U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA Z. EVANS and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINSITRATION, Jackson, MS

Docket No. 03-1686; Submitted on the Record;
Issued September 4, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant established that she sustained an emotional condition in the performance of duty, as alleged.

On October 31, 2002 appellant, then a 48-year-old aviation safety inspector, filed a claim for an occupational disease, alleging that she suffered discrimination and harassment beginning in late 1998, which caused a very hostile work environment. She stated that there were several investigations into the matter by the Equal Employment Opportunity Commission (EEOC), the employing establishment and there were organizational development assessments. Appellant stated that her manager and then supervisor constantly belittled her, stalked her and solicited her operators for derogatory statements. Appellant alleged that she sustained post-traumatic stress disorder, major depression and anxiety disorder.

In a statement dated October 31, 2002, appellant stated that she began to experience anxiety and depression around November 1998. Appellant stated that shortly after being employed, she began to have "considerable difficulty" with a coworker who eventually became her supervisor. Appellant stated that she learned that he "really disapproved" of women being in her position and that the office manager shared that disapproval. Appellant stated that she subsequently learned that the manager hired her to satisfy a diversity issue in the office, but said he would "merely get rid" of her at a later date.

She stated that the situation was complicated by her being unable to receive the training she needed and being expected to learn a highly technical job on her own. Appellant stated that she had to obtain as much assistance as possible from her peers in the office, which became a very divisive and high conflict situation.

Appellant stated that her efforts to work with external customers also became a source of high conflict. She stated that she "felt ill prepared" to deliver the needed quality of work, was considered a "token female and a performance problem, an agitator for addressing [her] needs and frustrations," and was undermined with her customers. Appellant stated that these tensions

intensified over a period of a couple of years, starting in late 1998 through sometime in 2001. Appellant stated that she filed a complaint with the EEOC in April 1999, the employing establishment performed an investigation from June through October 1999 and she filed a law suit in April 2000, which concluded in March 2001.

Appellant stated that the situation became a "very antagonistic and hostile work environment" for her and her emotional health deteriorated from the constant tension and conflict to the point where ability to concentrate and perform at work became impaired and she felt ill. Appellant took time off for treatment, but stated that after returning to work after an extensive absence, the "fears" and "horrible memories" came "flooding back," and she had to be hospitalized.

By letter dated December 26, 2002, the Office of Workers' Compensation Programs requested additional information from appellant including corroboration of her allegations by witnesses.

Appellant submitted evidence of her request for sick leave due to her illness and showed that she was granted annual leave, sick leave and leave without pay through July 15, 2002. Appellant was hospitalized from September 10 through 17, 2002, for treatment of depression and anxiety. In a record of an interview between appellant and the manager, Tom Katri, dated September 5, 2002, Mr. Katri stated that appellant returned to work part time on August 8, 2002 and was scheduled to return to work full time on September 3, 2002.

By letter dated December 21, 1999, addressed to the assistant division manager, Craig R. Smith, a union representative, Edward T. Jeszka, addressed problems in the workplace and mentioned a complaint from Tommy Nix about appellant. Mr. Jeszka stated that appellant followed all procedures according to the employing establishment orders specific to her actions and that the "bogus complaint" was apparently "solicited to continue to discredit" appellant. He stated that Joe A. Laird failed to abide by union agreements and his management techniques continued to sustain unhealthy conditions in the Jackson office.

By letter dated April 11, 1999 to Mr. Smith, Mr. Jeszka stated that due to what appeared to be the solicitation of negative comments from operators regarding appellant's qualification, he withdrew from negotiations conducted under partnership and would return to traditional bargaining.

In a statement dated April 1, 1999, Allen M. Davis stated that, at appellant's request, he attended a meeting on March 3, 1999 between members of management, that is, Mr. Laird, Gerald W. Dozier, Shelly Gibson and appellant. Mr. Davis stated that the "tone of the meeting was punitive from the beginning and became more hostile" as it progressed. He cited several instances where Mr. Dozier criticized appellant for her work performance. Among them were that Mr. Dozier identified mistakes appellant had made regarding key words and codes in a stack of "PTRS" records and although he felt Mr. Dozier was correct in some instances, the system of key words and codes was so ambiguous standardized entries from anyone were precluded. Mr. Davis stated that Mr. Dozier found that appellant's comments on the PTRS sheets were unclear about what had been done during inspection and that she used the wrong terminology to describe various aircraft parts. Mr. Davis stated that Mr. Dozier stated that based on appellant's

comments a condition notice should have been issued, but he stated that the Office's position on condition notices changed so often that there was no set standard for issuing one. He stated that the contents of appellant's enforcement investigative report were systematically torn apart even though two qualified inspectors had assisted her. Mr. Davis also indicated that Mr. Dozier stated that he told appellant that she spent too much time on the telephone conducting personal business.

