her employment in November 2005. As to her claim of FMLA interference, the jury found that the evidence did not establish that it was a negative factor in any employment action. The Office has not accepted that appellant established any compensable factors of employment with regard to these matters, accepting the argument of the postal service that the jury verdict was too vague in explaining how the incident of July 21, 2004 was due to retaliation or to establish error or abuse in an administrative matter. The Board disagrees.

Establishing a claim for compensation is a matter of proof.¹⁵ With regard to the rights of an employee for remedies provided under other statutory authority, the Board has held that the findings made by the Merit Systems Protection Board or the EEO Commission are not determinative of the employee's rights under the Federal Employees' Compensation Act.¹⁶ However, the findings made by the MSPB or EEO Commission may constitute substantial evidence relative to the claim to be considered by the Office and the Board in reviewing a claim for compensation and instructive to such proceedings.¹⁷ In *Michael A. Deas*,¹⁸ the EEO

¹⁴ *K. W.*, 59 ECAB ____ (Docket No. 07-1669, issued December 13, 2009).

¹⁵ *Beverly R. Jones*, 55 ECAB 411, 418 (2004).

¹⁶ See *Daniel Deparini*, 44 ECAB 657 (2993); *George A. Johnson*, 43 ECAB 712 (2992); *Constance G. Mills*, 40 ECAB 317 (1988). Decisions by such tribunals are pursuant to different statutes which have varying standards for establishing eligibility for benefits. See *Andrew Fullman*, 57 ECAB 574 (2006); *Freddie Mosley*, 54 ECAB 255 (2002).

¹⁷ *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Pamela I. Holmes*, 49 ECAB 581, 586-87 (1998).

¹⁸ 53 ECAB 208 (2001).

Commission found that the employee's allegations of discrimination pertaining to his removal from federal employment were not substantiated as factual and he failed to establish that the reasons for his termination were a pretext for discrimination or reprisal. The Board stated that an EEO decision constituted evidence that is "relevant and instructive as it provides a substantive review of the allegations" made by the employee. It was noted that an EEO judge set forth factual findings pertaining to the employee's allegations, held evidentiary proceedings, and evaluated the credibility of the testimony provided by witnesses.¹⁹ In this appeal, the evidence reflects that a jury trial was held pertaining to appellant's allegations of discrimination and reprisal by her managers at the employing establishment. Findings were made by the jury after considering the evidence presented by both parties and the testimony of the witnesses over a two-week trial. Such evidence should not be lightly dismissed by the Office.²⁰ The standard before the Board is not the equivalent of whether harassment or reprisal as defined by the EEO Commission took place. Rather, under the workers' compensation system, the question is whether there is evidence of record synonymous with mistreatment of the claimant by his or her managers or coworkers.²¹

The EEO Commission jury found that reprisal was a motivating factor on the part of Postmaster Foucault after he read excerpts of statements provided by various subordinate managers, including appellant, concerning a complaint brought against him by the Supervisor of Distribution Operations. Mr. Weiss, a postmaster, confirmed conversations with Mr. Foucault concerning the statements made in the EEO claim. Appellant testified that her job duties were altered and that the postmaster subsequently interfered with the performance of her work. This evidence, while in dispute, was found by the jury to substantiate that the postmaster took adverse actions against appellant based on her statements. Appellant has established reprisal as a compensable factor of employment arising in the performance of duty from her participation in protected activity.²²

The evidence further establishes administrative error on the part of appellant's managers in processing her requests for leave following July 21, 2004 into early 2005, prior to her termination in November 2005. While the Board has generally recognized that the handling of leave requests is an administrative matter and not a duty of the employee, such personnel matters will be considered as a compensable employment factor when the evidence of record discloses

¹⁹ *Id.* at 217.

²⁰ Compare *Irene St. John*, 50 ECAB 521 (1999) in which the Board did not agree with an EEO Commission's administrative judge's determination that the employee's allegations were factually established. The Board noted that the judge did not point to persuasive evidence that the sexual assault incident occurred as alleged and placed the burden on the employing establishment to disprove her allegation. The record before the Board contained the statements of a nurse who was present during the examination and did not support the employee's allegation of sexual or inappropriate physical contact.

