

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHARON H. CROSS and DEPARTMENT OF EDUCATION,
OFFICE FOR CIVIL RIGHTS, Atlanta, Ga.

*Docket No. 97-788; Submitted on the Record;
Issued December 15, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant has established an emotional condition due to her employment.

On July 9, 1991 appellant, then a 43-year-old equal opportunity specialist, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that her major depression was due to the stress and harassment she experienced in her workplace. Appellant alleged that being reassigned from a position she held for over 10 years to her new position, stress from her inability to perform her new position satisfactorily and harassment from supervisors as employment factors she believed contributed to her condition.

The Office of Workers' Compensation Programs sent appellant a letter informing her as to the deficiencies in her claim and the evidence required to support her claim.

Appellant submitted medical reports from Dr. Charles E. Stallings, an attending psychiatrist, dated September 13 and 19, and October 13 and 28, 1991.

In a September 13, 1991 letter, Dr. Stallings requested additional leave for appellant due to her major depression. He stated that appellant had been depressed before it began to interfere with her work performance. Dr. Stallings indicated that appellant began to feel she was failing due to her lack of concentration, the nature of her work and her inability to concentrate. He also indicated that appellant "also had received some verification of this feeling by way of supervisory evaluation."

In a September 19, 1991 discharge summary, Dr. Stallings diagnosed major depression, sarcoidosis, chronic low back pain, headaches and obesity. Dr. Stallings noted that appellant had a two-year history of depression.

In a progress note dated October 13, 1991, Dr. Stallings noted that appellant believed that her stress was job related and that harassment by her supervisor contributed to her stress which led to her depression.

In a report dated October 28, 1991, Dr. Stallings diagnosed major depression which started two years ago and has gotten worse in the past two months. He also indicated that appellant was "very frustrated in that the quality of her work performance has decreased." Appellant also informed Dr. Stallings that she had "been counseled on occasion due to the decline in her performance which had never happened in earlier years." Dr. Stallings opined that limitations imposed by appellant's sarcoidosis and back pain "compound her difficulties and worsen her depression."

In a decision dated October 9, 1992, the Office denied appellant's claim. In the attached memoranda, the Office noted that appellant failed to submit any evidence in support of her allegation of harassment and that her inability to perform her work was due to her depression. The Office also found that appellant failed to submit rationalized medical evidence in support of her claim showing a relationship between her disability and accepted factors of her employment.

By letter dated October 7, 1992, Lamar Daniel, appellant's supervisor, denied harassing appellant and attached a copy of her position description. Mr. Daniel indicated that he counseled appellant because she was visiting at other staff's desk, they were visiting her and she was engaged in personal telephone calls for long periods. Mr. Daniel also denied that appellant worked overtime or had quotas. He also indicated that appellant's conflict with him was due to his counseling her about her work performance. Lastly, he noted that appellant had been transferred from PRMS to Postsecondary Education Division due to an altercation she had with the PRMS supervisor at that time.

By letter dated October 5, 1993, appellant requested reconsideration and submitted several memorandums from her supervisor and her responses in support of her request for reconsideration. In memoranda dated August 9, 10 and 25 and November 15, 1989, appellant's supervisor wrote regarding medical leave, her work schedule, her behavior of August 10, 1989 and her wish to return to full-time status. Appellant responded in a memorandum dated August 11, 1989 regarding a meeting with her supervisor on August 10, 1989, requested advanced sick leave in memoranda dated August 24 and December 15, 1989.

By decision dated December 3, 1993, the Office denied modification of the October 9, 1992 decision.

By letter dated November 28, 1994, appellant requested reconsideration and submitted a May 6, 1994 report from Dr. Stallings and appellant's affidavit.

In her affidavit dated November 28, 1994, appellant alleged additional employment factors which she described as sexual harassment by Jesse High and other unidentified managers; dissatisfaction with Mr. High's management style; she was given additional duties and special assignments which were not in her position description; Mr. High shortened the internal time frame to complete her assignments; Millage Fountain gave her additional responsibilities upon becoming her supervisor; she believed her July 31, 1991 performance

appraisal was unfair; and that she worked overtime in PRMS due to deadlines and time frames for which she did not request payment. Appellant also described work factors which had been previously considered, dissatisfaction with her reassignment from Postsecondary Education Division to PRMS in May 1989; the employing establishment's request for documentation of her use of sick leave; harassment by Mr. Daniel regarding her work schedule; her work began to be affected by her health problems; and in mid 1991 she wished to transfer to another division.

