

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHLEEN FITZGERALD and U.S. POSTAL SERVICE,
POST OFFICE, Waterbury, CT

*Docket No. 03-1432; Submitted on the Record;
Issued January 15, 2004*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty.

On May 14, 2001 appellant, then a 39-year-old clerk, filed a notice of occupational disease alleging that she suffered anxiety, stress, high blood pressure, hypertension, depression and headaches beginning May 8, 2000 due to factors of her employment. Appellant attributed her condition to alleged harassment by supervisors and coworkers at the employing establishment. Appellant stopped work on December 8, 2000 and did not return.

Accompanying appellant's claim was a statement submitted by her attorney, Eric Brown, Esq., copies of grievances filed by appellant and other coworkers against individuals at the employing establishment dating back to 1997, personnel documentation, policies of the employing establishment and medical documentation from her physician, Dr. Bradley Rosenberg, a Board-certified family practitioner.

Appellant alleged that, on November 19, 1998, she and Gary Garcia, a supervisor, were indoctrinating new employees on a sorting machine. When she noted problems with the set up of one of the mail operations and the working conditions in the area, Mr. Garcia attacked her character by questioning her intelligence and personal family life. She alleged that Mr. Garcia insulted her and stated: "You do n[o]t know how to have a dialogue.... Oh, you do n[o]t know what dialogue means?" and, thereafter, Mr. Garcia stated "I [a]m sorry you had such a bad childhood." Appellant alleged that she was bewildered by his attacks and told Mr. Garcia, "You do n[o]t have to insult me." Mr. Garcia turned towards her and another staff worker and stated: "I have the right to insult workers!" She alleged that, on November 5, 1998, she questioned Mr. Garcia concerning the holiday "wheel turn" basis and that he insulted her by asking, "how much is two plus two?" She alleged that on November 21, 1998 she requested that Mr. Garcia provide her with union time to discuss a grievance; however, he denied the request.

Appellant alleged that on January 18, 1999 she had a confrontation with Mr. Garcia when she asked him why other employees were being allowed to leave early on that day, a holiday. Mr. Garcia allegedly informed her that he did not approve early dismissal and to ask Steve D'Angelo, another supervisor. Appellant indicated that, after she paged Mr. D'Angelo, Mr. Garcia told her that he was the supervisor and that she had to listen to him. She alleged that she went to the supervisor's office and Mr. Garcia followed her and told her that she was not to leave her work area. Appellant returned to her work area and Mr. Garcia followed closely behind and informed appellant that she was to listen to what he had to say, obey his instructions and not leave her work area.

Appellant alleged a February 25, 2000 confrontation with Louis Sabetta, another supervisor, when she left her console to go to the bathroom. She alleged that Mr. Sabetta followed her to the bathroom, waited until she finished, and then told her that he would like for her to try to go to the bathroom on her up time. Appellant alleged that she and Mr. Sabetta went to appellant's union steward to discuss the problem and that she felt embarrassed. She asserted that she felt harassed during the incident with Mr. Sabetta, which caused her to leave work sick.

Appellant alleged that on April 14, 2000 she had a confrontation with Pam Papaleo, a supervisor, after she accused Ms. Papaleo of staring at her and getting in her way while working. Appellant went to fill out a Form 3971 and Ms. Papaleo yelled her name out five times and followed her into the office. Appellant alleged that, as she filled out the Form 3971, Ms. Papaleo walked by her and stated to Kevin McCall, a manager, that "[appellant] has a problem." Mr. Papaleo told appellant that she wanted to talk to her, and denied staring at appellant. Appellant indicated that she felt that Ms. Papaleo was unprofessional and talked excessively with employees during their work shifts. She alleged that Ms. Papaleo retaliated against her because she asked Ms. Papaleo to refrain from talking so much.

Appellant alleged that, while she was working on April 19, 2000, Ms. Papaleo was performing bargaining unit work. She asked another employee to verify that Ms. Papaleo was performing bargaining unit work and the employee indicated that Ms. Papaleo should know better. Appellant alleged that Ms. Papaleo made a face at her. She alleged that Ms. Papaleo was unprofessional, disrespectful and harassing when she made a face at her for no reason.

