

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PAMELA I. HOLMES and U.S. POSTAL SERVICE,  
BULK MAIL CENTER, Allen Park, Mich.

*Docket No. 96-818; Submitted on the Record;*  
*Issued June 22, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether the refusal of the Office of Workers' Compensation Programs, in its decision dated October 10, 1995, to reopen appellant's claim for merit review constituted an abuse of discretion.

On April 15, 1994 appellant, then a 39-year-old mail handler, filed a notice of occupational disease and claim for compensation (Form CA-2) claiming depression brought on by sexual harassment, intimidation and fear for her life. Appellant stopped work on April 4, 1994.

In support of her claim appellant submitted an August 8, 1989 letter wherein she alleged that in July 1989 three employees, two of whom were supervisors, made racial comments about her, and engaged in a heated discussion with appellant which she considered to be intimidating and provocative. Appellant also submitted an August 20, 1993 letter in which she requested compensation at an equivalent rate to an employee chosen for a special project and that a letter of appreciation be entered into her personnel folder; a copy of a January 28, 1994 memorandum to a coworker which asked for the return of an incorrect verification of employment form (V.O.E.) which appellant had prepared; and a March 21, 1994 four-page letter to the Postmaster General (PMG) in which she requested an investigation into fraudulent and unethical practices in her workplace. Appellant also submitted an April 13, 1994 narrative in which she alleged that a coworker threatened her life because appellant asked for the return of a form which she incorrectly filled out and a copy of a hot line report dated April 5, 1994 wherein appellant alleged harassing and verbal threats made towards her. She also stated that she feared retaliation by Mr. Ruben Fowlkes, the general manager of the facility, to whom appellant sought redress after the threat to her life.

In a medical report dated April 18, 1994, Dr. Steven R. Miller, a licensed psychologist, demonstrated a familiarity with appellant's work history alleging sexual harassment and verbal threats which caused her to lose concentration, to have homicidal thoughts and to feel panic and fear. The doctor noted that appellant stated that she could not motivate herself to return to work after April 8, 1994, and has remained off work since then. Dr. Miller stated that appellant

presented “excessively high levels of anxiety together with clinical depression” which were caused by employment factors.

In statements received by the Office on April 21, 1994 and dated July 30, August 2 and 3, 1989, six employees denied the events that appellant described as occurring on July 29, 1989.

In a report dated May 27, 1994, Dr. Edward L. Klarman, a psychiatrist performing a fitness-for-duty examination for the employing establishment, stated that he had interviewed appellant on two occasions and demonstrated a familiarity with her work history including her “case pending because she was denied a supervisory position.” He stated that appellant did not suffer psychiatric disability and considered her capable of employment. The doctor found that appellant was hurt and angry as a result of the loss of a personal relationship with a supervisor, but that she showed no signs associated with depression such as self-reproach, social withdrawal, lassitude or suicidal ideation. He noted that she agreed with his assessment that she could and, in fact, wanted to return to work, although not in the same workplace as where her supervisor was employed.

On July 11, 1994 the Office denied the claim on the grounds that appellant failed to establish any compensable factors of employment.

Appellant requested reconsideration on July 27, 1994 and submitted a medical report from Dr. Miller dated July 11, 1994. In his report, the doctor noted that he had treated appellant on nine occasions and demonstrated a familiarity with her work and family history. Dr. Miller noted appellant’s allegations of harassment by Mr. Fowlkes, a manager, who, in appellant’s opinion, was motivated to harass her because his efforts to revive a long-standing affair were unsuccessful. Appellant alleged that Mr. Fowlkes threatened to transfer her from her job if she continued to refuse his advances, and that he threatened to “use his influence to get them to keep her from ever getting a higher position than mail handler.” She stated that she dreaded going to work each day. Dr. Miller diagnosed appellant as having a major depression episode without psychotic features as a result of this harassment and concluded that her emotional condition was causally related to the stress “she experiences at her place of employment.”

Appellant also submitted a narrative alleging that on December 17, 1993, she was required to input unverified social security numbers for new employees which would be recorded as data input errors; that she was harassed on January 13, 1994 regarding her January 10, 1994 time card for which she had taken approved leave, noting that she had rebuffed Mr. Fowlkes’ solicitations for her company during the time she had hoped to spend on leave; that her January 28 and 29, 1994 attempts to retrieve an erroneously prepared form were unsuccessful; that Mr. Fowlkes argued with her between January 29 and February 12, 1994 regarding her refusal to rekindle their affair and with another employee regarding death threats; that on February 12, 1994 Mr. Fowlkes argued with her in the presence of employing establishment personnel; that on March 17, 1994, Mr. Fowlkes improperly terminated her detail and returned her to lower paying position; that Mr. Fowlkes, between March 17 and 20, 1994, offered to retain appellant in personnel in exchange for sexual favors which preceded his alleged death threats; that on March 24, 1994 she sent a letter to the PMG complaining about Mr. Fowlkes; that Mr. Fowlkes on March 29, 1994 ordered appellant to process ten new employees so that they could begin work that day (5:00 p.m. shift); that Mr. Fowlkes through another employee on April 4, 1994 inquired whether appellant was willing to remain in personnel at lower pay; that on April 8, 1994 Mr. Fowlkes telephoned appellant at work and spoke in an angry tone about her

hot-line complaint and her letter to the PMG, stating that he would “teach [appellant] about trying to mess with him,” his decision that day to return appellant to the work floor with a loss of pay; and his request to review appellant’s daughter’s official file.

