U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAREN L. WOOD and U.S. POSTAL SERVICE,
POST OFFICE, Phoenix, AZ

Docket No. 03-323; Submitted on the Record;
Issued May 20, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant sustained an emotional condition in the performance of her federal duties; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing appellant's request for a subpoena.

On April 12, 2001 appellant, then a 41-year-old supervisor, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that she sustained an emotional condition as a result of a hostile environment and retaliation by her supervisors.[1] Appellant cited the following factors as causing her emotional condition: on February 15, 2001 she was removed from her job as attendance control supervisor (ACS) after she refused to grant leave to an employee who had not met the legal requirements; management leaked information that she was removed from her ACS position; a union newsletter slandered her and management did not rebut the false accusations. (The newsletter was distributed in an inter-office envelope and was posted on bulletin boards all over the building); with the exception of three people, management failed to support the ACS program; a supervisor agreed to give appellant's personal leave record to the union without appellant's consent or knowledge, an act that was later stopped by labor relations; a comment by a coworker that appellant should buy a bulletproof vest was improperly handled by the threat management team; a letter was sent to appellant via inter-office mail calling her a "stupid cunt," to which management did not respond; appellant's car was vandalized on several occasions while in the postal supervisors' parking lot and appellant had to pay for the repairs; and a swastika was drawn on appellant's cabinet and when she reported it to management she was told to "let it go."

Appellant alleges that these actions created a hostile environment, were embarrassing, led to severe emotional stress and anxiety attacks and were a violation of her privacy. She also alleged that her removal was in retaliation for filing an Equal Employment Opportunity (EEO) complaint in 1999.

[1] Appellant's relevant medical history includes an incident of situational depression with anxiety in 1996.

In a May 16, 2001 letter, the Office requested more information. In a June 5, 2001 letter, appellant's attorney expanded on the facts surrounding appellant's allegations. He wrote that the employing establishment, seeking to reduce absenteeism, appointed appellant as ACS with responsibility to ensure that all employees abide by attendance rules including those related to the Family Medical Leave Act.

On the evening February 12, 2001 appellant returned from a training session for her new position and discovered a Family Medical Leave Act application from Norman Tourvilles, who was requesting leave due to the recent death of his wife. Appellant reviewed the documents and discovered that they were not complete. She called Mr. Toursville at home to inform him that his application was pending and that he needed to provide more documentation. Mr. Toursville responded with profanity and stated that he intended to inform Plant Manager, Paul Harris and have the status of his application changed.

Appellant emailed Mr. Harris to notify him that Mr. Toursville might call and explain the status of the application.

On February 15, 2001 Mr. Harris emailed appellant stating that she had failed to use good judgment in her call to Mr. Toursville. On February 16, 2001 appellant learned that Mr. Harris had reassigned her ACS responsibilities to another supervisor and returned appellant to her previous assignment as a floor operations supervisor. Appellant stopped work and did not return.

On February 17, 2001 appellant learned that a "slanderous" union newsletter was circulating with the union taking credit for appellant being reassigned. On April 5, 2001 appellant informed the employing establishment of her intent to file a claim for an emotional condition. On April 7, 2001 she discovered that she was denied access to her office.

Appellant's representative alleged that appellant's condition resulted from a dispute or disagreement with her supervisor over how to perform her duties and her removal was traceable to the performance of her duties. The representative alleged that the employing establishment conspired with the union to humiliate appellant.

In a May 28, 2001 letter to appellant, James R. Morley, a coworker, wrote that on or around March 1, 2001 he saw a union flyer in which the union took credit for appellant's removal as sick leave coordinator. He opined that appellant had done a good job as an ACS, was fair and treated him compassionately.

In a July 25, 2001 statement, Mr. Harris noted that he never asked appellant to violate the law regarding the Family Medical Leave Act. He stated that appellant was not removed, but reassigned to another supervisory position. He denied her allegations that she received a letter calling her a "stupid cunt" or that he told her to develop thicker skin. Mr. Harris added that appellant never provided evidence that she received the letter or who sent it. Regarding appellant's car being vandalized, he wrote that appellant chose to park her car in an unsecured area and that there was no indication that the damage was caused by postal employees. He was not aware of the swastika incident and appellant's leave records were not given to the union. Regarding the comment by a coworker that she buy a bullet proof vest, he wrote that appellant did not report this comment at the time it occurred; but when she did report it a threat assessment

was conducted. As a result of the assessment the employee who made the comment was issued a letter of warning. No further action was taken because the comment did not constitute a genuine threat; in part because it was made in jest and appellant was reported to have laughed at the comment at the time it was made.

In a July 25, 2001 letter, Suzanne Hasting, injury compensation specialist at the employing establishment, denied appellant's allegation to act outside the law regarding the Family Medical Leave Act request, or that Mr. Harris acted in retaliation for an earlier EEO complaint. She noted that appellant disagreed with how Mr. Harris treated Mr. Toursville's application for leave. Appellant was not removed from her job but was reassigned to new responsibilities with no loss of grade or position. Ms. Hasting stated that appellant's allegations of lack of management support were unfounded and not supported by evidence. She denied that a supervisor gave appellant's personal leave records to the union. She indicated that Mr. Harris' email to appellant was in reference to her exercise of judgment in calling Mr. Toursville at home after his wife had just died. She characterized appellant's disagreement with what the union wrote as not within the performance of her duties and that Mr. Harris denied that he gave the union the information related to appellant's changed job assignment.