In a statement dated April 1, 1999, James H. McGee stated that prior to Mr. Laird's hiring appellant, Mr. Laird told Mr. McGee that he needed to hire a female because he was under pressure to hire minorities and that if he hired appellant and it did not workout, they "could always get rid of her." Mr. McGee stated that Mr. Dozier was "very upset" that the office was probably going to hire a female inspector. He stated that Mr. Dozier said to him that "a female had no business in the inspector workforce, that appellant was not experienced enough, he did not want her there and he was not going to "take up the slack" created by her presence.

Mr. McGee stated that in November 1998, he overheard a conversation between appellant and Mr. Laird, in which Mr. Laird chastised her for scheduling agricultural work program inspections during the upcoming holiday season, that he told her to change the dates to the second quarter of fiscal year 1999. Mr. McGee stated that "probably" in December 1998, he overheard another conversation between Mr. Laird and appellant, in which he told her the new schedule was unacceptable and she protested, stating that she had followed his directions. Mr. McGee stated that Mr. Laird responded that if she could not manage her work program that he could "or words to that effect."

Mr. McGee stated that on February 10, 1999 Mr. Dozier was "highly agitated" when there appeared to be a misunderstanding about Mr. McGee and appellant meeting him at a specific place during inspection of the hangar.

Mr. McGee stated that sometime in late February 1999 or early March 1999, he was seated in appellant's cubicle when Mr. Dozier brought some PTRS sheets to appellant and stated that the terminology and codes were wrong. He stated that Mr. Dozier proceeded to tell appellant that her knowledge of aircraft and PTRS procedures was deficient and she was not doing well as an inspector. He stated that "[t]his was all delivered in an apparently aggressive and intimidating manner standing all the time and stabbed at the PTRS sheets with his finger and appeared to be agitated all out of proportion to the matter being discussed."

Mr. McGee stated that "at another time" he was in "Mel's cubicle" when Mr. Dozier bought some PTRS sheets to appellant, told her they were wrong and she needed to change them. When she said okay, what do you want me to do, he became very agitated and told her that it would not do her "any good to strike an attitude with [him]," and she needed to do her job and do it right.

Appellant filed a lawsuit against the employing establishment alleging that her supervisors treated her unfavorably because of her sex and that they created a hostile work environment, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*. In a settlement agreement and release dated March 13, 2001, issued by the United States District Court of the Southern District of Mississippi between appellant and the

employing establishment, the parties agreed that the employing establishment would pay appellant $52,000.00. Other terms were that the employing establishment would reinstate 240 hours of sick leave and 80 hours of annual leave to appellant's current leave balance, appellant would complete 4 weeks of training at the Atlanta "[Flight Standards Division Office,]" and appellant would be recommended for up to 2 weeks of out-of-agency and/or industry training within 18 months of the date of execution of the agreement. The settlement stated that the agreement "shall not in any way be construed as an admission by the [d]efendant or any of his agents, employees, former employees, or assigns, of any acts of discrimination, reprisal, error, fault, or legal violation of any nature by the [a]gency, its agents, or employees with respect to the subject matter outline in the preamble of this [a]greement." The settlement stated that "[o]n the contrary, the [d]efendant specifically disclaims any liability to or discrimination against the [p]laintiff or any other person by the [a]gency or its officials, employees, former employees or agents."

By letter dated January 19, 2003, Mr. Katri stated that he first became aware of appellant's condition on March 4, 2002 when appellant requested a meeting with him and a union representative. He stated that as an effort to reduce her stress level, he suggested that appellant consider a voluntary downgrade to a FG-12 position, which she declined or that she transfer to a different office, which she declined and the office then approved and granted her extended leave. He stated that on July 25, 2002 when appellant called about training, with appellant's concurrence, the Office adjusted appellant's training so it would be less stressful for her. Mr. Katri stated that on August 9, 2002 the Office accommodated appellant's request to return to work four hours a day and gave her light-duty work with no deadlines. He also stated that the Office continued to assist appellant with her leave requests and approved them. Mr. Katri stated that prior to being granted extended leave, he was unaware of any documentation showing that appellant had performance or conduct problems.

By letter dated April 18, 2003, the director of personnel stated that the Air National Guard surgeon had determined that she was medically disqualified from her job and recommended her for discharge.

By decision dated May 13, 2003, the Office denied appellant's claim, stating that appellant did not meet the requirements for establishing that she sustained an injury in the performance of duty.

