U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of CHRISTINE M. ILIOPOULOS and U.S. POSTAL SERVICE, ITASCA POST OFFICE, Itasca, IL

*Docket No. 99-2095; Submitted on the Record;*
*Issued February 5, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she sustained an emotional condition in the performance of duty as alleged; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing on the grounds that it was untimely filed.

On June 23, 1998 appellant, then a 32-year-old clerk, filed a notice of occupational disease alleging that harassment, retaliation and discrimination by management beginning on May 13, 1996 caused an anxiety and stress condition. In an attached statement, appellant alleged that on May 13, 1996 she witnessed supervisor Kevin Koehler clock in an absent employee and that Mr. Koehler, thereafter, harassed and threatened her.[1] Appellant also alleged that after she injured her foot at work on August 3, 1996, Mr. Koehler made harassing comments to her when she raised the issue of her medical restrictions, saying "Do n[o]t give me that crap" and "I'm going to make things hard for you girl" and made her work outside her physical restrictions.[2] Appellant also claimed that Mr. Alan Swierkosz denied her union representation in a January 15 and April 18 1997 meetings and at other times.

Appellant alleged that Mr. Swierkosz made her go to the doctor on the clock in order to make her compensation file appear inactive and that Mr. Swierkosz called appellant at home to harass her when she reported this to workers' compensation specialists. Appellant alleged that she was denied medical leave, told to bring in documentation of her having chicken pox on

[1] In a July 1, 1998 letter, Mr. Michael Kervin, postmaster, noted appellant's allegation but indicated that an investigation failed to establish that the incident occurred. Appellant has thus not established that this incident occurred as alleged and, therefore, it cannot constitute a compensable factor of employment.

[2] In a March 12, 1997 slip, Dr. Shashi Saigal, an employing establishment physician, released appellant to work "without restrictions," noting that the right foot fracture "can take six to eight months to heal completely, so [Dr. Contento] wants to check her periodically until eight months," with an ending visit on approximately April 3, 1997.

February 10, 1997, was issued two letters of warning in retaliation for writing a witness statement regarding Mr. Kervin yelling at another employee on November 27, 1996 and that she was removed from her position as timekeeper on June 2, 1998 as retaliation for her filing grievances.

By decision dated September 24, 1998, the Office denied appellant's claim on the grounds that she failed to establish a compensable factor of employment, including that she was made to work beyond her restrictions and denied union representation. Appellant disagreed with this decision and in a November 3, 1998 letter, requested an oral hearing. She submitted additional evidence.

By decision dated and finalized November 27, 1998, the Office hearing representative denied appellant's request for a hearing, postmarked November 4, 1998, on the grounds that it was filed more than 30 days after the Office's decision. Appellant disagreed with this decision and in a January 2, 1999 letter, requested reconsideration. She submitted additional evidence.

In a September 23, 1998 notice, signed by Mr. Kervin and Mr. Swierkosz, appellant was advised that she was removed from her employment effective October 30, 1998 based on the findings of her attending psychiatrist, Dr. Joseph Kut[3] and Dr. Danielle Murstein, a psychiatrist who performed a fitness-for-duty examination for the employing establishment.

By decision dated April 9, 1999, the Office denied modification of the September 24, 1998 decision, finding that the additional evidence failed to establish a compensable factor of employment.

Appellant attributed her emotional condition in part, to being made to work outside of her physical restrictions against lifting more than 10 pounds, prolonged standing and walking prescribed by Dr. Keith Contento, an attending podiatrist, pursuant to an August 3, 1996 right foot fracture.[4] The Board has held that work outside of prescribed work restrictions may

[3] In a June 9, 1998 report, Dr. Kut stated that appellant was under his care and would "not be returning to work until further notice." In an October 1, 1998 letter, he diagnosed generalized anxiety disorder with panic attacks, possible post traumatic stress disorder, with symptoms of "rapid heart rate, chest pain, difficulty breathing, nausea, insomnia, fear of losing control and dread." The record also contains notes from Susan Glickley, a counselor associated with Dr. Kut. However, as Dr. Kut did not sign these forms, they cannot be considered as probative evidence in support of appellant's claim. *Merton J. Sills*, 39 ECAB 572 (1988).