Appellant alleged that on May 3, 2000 supervisors Paul Reder and Ms. Papaleo allowed a clerk to read the newspaper. She alleged that on one occasion Ms. Papaleo threw away a paper beside appellant's console which made appellant feel accused of reading while working. Appellant wanted to discuss this with her union representative and, when she proceeded to his office, she heard a page from Ms. Papaleo requesting that appellant report to the flat sorter. Appellant indicated that she had only been missing from the flat sorter for approximately two to three minutes and was surprised of the page. Appellant alleged that, when she asked the reason for the page, Ms. Papaleo stated that she did not know where appellant was since she had paged the union representative and that everyone else was on a machine except her. After this exchange appellant continued to work; however, Ms. Papaleo made it difficult for her to do her work effectively. Appellant stated that Ms. Papaleo worked in close proximity to her, got in her way while she was loading ledges and bragged about how fast she used to key. She indicated that she told the supervisor, "Why don't you go back to the craft if you were so good at it" and Ms. Papaleo replied, "[Appellant], you [a]re always talking and always making comments on

what I say.” Appellant asserted that she then stated, “I [a]m always talking? You never shut your mouth” and the supervisor replied, “It [i]s my job to stand here....” Appellant indicated that she filled out a Form 3971 for sick leave due to stress and Ms. Papaleo requested medical documentation. She alleged that, as she talked to her union representative before leaving, Ms. Papaleo walked behind him and appeared to be listening to their conversation. Appellant indicated that Ms. Papaleo eventually walked away but she was embarrassed because the incident caused a lot of attention. She indicated that Ms. Papaleo had been known to reward people by buying them food allowing them to leave the work area frequently and allowing long breaks. Appellant stated that she felt slighted because Ms. Papaleo had not done any of these things for her.

Appellant alleged that supervisor Ron Connely yelled at her on September 26, 2000. She asserted that, although she notified her supervisor of the incident, no action was taken. Appellant also described a confrontation with Myrna Cortes, a coworker, and that she asked to speak to a union steward because she was feeling ill and decided to leave work. She asserted that a supervisor sarcastically asked her if she got along with anyone and that, as she left, Ms. Cortes chided appellant for not having any friends. Appellant stated that, when she sought help from Mr. Sabetta, he was unresponsive.

Appellant alleged that on December 8, 2000 she discovered human blood on mail and the employing establishment sent her to a physician to be examined. When she returned to work, she discussed the physician’s visit with Mr. Sabetta and went on break. Appellant alleged that she returned to work after a 15-minute break and discovered that all of her boxes were full, which should have been emptied by another employee. She sought a supervisor to complain that she was not responsible for performing the jobs of others and got into another confrontation with Ms. Cortes regarding the performance of duties.

In support of the claim, appellant submitted several disability certificates and a February 2, 2001 medical report from Dr. Rosenberg which stated that she had been his patient since 1998 and had been suffering from anxiety, depression, headaches, muscle aches and hypertension. The physician opined that there was a strong association with her stress and her physical condition.

In a letter dated May 16, 2001, Joan Mazzamaro, a representative of the employing establishment, controverted the claim and furnished statements from supervisors and staff regarding appellant and documentation regarding disciplinary actions taken against appellant. Mr. Sabetta, in a statement dated April 27, 2001, indicated that appellant had an antagonistic nature and did not get along well with her supervisors or coworkers. He indicated that appellant perceived that her work environment was hostile and that she was being harassed. Mr. McCall, a supervisor, stated in a May 10, 2001 letter that appellant claimed harassment against most supervisors, managers and coworkers. He stated that appellant would raise medical concerns related to alleged harassment in an effort to leave work and that her file contained medical documentation which established that appellant was able to return to work. Mr. McCall indicated that appellant’s attendance record was poor and that disciplinary action would have been taken had she returned to work after December 2000. An undated statement from Ms. Papaleo addressed each of appellant’s allegations in which she was involved. Regarding the incident on April 14, 2000, she was assigned to oversee appellant’s work unit and became

apprehensive at that time because appellant was an extremely difficult person to supervise. She stated that appellant manipulated the facts pertaining to the events on April 14, 2000 and that she did not stare at appellant or pick at everything she did that day. When appellant left her work area, Ms. Papaleo followed her to see where she was going and an exchange ensued about the incident with another manager and a union representative. Ms. Papaleo asserted that appellant's remarks, attitude, refusal to communicate civilly and lack of cooperation had caused poor work relations.

By decision dated January 8, 2002, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that she failed to establish that she developed an emotional condition in the performance of duty. In a letter received January 20, 2002, appellant requested an oral hearing and submitted additional evidence.

During the hearing held July 25, 2002, Joe Mancine, a union steward, testified on her behalf. Mr. Mancine stated that he saw the blood on the mail appellant was processing on December 8, 2000 and that appellant seemed extremely upset by the blood.