The Board finds that appellant did not establish that she sustained an emotional condition in the performance of duty, as alleged.

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 factors of her federal employment.[1] To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; (2) medical evidence establishing that she has an emotional or psychiatric

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

disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.[2]

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.[3] 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.[4]

Where an employee alleges harassment and cites to specific incidents and the employer denies that harassment occurred, the Office or some other appropriate fact finder must make a determination as to the truth of the allegations.[5] The issue is not whether the claimant has established harassment or discrimination under standards applied under the EEOC. Rather the issue is whether the claimant under the Act has submitted evidence sufficient to establish an injury arising in the performance of duty.[6] To establish entitlement to benefits, the claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.[7]

To the extent that disputes and incidents alleged as constituting harassment by supervisors and coworkers are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[8] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[9]

Regarding appellant's contentions that management discriminated against her because she was female, that she was harassed, that her supervisor "constantly belittled" her, stalked her and solicited her operators for derogatory comments, appellant has not presented corroborating evidence. Although in his letter dated December 21, 1999, Mr. Jeszka referred to a "bogus complaint" filed by a "Tommy Nix," and stated that appellant complied with proper procedures,

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[2] *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

[3] 5 U.S.C. §§ 8101-8193.

[4] *Clara T. Norga*, 46 ECAB 473, 480 (1995); *see Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[5] *Michael Ewanichak*, 48 ECAB 364, 366 (1997); *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

[6] *See Martha L. Cook*, 47 ECAB 226, 231 (1995).

[7] *Barbara E. Hamm*, 45 ECAB 843, 851 (1994).

[8] *Clara T. Noga*, *supra* note 4 at 481; *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

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

no details of the complaint are provided. Mr. Laird's failure to abide by union agreements Mr. Jeszka referenced is not pertinent to the specific details of appellant's claim. There was no corroboration of management's soliciting negative comments from appellant's operators.

In his description of the April 1, 1999 meeting, members of management had with appellant, Mr. Davis cited several instances where he felt appellant was unfairly criticized for her work as in her making errors in the PTRS records or failing to issue a notice condition. He also stated that the "tone" of the meeting was punitive and became increasingly hostile. Without additional, corroborating evidence, it cannot be determined whether Mr. Davis' perception that management unfairly criticized appellant at the meeting or that the meeting was hostile is accurate. Further, although Mr. McGee cited a few instances, in which he overheard or observed Mr. Laird criticizing appellant in her cubicle or elsewhere in the office for problems in her work or with her attitude and on one occasion criticized her in an aggressive and intimidating manner, there is no corroboration of Mr. McGee's assertions. The Board has held that the evaluation of an employee's work performance or the monitoring of her work is an administrative matter and, therefore, is not considered to be a compensable factor of employment unless the employing establishment was in error or abusive in the administrative actions.[10] Appellant has not made this showing.

Appellant did not submit evidence showing that she was refused training. Even if training were denied, however, error or abuse would have to be shown with regard to the denial and appellant did not submit that evidence.[11] Appellant submitted much evidence documenting her requests for leave but did not actually allege any stress resulting from management's handling of her requests, which it eventually granted. In any event, the handling of leave requests are administrative functions of the employer, not duties of the employee and are compensable only if management acted erroneously or abusively.[12] Appellant had not made this showing.

Moreover, in his January 19, 2003 letter, Mr. Katri stated that management tried to reduce appellant's stress by suggesting that she take a voluntary downgrade or transfer to another office but appellant declined. He also stated that management tried to implement training consistent with appellant's modified work schedule and when she returned to part-time work, they provided her with light duty and no deadlines. The Settlement Agreement and Release dated March 13, 2001, issued by the United States District Court of the Southern District of Mississippi, in which the employing establishment was required to pay appellant $52,000.00, reinstate leave and offer her training, is not determinative of the merits of appellant's contentions because the settlement specifically stated that it was not to be "construed as an admission of discrimination, reprisal, error, fault, or legal violation" by the employing establishment.

[10] *See Sherry L. McFall*, 51 ECAB 436, 439 (2000); *John Polito*, 50 ECAB 347-48 (1999).

[11] *See Ernest St. Pierre*, 51 ECAB 623, 625 (2000).

[12] *John Polito*, *supra* note 10 at 349 (1999).

Appellant has not submitted sufficient evidence to show that she was discriminated or harassed by the employing establishment and has failed to establish her claim.[13]

The May 13, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 4, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[13] Since appellant did not establish a compensable factor of employment, it is not necessary to address the medical evidence. *See Diane C. Bernard*, 45 ECAB 223, 228 (1993).