[4] In an August 15, 1996 form report, Dr. Keith M. Contento, an attending podiatrist, treating appellant for the August 3, 1996 right foot injury, diagnosed a "strained/torn interosseous ligament first metatarsal cuneiform joint right foot with possible fracture of bone, extensor tendonitis dorsum right foot" and recommended limited duty. In a September 26, 1996 note, Dr. Contento found that appellant could lift up to 10 pounds, had both a right foot fracture and torn ligaments and prescribed medication, orthotics and strengthening exercises. He submitted periodic progress reports through November 1996 limiting lifting to zero pounds, standing and walking to one hour per day. In January 3 and April 4, 1997 reports, Dr. Contento noted that there was "delayed healing of fracture R[ight] foot causing pain and difficulty in walking" and prescribed a flexible cast with pad.

constitute a compensable factor of employment.[5]

In this case, appellant submitted factual evidence establishing her allegation that she was required to work outside her physical restrictions. In a July 1, 1998 letter, Mr. Kervin confirmed that appellant "was working outside of her restrictions" in September and early October 1996, while under Mr. Koehler's supervision.[6]

The Board finds that the record establishes that, appellant was required to work outside her physical restrictions.

Appellant also alleged that she was denied union representation at the January 15 and April 18, 1997 disciplinary meetings. While the Board has held that union activities are not considered to be in the performance of duty,[7] where the evidence demonstrates that the employing establishment has erred or acted abusively in administration of personnel matters, coverage may be afforded.[8] In an April 19, 1997 statement, Lester W. Smith, a union steward, recalled that on January 15, 1997, management denied appellant his representation at a meeting when there was no other steward available and that Mr. Kervin "kicked [him] out of the postmaster's … office in the presence of the Mr. Swierkocz and [appellant]. Mr. Smith alleged that Mr. Kervin and Mr. Swierkocz were picking on and singled appellant out for harassment. Mr. Smith also alleged that on April 18, 1997, Mr. Kervin and Mr. Swierkocz had appellant "in the Postmaster's office without giving her union representation."

While the precise nature of the two meetings is not ascertainable from the record, appellant's statements, as supported by Mr. Smith, implicate that the employing establishment may have acted in error in denying appellant representation. Therefore, on return of the case, the Office should further develop the evidence on whether appellant was entitled to union representation at those meetings.

Appellant also alleged verbal abuse by Mr. Koehler, her supervisor, from August to October 1996. In a July 1, 1998 letter, Mr. Kervin indicated that Mr. Koehler referred to appellant as "girl" in September and early October 1996 and that he had admonished Mr. Koehler in this regard. Verbal altercations with supervisors, when sufficiently detailed and supported by the evidence, may constitute a compensable factor.[9] Although the Board has recognized the compensability of verbal abuse, this does not imply that every statement uttered

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[5] *Lorraine E. Schroeder*, 44 ECAB 323 (1992); *Minnie L. Bryson*, 44 ECAB 713 (1993); *Dodge Osborne*, 44 ECAB 849 (1993).

[6] Appellant submitted August 7 to October 11, 1996 timekeeping records, which appellant asserts substantiate that she was ordered to "throw flats" against her physician's orders. Appellant explained that code 240-00 on the forms denoted "sorting mail, either letters or flats." While the 240-00 code appears on various dates, there is no differentiation in coding between "throwing flats" and other types of mail sorting.

[7] *See Larry D. Passalacqua*, 32 ECAB 1859 (1981).

[8] *See Sharon R. Bowman*, 45 ECAB 187, 194 (1993).

[9] *See Janet D. Yates*, 49 ECAB 240 (1997).

in the workplace will give rise to coverage under the Act.[10] Appellant has not explained how the comment would rise to the level of verbal abuse. The Board finds that appellant has not established a compensable factor in this regard.

The Board further finds that the remainder of appellant's allegations concern either noncompensable elements of her employment, or are not established as factual.

Appellant attributed her condition in part to several disciplinary actions. She was issued a May 9, 1997 letter of warning for taking unauthorized breaks and a June 9, 1998 seven-day suspension for being absent without leave on June 2, 1998.[11] In a September 23, 1998 notice, signed by Mr. Kervin and Mr. Swierkosz, appellant was advised that she was removed from federal employment effective October 30, 1998, due to the findings of her attending psychiatrist, Dr. Murstein, who performed a fitness-for-duty examination for the employing establishment.

Appellant also alleged that she was removed from her position as a job instructor and from her timekeeping duties on June 2, 1998 as retaliation for submitting a witness statement in December 1996 regarding a confrontation between Mr. Kervin and a coworker. However, in a July 1, 1998 letter, Mr. Kervin stated that appellant was removed from her time keeping duties and her instructor position as her credibility was in question due to missing and altered time keeping records. The Board finds that the employing establishment presented credible evidence refuting appellant's claims of retaliation.

The Board has held that disciplinary matters are not in the performance of duty,[12] as they 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.[13] While administrative and personnel matters may come under the coverage of the Federal Employees' Compensation Act if there is error or abuse on the part of the employing establishment.[14] Appellant has not submitted sufficient evidence in corroboration of her claim to establish that the employing establishment

[10] *See Christophe Jolicoeur*, 49 ECAB 553 (1998).