In a report dated May 6, 1994, Dr. Stallings summarized his report by stating:

“[I]t can be said that [appellant] has been depressed for some period of time. It would seem that chronologically the events beginning in 1986 with difficulty at work, harassment and intimidation of a sexual nature set her depression in motion. It was not until May of 1989 that she was involved in the automobile accident which only worsened her depression. It was after her return to work from the automobile accident that symptoms indicated the diagnosis of [s]arcoidosis which further compromised her physical and emotional health. [Appellant] was involved in active psychiatric treatment beginning in 1987 or 1988 which was also prior to the automobile accident. At that time, she was on a leave of absence for depression and was also prescribed medication. She, however, has been in ongoing treatment with me since 1991. I have corresponded in the past on [appellant's] behalf documenting her depression and some of the sources, however, because [appellant] was uncertain she wanted to deal with the frustration and complications of a charge of sexual harassment she asked that I not utilize that as a clear etiological factor. Her job performance was mentioned as having changed but with no specific documentation of the relationship of the factors involved.”

By letter dated July 19, 1995, the employing establishment responded to appellant's allegations. The employing establishment stated that there is no evidence that appellant was subjected to sexual harassment nor is there any record of appellant filing any grievance on this matter. The employing establishment also indicated that there was no knowledge that male supervisors were known to make sexual advances to female staff at office parties. The employing establishment admits that all staff members in PRMS were affected by shortened time frames and additional duties when Mr. High was assigned as regional director. The employing establishment admits that appellant may have been under stress at this time, but she never submitted any medical documentation to support that she was suffering from severe stress. Regarding Mr. High's directly dealing with appellant and bypassing her supervisor, Sarah Barron, who confirmed that Mr. High did not like her and went directly to appellant with assignments. Ms. Barron stated that she had no knowledge of whether appellant was under any stress at this time. Regarding Mr. High's girlfriend reviewing work, the employing establishment has no knowledge that this occurred. Next, the employing establishment noted that Mr. Daniel denied harassing appellant and that he had been counseling appellant about her work. The employing establishment noted that Ms. Barron and Mr. Fountain both agreed that appellant was under stress during Mr. High's administration, but all PRMS staff were subjected to similar stress. Lastly, the employing establishment noted that appellant did not raise the issue

of sexual harassment in her initial application nor did the medical documentation submitted at the time note any stress related to sexual harassment.

By letter dated August 18, 1995, appellant submitted medical records from Brawner Psychiatric Institute and South Fulton Hospital, copies of three of appellant's earnings and leave statements detailing her use of sick leave in early 1987, a March 1, 1991 statement regarding Mr. Daniel, a July 19, 1995 statement by Mr. Jim Lemon, a July 19, 1995 statement by Ms. Juliette H. Stroman, a July 19, 1995 statement by Mr. Fountain, a July 21, 1995 statement from Thomasina Brown-Nolan, a July 24, 1995 statement by Ms. Marsha Dodson, a July 28, 1995 statement by Mr. John Pierson, an August 11, 1995 statement by Ms. Lisa Murfree, an August 11, 1995 statement by Mr. Louis O. Bryson, an August 16, 1995 statement from Ms. Barron and an August 15, 1995 statement by Jane Bailey Butler.

The March 1, 1991 statement signed by eight individuals stated that they "have been or are being subjected to disrespectful, insulting and/or abusive behavior by Lamar Daniel."

In a clinical assessment sheet dated August 26, 1991, it was noted that appellant had become increasingly depressed which appellant noted coincided with her back injury from an automobile accident in 1989 and changes in her work position which she found stressful.

In an August 28, 1991 psychiatric evaluation, Dr. Seymour Solodar, a Board-certified psychiatrist, diagnosed major depression.

In a September 3, 1991 psychological evaluation, Leisa A. Bailey, Ph.D., noted that appellant indicated that she had been depressed for the past three or four years. Appellant indicated that she had significant conflict with her supervisors since her transfer.

In a September 7, 1991 report, Matthew P. Parvis, Ph.D., noted that appellant had been admitted for major depression and appellant's sister indicated that appellant had been under a lot of stress due to financial and job problems. Appellant's sister also related that appellant "had long-standing problems with her supervisor at work."

Mr. Lemon, in a July 19, 1995 statement, wrote that appellant had informed him that she suffered from stress due to Mr. High's sexual harassment and that Mr. Daniel gave her unrealistic work assignments.

In a July 19, 1995 statement, Mr. Fountain stated that the time frames while he supervised appellant was stressful. Mr. Fountain also stated that appellant was given difficult assignments with short time frames which was stressful. He noted that he and Mr. High received complaints from appellant and other staff regarding the stressful environment in PRMS.