Appellant's attorney submitted medical evidence and two statements from coworkers. In a medical report dated July 11, 2002, Dr. Rosenberg diagnosed major depression and anxiety disorder and opined that the conditions appeared to be progressing in severity when appellant was allowed back in her work environment. In a statement dated April 19, 2000, John Plummer indicated that on April 14, 2000 he witnessed Ms. Papaleo staring at the employees and that, when one of the machines jammed, she would go over to the machine and poke her head in, which seemed unnecessary. Mr. Plummer described Ms. Papaleo's behavior when appellant left the work area for what he believed was a drink of water. He stated, "Ms. Papaleo started squawking, 'hey, where are you going' and so on, like a rabid parrot on steroids." He concluded by stating that he found Ms. Papaleo's behavior that day to be excessive. In a statement also dated April 19, 2000, James Conway addressed the incident on April 19, 2000 when appellant noticed Ms. Papaleo doing bargaining unit work. Mr. Conway asserted that he was asked to witness the event and he noted that the supervisor did make a face at appellant when she made a remark about Ms. Papaleo's activities.

By decision dated October 21, 2002, an Office hearing representative found that appellant failed to establish a compensable factor of employment in support of her emotional condition claimed and therefore affirmed the prior decision.

The Board finds that this case is not in posture for decision.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.¹ There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the coverage of the Federal Employees' Compensation Act.² These injuries occur in the course of the

¹ *Samuel Senkow*, 50 ECAB 370, 373 (1999).

² 5 U.S.C. §§ 8101-8193.

employment but nevertheless are not covered because they are found not to have arisen out of the employment.³

In an emotional condition claim, appellant has the burden of establishing by the weight of reliable, probative and substantial evidence that the mental condition for which she claims compensation was caused or adversely affected by factors of her federal employment. To establish 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 disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.⁴

Disability that results from an employee's frustration over not working in a particular environment, holding a particular position, or securing a promotion is not covered.⁵ On the other hand, disability due to an employee's emotional reaction to her regular or specially assigned duties or to a requirement imposed by management or the work itself is covered under the Act.⁶

Noncompensable factors also include administrative and personnel actions, which are not generally considered to be within the performance of duty.⁷ Error or abuse by the employing establishment in such administrative or personnel actions may be covered under the Act, but the record must establish that the employing establishment acted erroneously or unreasonably in its managerial functions.⁸ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.⁹ Unless the evidence discloses error or abuse on the part of the employing establishment, administrative or personnel matters will not constitute compensable employment factors.¹⁰

The Board has held that a claimant's allegations alone are insufficient to establish compensable work factors without probative and reliable evidence corroborating the allegations.¹¹ The claimant must substantiate such allegations by submitting a detailed description of specific employment factors or incidents that she believes caused or adversely

³ *Frank B. Gwozdz*, 50 ECAB 434, 436 (1999).

⁴ *Wanda G. Bailey*, 45 ECAB 835 (1994); *Kathleen D. Walker*, 42 ECAB 603, 608-09 (1991).

⁵ *Blondell Blassingame*, 48 ECAB 130, 131 (1996).

⁶ *Bonnie Goodman*, 50 ECAB 139, 143 (1998). See generally *Lillian Cutler*, 28 ECAB 125 (1976).

⁷ *Peggy Ann Lightfoot*, 48 ECAB 490, 493 (1997).

⁸ *Virginia Dorsett*, 50 ECAB 478, 480 (1999); citing *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

⁹ *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁰ *Anna C. Leanza*, 48 ECAB 115, 121 (1996).

¹¹ *Joe E. Hendricks*, 43 ECAB 850, 857-58 (1992).

affected her condition.¹² Personal perceptions and feelings alone are not compensable under the Act.¹³

In emotional condition cases, the Office 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 to be factors of employment and may not be considered.¹⁴ Therefore, the initial question is whether appellant has alleged compensable factors of employment that are substantiated by the record.¹⁵

Appellant attributed her emotional condition to incidents which she felt constituted harassment or discrimination. Appellant indicated that Ms. Papaleo excessively supervised and stared at her while she performed work duties and interfered with her work by getting in her way and talking excessively. She also asserted that on one occasion Ms. Papaleo made faces at her. Appellant further asserted that Ms. Papaleo treated her disparately and held her to harsher and different standards than other employees. Appellant also stated that she was yelled at by Mr. Connely and insulted by Mr. Garcia on more than one occasion. Appellant alleged that Ms. Cortes, a coworker, confronted her regarding work duties and made derogatory comments to her regarding family and friends. Appellant asserted that when she sought help from Mr. Sabetta about the situation with Ms. Cortes and he was unresponsive.

In support of her claim, appellant submitted her own statements, witness statements, as well as various grievance complaints which outlined the alleged harassing and intimidating treatment including staring and excessive supervising and making faces by Ms. Papaleo on April 14 and 19, 2000. Mr. Plummer, a coworker of appellant, submitted a statement in which he asserted that on April 14, 2000 Ms. Papaleo did in fact stare at the employees working the flat sorting machine and was excessive in supervising that day. He further stated that “Ms. Papaleo started squawking, ‘hey, where are you going’ and so on, like a rabid parrot on steroids.”