Appellant also submitted several witness statements citing instances of Mr. Fowlkes’ personal relationship with her family and herself; a copy of her Equal Employment Opportunity (EEO) complaint against Mr. Fowlkes alleging that her detail was terminated because she had filed EEO complaints; and an April 14, 1994 letter from appellant alleging that Mr. Fowlkes reneged on an EEO settlement. Appellant also submitted a June 29, 1993 findings of fact and Conclusions of Law memorandum of the U.S. Equal Employment Opportunity Commission (EEOC) concerning appellant’s complaint of reprisal against the employing establishment. In that decision an administrative judge found that Mr. Fowlkes, the approving official retaliated against appellant based on her EEO activity in denying her a promotion to the position of mail supervisor. On March 11, 1992 Mr. Fowlkes approved the promotion selection of another employee to the position of mail supervisor with an effective date of March 21, 1992. The administrative judge ordered the employing establishment to promote appellant retroactively to March 21, 1992, to pay all benefits and privileges with interest, and to pay all reasonable attorneys fees for any period during the pendency of her claim in which she was represented by counsel.

In a September 2, 1994 medical report, Dr. Miller stated that appellant remained under his care for depression and anxiety, and that she remained unable to perform the duties to which she had been assigned.

By decision dated October 7, 1994, the Office modified its July 11, 1994 decision on the basis that appellant had established fact of injury, but affirmed denial of the claim because she failed to establish “that the accepted factors of employment occurred not only in the course of employment but out of it as well.” In an accompanying memorandum, the Office stated that several of the instances that appellant raised in her narrative in fact occurred, including Mr. Fowlkes’ questioning of her time cards on January 10, 1994, appellant’s attempts to retrieve an incorrectly prepared V.O.E., her mailing a letter to the PMG and contacting the hot-line, and the termination of her detail. However, the Office found that the letter to the PMG and the call to the hot-line were not part of her regular or special assignment. With respect to the other allegations that the Office accepted as having occurred, *i.e.* Mr. Fowlkes questioning her time card in January 1994, her attempts to retrieve the incorrectly filed out V.O.E., and the termination of her detail, it found that appellant had failed to establish that the employing establishment or Mr. Fowlkes acted in error or in an abusive manner. The Office determined that although appellant’s time keeper had erred in calculating her time on January 10, 1994, such an error did not implicate Mr. Fowlkes’ questioning of her as an error or as an abusive act. The Office also found that appellant’s unsuccessful efforts to retrieve an incorrect V.O.E. did not represent error or abuse on the part of the employing establishment. It further noted that it could not “accept” that appellant was issued a death threat in this instance. The Office also found that Mr. Fowlkes did end appellant’s detail but that no evidence was submitted to support error or abuse in Mr. Fowlkes’ decision. In addition, the Office found insufficient evidence to find that the following allegations occurred: that appellant was required to process new employees improperly, that Mr. Fowlkes called her at home between March 17 and 20, March 30 and April 8, 1994, that appellant was ordered to hire ten employees on March 29, 1994 which required appellant to drop other work to complete this task; or that appellant was asked to remain

in personnel at lower pay level. However the Office noted the EEOC's June 29, 1993 Findings of Fact, Conclusions of Law memorandum wherein the administrative judge determined that the employing establishment had retaliated against appellant in failing to promote her to the position of mail supervisor on March 21, 1992 based on appellant's participation in protected Equal Employment Opportunity (EEO) activities.

Appellant requested reconsideration on July 11, 1995 and submitted a November 21, 1994 EEOC decision, an SF-50 and various letters regarding phone calls to Mr. Fowlkes, her labor union activities, and her attempts to be reassigned.

In its November 21, 1994 decision, the EEOC found that appellant's nonselection for promotion to a position of mail supervisor was based on reprisal against her on account of her EEO activity. The decision indicated that appellant timely filed an application pursuant to an announcement for promotion but that one of the employees selected for promotion did not file an application and the other filed an application after the deadline had expired. Further, these selections were made more than 120 days after the advisory panel's recommendation which directly violated the employing establishment's policy which required selections to be made within 120 days after recommendations from the panel. Since the appointing official of the promotion actions had unsuccessfully represented the employing establishment against appellant in an EEO claim, and since the employing establishment was unable to justify a nondiscriminatory reason for setting aside the 120-day selection requirement, the administrative judge found that the promotion actions were improper. Further, since the employing establishment was unable to locate a response to an inquiry from Mr. Fowlkes about the alleged policy violation concerning the 120-day selection deadline, the administrative judge drew an adverse inference that the document would have reflected unfavorably upon the employing establishment, and found therefore that it had discriminated against appellant on the basis of reprisal for her earlier case. The administrative judge awarded retroactive promotion and reasonable attorney's fees.