²¹ *Beverly R. Jones*, *supra* note 15 at 417.

²² While the Board has held that the general processing of an EEO claim is not, of itself a compensable factor, appellant was required to provide a statement in the action brought by a fellow subordinate manager. Therefore, her participation became specially assigned requirement of her employment. See *Isabel R. Pumpido*, 51 ECAB 326 (2000).

error or abuse on the part of management.²³ Again, the jury found that reprisal was a factor in management's handling of appellant's leave requests during this period. The Board finds that appellant has established administrative error as a compensable factor under the Federal Employees' Compensation Act.

As to appellant's detail to the Central Point office, the jury found against her allegation that this was in reprisal for her participation in protected activity. The Board has noted generally that the assignment of work is an administrative matter and that an employee's dissatisfaction with being transferred constitutes frustration from not being permitted to work in a particular environment or to hold a particular position.²⁴ The evidence of record is not sufficient to establish error or abuse on the part of Postmaster Foucault in detailing appellant to another office. Similarly, the jury found against appellant's allegations of reprisal when she was not allowed to return to work under medical restrictions and in being separated from employment in November 2005. The evidence of record before the Board is not sufficient to establish administrative error or abuse in these administrative actions and appellant has not established these personnel matters as compensable factors.

Appellant alleged that she was excluded from certain meetings, locked out of her office, and investigated for being AWOL. The Board finds that she has not submitted sufficient evidence to establish these allegations as compensable factors. The evidence includes a statement of Mr. Weaver concerning a meeting with the postmaster and manager on May 19, 2004. However, his statement is not sufficient to establish that appellant was improperly excluded from participation in the meeting or that her managers prevented her access to her office. The fact that her office was made secure after she left work on July 21, 2004 and did not return does not rise to the level of administrative error or abuse. Investigations are also administrative functions of the employer and not related to an employee's day-to-day or specially assigned duties.²⁵ There is insufficient evidence to establish that any investigation into appellant's attendance during May and July 2004 by Mr. Foucault or Mr. Wood was in error or otherwise abusive in nature. These allegations are not established as compensable work factors.

Regarding the incident of July 21, 2004, the record reflects that Mr. Kelly was asked by Mr. Wood whether appellant was present to close the office and he was advised that she had left for the day. Appellant denied knowledge of being assigned to close the office that evening. She left the office but subsequently returned. In an August 2004 statement, Mr. Kelly stated that he did not overhear the discussion between appellant and Mr. Wood. After 20 minutes, appellant completed a form and left. Mr. Wood stated to Mr. Kelly that he and appellant had a "falling out."²⁶ The statements of the other coworkers are not probative on this issue as the record does not establish that they were present. The evidence of record does not establish that there was

²³ See *Jeral R. Gray*, 57 ECAB 611 (2006).

²⁴ *Robert Breeden*, 57 ECAB 622 (2006).

²⁵ *Ernest St. Pierre*, 51 ECAB 623 (2000).

²⁶ As the Office did not review the February 5, 2006 statement of Mr. Kelly, the Board may not consider such evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

error or abuse of appellant by Mr. Wood on that day.²⁷ This is not established as a compensable factor of employment.

CONCLUSION

The Board finds that appellant has established retaliation by her postmaster and error by her managers in the processing of her leave requests from July 21, 2004 through early 2005 as compensable factors. As the Office did not evaluate the medical evidence submitted in support of her claim, the case will be remanded to the Office for further development to be followed by a merit decision on her claim for benefits under the Federal Employees' Compensation Act.²⁸

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 6 and December 1, 2008 be set aside. The case is remanded to the Office for further development with this decision of the Board.

Issued: December 18, 2009
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

²⁷ The statement of Mr. Kelly does not support assertions made by Mr. Wood that appellant became disruptive and began yelling on the workroom floor.

²⁸ Based on this factual determination, the second issue in this case is rendered moot.