In a September 17, 2001 decision, the Office denied appellant's claim finding that she had not established a compensable employment factor that arose in the performance of duty.

In a September 26, 2001 letter, appellant requested a hearing. Appellant's representative argued that appellant's emotional condition arose directly from a disagreement or dispute with her supervisor over how she performed her day-to-day duties and resulted in an administrative action; therefore, her reassignment to new duties was a compensable factor. Appellant also submitted copies of awards and emails appellant received for her effective administration as ACS.

In a June 5, 2001 letter, appellant's representative requested that Mr. Harris be subpoenaed on the grounds that he had unique information as to why appellant was reassigned, an important element of her claim. He added that, since only Mr. Harris had the information sought, a subpoena is the best and only way to obtain this evidence.

In a June 6, 2002 decision, the hearing representative denied the subpoena request finding that appellant had failed to explain why Mr. Harris' testimony was directly relevant to the issue in the case or why a subpoena was the best way to obtain such evidence and there was no other means to obtain his testimony. She noted that a statement by Mr. Harris was part of the record and, if appellant disagreed with the statement, appellant could provide probative evidence refuting it.

At the hearing appellant testified that she was told that the employing establishment was losing money due to poor administration of the attendance policy and they wanted ACSs who would ask questions and require proper documentation. She alleged that she was told by her immediate supervisor, Mr. Weaver, that Mr. Harris was furious with her over the "[Mr.] Toursville situation" and that she ought to apologize to Mr. Toursville and Mr. Harris. When appellant told Weaver that she did everything correctly, Mr. Weaver allegedly said "No

one said you were incorrect procedurally. We are saying you were insensitive…. We [ha]ve been giving away Family Medical Leave Act for years. What is one more?"

Following the hearing, the employing establishment noted that there was no disagreement or dispute about appellant's job performance; there was no evidence to support the employing establishment was dissatisfied with appellant's efforts and that appellant received no letter of warning or other administrative action.

In a July 23, 2002 letter, appellant responded that the fact that Mr. Harris approved Mr. Toursville's application established that there was a disagreement between appellant and Mr. Harris. In a July 26, 2001 letter, the employing establishment indicated that Mr. Toursville's Family Medical Leave Act request was approved by supervisor, Joe Shank, not Mr. Harris. It was noted that Mr. Harris' email to appellant did not reflect a disagreement between them but was an assessment of her performance and therefore appellant's medical condition arose from her frustration with how Mr. Harris handled his administrative duties.

In a September 9, 2002 decision, the hearing representative affirmed the Office's September 17, 2001 decision finding that appellant had not established a compensable factor.

Initially, the Board finds that the Office did not abuse its discretion by refusing to issue a subpoena.

Section 8126 of the Federal Employees' Compensation Act[2] provides, in relevant part, "The Secretary of Labor, on any matter within his jurisdiction under this subchapter, may (1) issue subpoenas for and compel attendance of witnesses within a radius of 100 miles."[3] Federal regulations provide that, while a claimant may request a subpoena, the decision to grant or deny such a request is within the discretion of the hearing representative.[4]

By letter dated June 5, 2001, appellant requested that the Office issue a subpoena for the appearance of Mr. Harris. In a June 6, 2001 decision, the Office hearing representative denied appellant's request for a subpoena, noting that appellant failed to explain why the documents, or person, requested were directly related to the issue at hand or that a subpoena was the best method for obtaining the requested information. The hearing representative noted that a statement and emails by Mr. Harris were already part of the record. She determined that appellant failed to provide any evidence to support that any additional probative information would be elicited by compelling the attendance of Mr. Harris.

To establish that the Office abused its discretion, appellant must show manifest error, prejudice, partiality, intentional wrong, an unreasonable exercise of judgment, illogical action or action that would not be taken by a conscientious person acting intelligently. The mere showing that the evidence would support a contrary conclusion is insufficient to prove an abuse of discretion.

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8126.

[4] 20 C.F.R. § 10.619 (1999).

In the present case, appellant has not met her burden to show abuse of discretion. She provided explanation of why Mr. Harris' testimony would be relevant to the issue in her claim or why a subpoena was the best method or opportunity to obtain such evidence.

The Board finds that appellant has not met her burden of proof to establish that she sustained an emotional condition in the performance of her federal duties.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an 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 her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[5] 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.[6]

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by employment factors.[7] 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.[8]

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 a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[9] 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 record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[10]

In the present case, appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and actions. By decision dated September 9, 2002, the

[5] 5 U.S.C. §§ 8101-8193.

[6] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[7] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[8] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[9] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[10] *Id.*

Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Federal Employees' Compensation Act.