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹⁶

The statement given by Mr. Plummer does not establish that Ms. Papaleo harassed appellant by overseeing her work activities or asking her where she was going when she left her

¹² *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991).

¹³ *Earl D. Smith*, 48 ECAB 615, 650 (1997).

¹⁴ *Margaret S. Kryzcki*, 43 ECAB 496, 502 (1992).

¹⁵ *Donald E. Ewals*, 45 ECAB 111, 122 (1993).

¹⁶ *Alice M. Washington*, 46 ECAB 382 (1994).

work area. His statement is rather subjective in the absence of more corroborating evidence. Ms. Papaleo refuted these allegations and indicated that she was assigned to oversee the work unit on April 14, 2000. The Board finds that the evidence does not support that Ms. Papaleo acted unreasonably when carrying out her supervisory responsibilities in such a way as to constitute error and abuse. Appellant's allegation that Ms. Papaleo made a face at her when she commented on the fact that the supervisor was involved in doing bargaining unit work was corroborated by her coworker in a statement by James Conway; however, neither appellant's statements or the vague statement of her coworker establish that Ms. Papaleo acted abusively or unreasonably.

Appellant felt discriminated against when other employees were allowed to read while working and noted that she was upset by the fact that management was unresponsive to her complaints. The fact that management did not respond to appellant's complaints of other's reading while working is an administrative function unrelated to appellant's regular or specially assigned duties but it has not been shown that management committed error or abuse in regards to this matter. Regarding the various grievances filed by appellant which accused supervisors of harassment, Joe Mancine, a union representative, testified that each of the grievances filed by appellant were settled at step one without a direct finding of fault. The Board has held that such settlement agreements without admissions of wrongdoing are not sufficient to establish error on the part of the employing establishment.¹⁷ Appellant has not submitted sufficient evidence regarding her Equal Employment Opportunity Commission complaints and grievances to establish discrimination, harassment or retaliation as a compensable factor of employment.

Appellant alleged that she felt embarrassment and experienced anxiety following exchanges with supervisors regarding instructions, policies pertaining to bathroom breaks and leaving her work area. Her discussions with management regarding these events and her need to leave work attracted attention from other employees, which embarrassed her. While appellant has generally alleged that her work environment was hostile and that management acted abusively, there is insufficient evidence of record supporting her allegations. The factual evidence in the record pertaining to appellant's claims; namely the various grievance complaints and letters from two coworkers discussing two of the alleged work incidents support that appellant's verbal exchanges with supervisors regarding the above did in fact occur. However, these supervisor actions constitute administrative or personnel matters and appellant has not shown error or abuse in connection with them. Therefore, she has failed to establish a compensable factor in this regard.¹⁸ Appellant's feelings about her job and what other employees thought of her are self-generated and therefore not compensable work factors.

Appellant also alleged that a coworker, Ms. Cortes, made derogatory statements and engaged in actions which she believed constituted harassment the evidence is insufficient to establish that the statements constituted verbal abuse.¹⁹ Appellant has also failed to establish that

¹⁷ *Georgia M. McCardle*, 48 ECAB 502, 504 (1997); *Mary L. Brooks*, 46 ECAB 266, 274 (1994).

¹⁸ See *William Karl Hansen*, 49 ECAB 140, 144 (1997) (finding that appellant's frustration with the policies and procedures of management do not constitute compensable work factors absent a showing of error or abuse).

¹⁹ See *Joel Parker, Sr.*, *supra* note 12 (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

the employing establishment was unresponsive to any work incidents involving appellant and other coworkers in which she was harassed.

Appellant also attributed her emotional condition and disability to an incident on December 8, 2000 when she discovered fresh blood on a piece of mail that she was sorting. The record supports the fact that this event actually occurred during the performance of duty. The employing establishment acknowledged this incident and appellant submitted supportive evidence regarding the incident. Mr. Mancine corroborated the incident. Appellant has established that the December 8, 2000 incident in which she discovered fresh blood on a piece of mail for which she sought a medical evaluation occurred in the performance of duty.²⁰

As appellant has substantiated a compensable employment factor, the Office must base its decision on an analysis of the medical evidence. As the Office found there were no compensable employment factors, it did not address the medical evidence. The case will be remanded to the Office for this purpose.²¹ After such development as it deems necessary, the Office should issue an appropriate merit decision.

The decision of the Office of Workers' Compensation Programs dated October 21, 2002 is hereby set aside and the case remanded to the Office for action consistent with this decision of the Board.

Dated, Washington, DC
January 15, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

²⁰ See *Lillian Cutler*, 28 ECAB 125 (1976).

²¹ See *William P. George*, 43 ECAB 1159 (1992).