In a July 19, 1995 statement, Ms. Stroman indicated that Mr. Daniel lacked managerial skills and that she was granted a transfer to another division upon her request. She also indicated that it was frustrating working with Mr. Daniel.

Ms. Dodson, in her July 24, 1995 statement, indicated that she was aware of appellant's difficulties with Mr. Daniel's management style and that appellant did not like the way

Mr. Daniel talked to her. Ms. Dodson stated that she also had problems with Mr. Daniel's supervision and that she believed more work was required of her while working for Mr. Daniel.

In her July 21, 1995 statement, Ms. Brown-Nolan stated that many of appellant's problems began when Mr. High became regional director or in 1990. Ms. Brown-Nolan stated that appellant was under a lot of stress as indicated by a personality change and that appellant believed she was given a lot of duties outside her position description. Ms. Brown-Nolan also stated that Mr. Daniel had a reputation of being a difficult person to work with and lacked managerial skills.

In a July 28, 1995 statement, Mr. Pierson stated that Mr. High placed unreasonable demands upon appellant due to the shortened time frames and her increased work load. He stated that all the PRMS employees suffered from the stress of the work situation under Mr. High. Mr. Pierson stated that late hours and large numbers of daily deadlines were common and that their team had the heaviest work load. He stated that "time frames were constantly being shortened, duties were continuously being added to positions and the general complaint load constantly escalated." Lastly, Mr. Pierson stated that after appellant and another employee were transferred to investigative positions, additional staff were reassigned to PRMS and some people were promoted to program analysts.

Ms. Murfree in her statement indicated that appellant was given a lot of management responsibility while working in PRMS and that she was responsible for reviewing the staff's work. Ms. Murfree stated that appellant told her she was under a lot of pressure and she was concerned about all the work she was assigned to perform.

In an August 11, 1995 statement, Mr. Bryson indicated that appellant came to him several times regarding her assignments and she requested a transfer from Mr. Daniel's branch. Appellant told him that Mr. Daniel was putting too much pressure on her which affected her health and her performance.

In the August 16, 1995 statement, Ms. Barron indicated that Mr. High wanted to remove her and that she and her employees were given unreasonable time frames due to his animosity towards Ms. Barron. She indicated that she had to add to appellant's duties due to Mr. High reducing the intake time frames at a time when they were short staffed. Ms. Barron confirmed that Mr. High bypassed her on a couple of occasions and gave appellant her assignments directly. She indicated that the shortened time frames decided by Mr. High caused a lot of stress and that appellant complained to her about the difficulty in accomplishing her job and the stress she experienced trying to meet her assignments.

In an August 15, 1995 statement, Ms. Butler stated that Mr. High went to appellant with work without going through appellant's supervisor. Ms. Butler stated she saw Mr. High tickling appellant's palm upon his introduction to the PRMS staff. She stated that she also heard Mr. High try to invite himself to appellant's house for drinks or dinner and saw Mr. High always touching appellant by putting his hands on her shoulders or grabbing her hand while talking to appellant.

By decision dated September 30, 1996, the Office denied modification of the December 3, 1993 and October 9, 1992 decisions. In the attached memorandum, the Office accepted that there was physical contact between appellant and Mr. High as described in Ms. Butler's statement, but found the charge of sexual harassment unsubstantiated as appellant failed to file a complaint or report the harassment in a timely way. The Office accepted that appellant was given special assignments and additional duties not contained in her job description as well as having shortened time frames to complete her assignments. The Office found that appellant's dissatisfaction with Mr. High and Mr. Daniel in their management styles was not compensable nor was her reaction to her July 1991 performance evaluation. The Office found that the medical evidence related sexual harassment as causing appellant's depression which was not an accepted factor. The Office thus found the medical evidence insufficient as it did not relate appellant's disability to an accepted factor.

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that the injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.¹

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 illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. On the other hand, where disability results from an employee's emotional reaction to her regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.²

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition for 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.³ If a claimant does indicate a compensable factor of employment, the Office should then determine whether the evidence of record substantiates that factor. 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.⁴

¹ *Elaine Pendleton*, 40 ECAB 1143 (1989).

² *Lillian Cutler*, 28 ECAB 125 (1976).

³ See *Gregory J. Meisenburg*, 44 ECAB 527 (1993); *Norma L. Blank*, 43 ECAB 384 (1992).

⁴ *Ruthie M. Evans*, 41 ECAB 416 (1990).