[11] In a June 2, 1998 letter, to Mr. Kervin, Mr. Swierkosz stated that appellant was removed from the position of job instructor that day she "could no longer trust her" as she did not keep information concerning the pending removal of Scott Hibner, a coworker, confidential as required. The job instructor position required that supervisors be able to entrust appellant with confidential employee information such as work deficiencies requiring training. The employing establishment alleged that on June 2, 1998 after being informed she "would no longer be the tour one job instructor" and of the reasons why she became "loud and disruptive" and stated that she was going to the Carol Stream branch to speak with Equal Employment Opportunity (EEO) officials and did not care if she was marked as absent without leave (AWOL). Appellant was instructed to speak with union steward Lester Smith, which she did, then returned to Mr. Kervin's office and again stated that she was going to the Ms. Stream branch and submitted a request for sick or administrative leave. Appellant submitted a June 2, 1998 leave slip for sick leave on that day, noting "or administrative/will be at Ms. Stream then d[octo]r." Mr. Swierkosz disapproved the request on June 5, 1998, noting "unacceptable-AWOL." Appellant was then informed by Mr. Kervin and Mr. Swierkosz of the type of documentation needed to substantiate her leave request.

[12] *See Larry D. Passalacqua*, *supra* note 7.

[13] *See Jimmy Gilbreath*, 44 ECAB 555 (1993).

[14] *See Richard Dube*, 42 ECAB 916 (1991).

erred or acted abusively with regard to the disciplinary actions. Thus, appellant has not established a compensable employment factor under the Act in this respect.[15]

Appellant also asserted that her emotional condition was due to the stress of being denied requested leave and the processing of her leave requests. She submitted copies of leave slips indicating that sick leave was approved on eight occasions from September 1996 to July 3, 1998 disapproved for February 27, March 7 and June 13, 1997 and March 27, 28, April 20 and June 5, 1998. Leave slips for the dates January 24, February 7 and April 4, 1997 show that appellant's request for "COP leave [continuation of pay]" was altered to read sick leave and then approved. Appellant alleged that Mr. Swierkosz altered the leave slips to make her compensation file appear inactive.

Appellant also asserted that she was wrongly denied Family and Medical Leave Act (FMLA) leave on February 8, 1997 to care for herself and her children who had chickenpox and that Mr. Swierkosz called her at home to demand documentation of the illness while she was sick on February 10, 1998. In a September 1998 statement, union steward Keith McCreary stated that at a February 8, 1997 meeting with appellant and Mr. Swierkosz, appellant requested FMLA leave to care for her two children with chickenpox and Mr. Swierkosz repeatedly called appellant "selfish" and denied her request. When appellant brought in documentation as per Mr. Swierkosz's orders on February 10, 1997, Mr. Kervin told Mr. McCreary that Mr. Swierkosz was wrong to have ordered appellant to come in when she herself had the chickenpox and granted appellant 15 days leave. Appellant also submitted a February 9, 1997 emergency room report, diagnosing appellant with chicken pox. February 17 and 27, 1997 FMLA slips from pediatrician Dr. Joanne Sundermeier.[16]

In March 18 and April 2, 1998 statements, Mr. Kervin denied that appellant was instructed to come in to work to confirm that she had chickenpox and that she must have misunderstood him. In a July 1, 1998 letter, Mr. Kervin noted instructing Mr. Swierkosz not to have appellant schedule medical appointments during work hours after the 45 days of continuation of pay had elapsed, as it was "convenient for her to be paid instead of buying back leave."

The Board has carefully reviewed the evidence regarding appellant's leave requests and finds that the employing establishment acted reasonably. The Board has held that alleged unfairness in leave request evaluations and leave denials are not compensable work factors where appellant offered no independent evidence that the employing establishment erred or acted abusively in these matters.[17] Appellant has thus failed to implicate a compensable factor of employment regarding the leave issues.

[15] *See Frederick D. Richardson*, 45 ECAB 454 (1994).

[16] Appellant submitted letters from coworkers Tim Koleno, Margie Miller and Betty Gattuso generally corroborating the account of events provided by appellant.

[17] *Michael Thomas Plante*, 44 ECAB 510 (1993).

As the case must be remanded to the Office for further development regarding the implicated compensable employment factors, the second issue regarding the timeliness of appellant's request for an oral hearing is rendered moot.

The decisions of the Office of Workers' Compensation Programs dated April 9, 1999 and November 27, 1998 are hereby set aside and the case remanded for further development consistent with this decision.[18]

Dated, Washington, DC
February 5, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[18] Appellant submitted evidence to the Office subsequent to the decision dated and finalized April 9, 1999. The Board, however, cannot consider this evidence, since the Board's review of the case is limited to the evidence of record, which was before the Office at the time of its final decision; *see* 20 C.F.R. § 501.2(c). Appellant may resubmit this evidence to the Office with a formal request for reconsideration; *see* 20 C.F.R. § 501.7(a).