In an October 10, 1995 decision, the Office found that the EEOC decision was not sufficient to warrant modification of its prior decision. In an attached memorandum, the Office stated that the basis of appellant's claim was sexual harassment which was not addressed by the EEOC decision and therefore no formal finding had been reached on that issue. The Office recommended that since the EEOC decision addressed a promotion action, appellant should file a separate notice of occupational disease and claim for compensation (Form CA-2) alleging that her medical condition resulted from her nonselection for promotion.

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

Section 8128(a) of the Federal Employees' Compensation Act<sup>1</sup> provides for review of an award for or against payment of compensation. Section 10.138, the statute's implementing regulation, requires a written request by a claimant seeking review that specifies the issues which the claimant wishes the Office to review and the reasons why the decision should be changed.<sup>2</sup> Thus, a claimant may obtain review of the merits of her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not

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<sup>1</sup> 5 U.S.C. §§ 8101-8193. (1974); 5 U.S.C. § 8128(a).

<sup>2</sup> 20 C.F.R. § 10.138(b)(1); *John F. Critz*, 44 ECAB 788, 793 (1993).

previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office.<sup>3</sup>

Section 10.138(b)(2) provides that if a request for review of the merits of the claim does not meet at least one of the three requirements, the Office will deny the request without reviewing the merits.<sup>4</sup> If a claimant fails to submit relevant evidence not previously of record or advance legal contentions or facts not previously considered, the Office has the discretion to refuse to reopen a case for further consideration of the merits pursuant to section 8128.<sup>5</sup>

Because the EEOC found that appellant's non-selection for promotion to a position of mail supervisor was based on reprisal against her on account of her EEO activity, the Board finds that appellant submitted relevant and pertinent evidence not previously considered by the Office, and that therefore appellant has established that the Office abused its discretion in its October 10, 1995 decision by denying her request for a review on the merits of its November 21, 1994 decision under section 8128(a) of the Act.

Although the findings of other administrative agencies are not dispositive of proceedings brought under the Act, which is administered by the Office and the Board, nonetheless, such decisions are instructive to such proceedings.<sup>6</sup> The November 21, 1994 decision of the EEOC, which found that the employing establishment engaged in retaliatory action against appellant by refusing to promote her based on her protected activities, is relevant and pertinent evidence that is sufficient to require the Office to reopen the claim. In that decision, the EEOC found that the employing establishment improperly selected other employees for promotion instead of appellant and drew an adverse inference that the employing establishment's failure to select appellant was based on its retaliation against her based on her EEO activities. The EEOC decision was not previously of record and it supports appellant's claim that her emotional condition was causally related to stress as a result of harassment from her supervisor who threatened to prevent her from receiving a promotion. The Board notes that, contrary to the Office's finding in its October 10, 1995 decision that the March 10, 1992 promotion action cited in the EEOC decision occurred after appellant filed her claim, the record reveals that appellant initially filed her EEOC claim on March 17, 1992, almost two years before she filed her present claim. Further, appellant raised this issue in her medical examination with Dr. Klarman on May 27, 1994 noting that she had a case pending because she was denied a supervisory promotion. In addition, Dr. Miller, appellant's treating psychologist, stated in a July 11, 1994 medical report that appellant stated that Mr. Fowlkes threatened to keep her from ever getting a higher position than mail handler, and found that her major depression episode was causally related to the work-related stress. Thus, the Office was required to reopen appellant's claim for merit review. Although the Office stated that the EEOC decision was not relevant and pertinent because it addressed a promotion action, appellant's claim in this case was based in part on her allegation that the employing establishment caused her emotional condition based on her fear that the employing establishment would retaliate against her by preventing, among other things, promotion to a position higher

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<sup>3</sup> 20 C.F.R. § 10.138(b)(1)(i)-(iii); *Willie H. Walker, Jr.*, 45 ECAB 126, 131 (1993).

<sup>4</sup> *Daniel Deparini*, 44 ECAB 657, 659 (1993).

<sup>5</sup> *John E. Watson*, 44 ECAB 612, 614 (1993).

<sup>6</sup> *Richard A. Ballard*, 44 ECAB 146 (1992).

than a mail carrier. The EEOC decision supports appellant's contention that the employing establishment did indeed retaliate against her which contributed to her emotional condition. The Board also notes that the Office, in its October 7, 1994 decision, noted the EEOC decision but found that the complaint had not yet been resolved.

Because she submitted relevant and pertinent evidence not previously considered by the Office, appellant has established that the Office abused its discretion in its October 30, 1995 decision by denying her request for review of its November 21, 1994 decision under section 5 U.S.C. § 8128(a) of the Act. On remand the Office should exercise its discretion to determine whether the EEOC decision constituted error on the part of the employing establishment by nonselecting appellant for promotion. After such further development of the evidence as is deemed necessary, the Office should issue a *de novo* decision on whether appellant's emotional condition is causally related to factors of her employment.

The decision of the Office dated October 30, 1995 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.

June 22, 1998

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member