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.⁵

In this case, appellant alleged sexual harassment by Jesse High and other unidentified managers; dissatisfaction with Mr. High's management style; she was given additional duties and special assignments which were not in her position description; Mr. High shortened the internal time frame to complete her assignments; Mr. Fountain gave her additional responsibilities upon becoming her supervisor; she believed her July 31, 1991 performance appraisal was unfair; and that she worked overtime in PRMS due to deadlines and time frames for which she did not request payment. Appellant also described work factors which had been previously considered which were dissatisfaction with her reassignment from Postsecondary Education Division to PRMS in May 1989; the employing establishment's request for documentation of her use of sick leave; harassment by Mr. Daniel regarding her work schedule; her work began to be affected by her health problems and in mid 1991 she wished to transfer to another division.

The Office has accepted that appellant was given special assignments and additional work which were not within her position description. The Office also accepted that appellant was given shortened time frames in which to complete her assignments. The Office accepted that physical contact between Mr. High and appellant had occurred, as supported by Ms. Butler's statement.

Appellant has alleged that Mr. High subjected her to sexual harassment and general allegations of harassment by Mr. Daniel. Actions of an employee's supervisor which the employee characterizes as harassment may constitute a compensable factor of employment. However, for harassment to give rise to a compensable disability, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions are not compensable. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment occurred.⁶ 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.⁷

In regard to harassment by Mr. Daniel, Mr. Daniel denied harassing appellant. The record contains no evidence except for appellant's statement that Mr. Daniel harassed her. Thus, the Board finds the evidence of record is insufficient to establish that appellant was harassed by Mr. Daniel at the employing establishment.

Regarding the allegation of sexual harassment by Mr. High, appellant did not report the alleged sexual harassment by Mr. High nor file a complaint until her 1994 reconsideration

⁵ See *Gregory J. Meisenburg*, *supra* note 3; *Norma L. Blank*, *supra* note 3.

⁶ See *Sheila Arbour* (*Victor E. Arbour*), 43 ECAB 779 (1992); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991); *Arthur F. Hougens*, 42 ECAB 455, 462 (1991); *Ruthie M. Evans*, *supra* note 4.

⁷ *Ruthie M. Evans*, *supra* note 4.

request. Appellant had also stopped working for Mr. High in May 1989 when she was transferred to the Postsecondary Education Division. The Board finds that the evidence of record is insufficient to establish that appellant was sexually harassed by Mr. High at the employing establishment.

In regards to appellant's dissatisfaction with the management style of her supervisors, Mr. High and Mr. Daniel, the Board has held that an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.⁸

Regarding appellant's emotional reaction to her July 199 performance appraisal, the Board has held that reactions to assessments of job performance are not covered by the Act.⁹ In the present case, there is no evidence that the employing establishment erred or acted abusively in regard to appellant's performance evaluation.

Appellant has alleged that the employing establishment harassed her by requiring documentation for use of her sick leave. Actions of the employing establishment in matters involving the use of leave are generally not considered compensable factors of employment.¹⁰ In this case, there is no evidence of error or abuse by the employing establishment in this matter.

Appellant has alleged that her emotional condition was caused by her transfer from PRMS to Postsecondary Education Division in May 1989 and her desire to transfer to another division. An employee's frustration from not being permitted to work in a particular environment or to hold a particular position is not a compensable factor of employment under the Act.¹¹

The only medical evidence which attributes the development of appellant's emotional condition to any factor related to her employment is the May 6, 1994 dated by Dr. Stallings, which attributed her depression to sexual harassment by Mr. High. This report is insufficient to meet appellant's burden of proof as Dr. Stallings opined that appellant's major depression was causally related to her sexual harassment by Mr. High, which is not an accepted employment factor. Dr. Solodar's report is also insufficient to meet appellant's burden as he diagnosed depression, but does not attributed it to her employment beyond noting that appellant believed her depression to be job related. Similarly, the clinical notes dated August 26, 1991 indicated that appellant stated that her depression is due to harassment at work and stress at work. The clinical notes are insufficient to meet appellant's burden and they do not opine that there is a causal connection between appellant's depression and accepted employment factors. As

⁸ See *Michael Thomas Plante*, 44 ECAB 510 (1993).

⁹ See *Kathleen D. Walker*, *supra* note 6; *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991) (holding that an unsatisfactory performance, without more, is insufficient to provide coverage).

¹⁰ *Gracie A. Richardson*, 42 ECAB 850 (1991).

¹¹ *Artice Dotson*, 41 ECAB 754, 758 (1990); *Lizzie McCray*, 36 ECAB 419 (1985); *Lillian Cutler*, *supra* note 2 at 131.

appellant has failed to submit the necessary medical evidence to meet her burden of proof, the Office properly denied her claim.

The decision of the Office of Workers' Compensation Programs dated September 30, 1996 is hereby affirmed.

Dated, Washington, D.C.
December 15, 1998

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member