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions and unreasonably monitored her activities at work, 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 Federal Employees' Compensation Act.[11] Although the handling of disciplinary actions, the assignment of work duties and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[12] 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.[13] However, appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. Thus, appellant has not established a compensable employment factor under the Federal Employees' Compensation Act with respect to administrative matters.

Regarding appellant's allegation that a supervisor gave her leave records to the union and this action was later stopped by labor relations, the Board notes that the employing establishment denied this and appellant has not submitted evidence to establish that this occurred.

Appellant has 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.[14] However, for harassment or discrimination to give rise to a compensable disability under the Federal Employees' Compensation Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Federal Employees' Compensation Act.[15] In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that she was harassed or discriminated against by her supervisors or coworkers.[16] Appellant alleged

[11] *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).

[12] *Id.*

[13] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[14] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[15] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[16] *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).

that supervisors and coworkers wrote newsletters sent letters and engaged in actions which she believed constituted harassment and discrimination. The employing establishment denied these allegations. Although appellant submitted a statement from Mr. Morley, noting that he saw a union flyer, such evidence does not establish that the flyer constituted harassment or discrimination against appellant[17] nor has appellant submitted sufficient evidence that supports that management was involved with these allegations. Thus, appellant has not established a compensable employment factor under the Federal Employees' Compensation Act with respect to the claimed harassment and discrimination.

In the present case, the Board notes that appellant did not attribute her emotional condition to the regular or specially assigned job requirements, but that she was criticized by her supervisory for exercising poor judgment.

Regarding appellant's allegation that she developed stress due to insecurity about maintaining her position, the Board has previously held that a claimant's job insecurity, including fear of a reduction-in-force, is not a compensable factor of employment under the Federal Employees' Compensation Act.[18]

Appellant alleged that the employing establishment improperly changed her work assignment. As noted above, disability is not covered where it results from such factors as frustration from not being permitted to work in a particular environment or to hold a particular position. To show that an administrative action such as the proposed change in work assignment implicated a compensable employment factor appellant would have to show that the employing establishment committed error or abuse.[19] Appellant has not provided sufficient evidence to establish such action on the part of the employing establishment. Thus, appellant has not established a compensable employment factor under the Federal Employees' Compensation Act with respect to the proposed change in work duties.

Regarding appellant's dissatisfaction with her position change, the Board has previously held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Federal Employees' Compensation Act, as they do not involve appellant's ability to perform her regular or specially assigned work duties, but rather constitute appellant's desire to work in a different position.[20] Thus, appellant has not established a compensable employment factor under the Federal Employees' Compensation Act in this respect.

The Board has held that an employee's dissatisfaction with working in an environment which is considered to be otherwise undesirable constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under

[17] *See William P. George*, 43 ECAB 1159, 1167 (1992).

[18] *See Artice Dotson*, 42 ECAB 754, 758 (1990); *Allen C. Godfrey*, 37 ECAB 334, 337-38 (1986).

[19] *See Richard J. Dube*, *supra* note 13.

[20] *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

the Federal Employees' Compensation Act.[21] The Board notes that appellant's reaction to such conditions and incidents at work must be considered self-generated in that it resulted from her frustration in not being permitted to work in a particular environment or to hold a particular position.[22]

The Board has held that investigations, which are an administrative function of the employing establishment, that do not involve an employee's regularly or specially assigned employment duties are not considered to be employment factors.[23] 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.[24] Although appellant has made allegations that the employing establishment erred and acted abusively in conducting its investigation of appellant, she has not provided sufficient evidence to support such a claim. A review of the evidence indicates that appellant has not shown that the employing establishment's actions in connection with its investigation of her handling of Mr. Toursville's Family Medical Leave Act request and the coworker's comment that she should buy a bullet proof vest were unreasonable. Appellant alleged that her supervisor made abusive statements during the course of the investigation of her, but these allegations were denied and appellant provided no evidence, such as witness statements, to establish that the statements were actually made.[25] Thus, appellant has not established a compensable employment factor under the Federal Employees' Compensation Act in this respect.

The Board has recognized the compensability of physical threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Federal Employees' Compensation Act.[26] Appellant's allegations of receiving profane letters and threatening letters were not corroborated by any evidence and thus were not established as factual.[27]

Appellant has not established any compensable employment factors under the Federal Employees' Compensation Act and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.[28]

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[21] *See David M. Furey*, 44 ECAB 302, 305-06 (1992).

[22] *Tanya A. Gaines*, 44 ECAB 923, 934-35 (1993).

[23] *Jimmy B. Copeland*, 43 ECAB 339, 345 (1991).

[24] *See Richard J. Dube*, *supra* note 13.

[25] *See Larry J. Thomas*, 44 ECAB 291, 300 (1992).

[26] *See Leroy Thomas, III*, 46 ECAB 946, 954 (1995); *Alton L. White*, 42 ECAB 666, 669-70 (1991).

[27] *See Mary A. Sisneros*, 46 ECAB 155, 163-64 (1994); *David W. Shirey*, *supra* note 14.

[28] 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).

The September 9, 2002 decision by the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 20, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member