U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALYN KUSENBERGER and DEPARTMENT OF THE ARMY, U.S. ARMY HEALTH CARE SYSTEMS SUPPORT, San Antonio, Tex.

Docket No. 95-3114; Submitted on the Record;
Issued October 27, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

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

On October 5, 1993 appellant, a computer specialist, filed a claim for an occupational disease (Form CA-2) alleging that on September 6, 1993 she first became aware that her severe stress, depression and addiction to alcohol were caused or aggravated by her employment. Appellant stopped work on August 23, 1993.

Appellant's claim was accompanied by employment records, an unsigned duty status report (Form CA-17) indicating appellant's work requirements and medical bills. Appellant's claim was also accompanied by her October 6, 1993 letter to Dr. Joseph A. Simpson, a Board-certified psychiatrist, alleging that the following incidents caused or aggravated her emotional condition: (1) advising Captain Edwards and Lieutenant Colonel Irish in August 1988 about an illegal contracting plan that they executed anyway; (2) being verbally reprimanded/admonished on August 22, 1988 for this action by Captain Edwards because she had embarrassed the commander; (3) being passed over for promotion by Captain Edwards twice in January 1989 despite working in the same office for two and one-half years at the highest level of performance; (4) Captain Edwards' insistence that they have an off-site discussion at his house in January 1989 to discuss why she was not promoted and that she have a drink to calm down even though she did not drink; (5) Captain Edwards' statement that he and his wife were having problems and his angry response when she told him that she was not interested in having an affair; (6) Captain Edwards' statement that he promoted Anglo Saxon females without college degrees so that she could not complain about their race, gender or education and her request for a transfer on the following day; (7) a transfer in February 1989 because the employing establishment believed she was at fault for an investigation of its contracting practices by the Department of Defense's inspector general; (8) an investigation in May 1989 based on anonymous and false accusations regarding claimed overtime hours, which ended in June 1990; (9) an August 1989 audit, which revealed that she was correct in advising management about an

illegal contract in August 1988; (10) sexually harassing statements made by her coworker, Ed Allen and supervisors, Al Pike and Billy Stringer, about her during the period June 1990 through August 1993; (11) her use of leave without pay in May 1993 to find another job; (12) the employing establishment's request that she return to work because two coworkers' were injured in an automobile accident; (13) disapproval of preapproved leave without pay to tend to her father's estate in August 1993 by new management; (14) filing of an informal complaint with the Equal Employment Opportunity Commission (EEOC) in August 1993 and a formal complaint in September 1993 alleging sexual harassment; and (15) her hospitalization in August 1993 due to mental, emotional and physical collapse.

Further, appellant's claim was accompanied by documents regarding an employing establishment contract and documents concerning the employing establishment's funding, correspondence with Art Nehaus, appellant's coworker, regarding appellant's requests for monthly progress reports on a special project, a response to appellant's Freedom of Information Act concerning the inspector general's investigation of the employing establishment's contracting practices and an application for leave denying appellant's request for leave without pay.

Appellant submitted an undated accompanying statement in response to a question on the Form CA-2 regarding the relationship of her employment and condition revealing her previous allegations, as well as, the following additional allegations: (1) Captain Edwards made a sexually explicit comment in response to her question why she did not receive the promotion; (2) the employing establishment refused to give her a cash award while her assistants received an award; (3) Mr. John Whorton, appellant's supervisor, gave her an angry response and made degrading comments about her work abilities due to her use of one of his employees on a special project; (4) Cliff Manis, appellant's coworker, told her that Mr. Jimmy Brookins, appellant's coworker, Mr. Pike and Mr. Whorton made sexually degrading comments about her; (5) Mr. Allen made distasteful, sexist, ethnic and religious jokes and statements and that he had a physical altercation with Shirley Wickery, appellant's coworker; (6) Mr. Whorton directed her to perform the employing establishment's "dirty work" by reassigning Mr. Allen to Dee Lawrence, a supervisor; (7) discovery of empty liquor bottles on her desk on several occasions; (8) an invitation from a contractor who Mr. Nehaus said had lots of money and pretty girls hanging on both arms to attend a happy hour; (9) Mr. Pike directed her to write a letter of apology to Lieutenant Colonel Neville for notes that she took during a software acceptance test; (10) Anita Peterson, appellant's coworker, circulated rumors that she had slept with someone to get a promotion; (11) the unknown whereabouts of her personnel file; (12) Mr. Stringer threatened her with termination if she did not report to work; (13) Susan Gray, appellant's coworker, told her that she was being watched and that there was a plan to terminate her from the employing establishment; (14) Mr. Stringer directed her to change her tour of duty on August 4, 1993; (15) Mr. Stringer refused to allow her to return to her programming duties; and (16) a confrontation with Alex Smith, an EEOC employee, regarding her inability to attend a scheduled meeting.

Several narrative statements from her supervisor and coworkers accompanied appellant's claim. In a November 15, 1993 narrative statement, Lyn C. Battey, appellant's coworker, stated that at no time had she alone or in concert with Mr. Stringer been "out to get" appellant. Ms. Battey further stated her desire for appellant to return to work due to the increased work load

and staff shortage. Ms. Gray indicated in a narrative statement of the same date that while she was having lunch at appellant's home on August 13, 1993, she advised appellant that her conduct and attendance were being monitored and to watch her actions. Ms. Gray stated that Mr. Stringer's name was not mentioned and that she did not say that appellant was being "set up," rather appellant used this phrase to describe the situation. Ms. Gray further stated that appellant refused to perform certain tasks and that "[appellant] preferred to work in a private office on special projects directly for Mr. Stringer and/or the project manager's office." Ms. Gray noted appellant's late arrival to a meeting with herself, Mr. Pike and Ms. Battey. Ms. Gray further noted that appellant told her that she returned to work due to a request from Mr. Potts, appellant's former supervisor. Mr. Pike denied appellant's allegations in a November 16, 1993 statement. Mr. Manis denied that he made any comments to appellant in a narrative statement of the same date. Mr. Manis stated that Mr. Pike gave appellant a programmer position that he was scheduled to get, but instead he waited for the next opening. Mr. Manis further stated that he never heard Mr. Brookins, Mr. Pike and Mr. Whorton say anything degrading about appellant. In a November 16, 1993 statement, Ms. Peterson denied appellant's allegations that she spread rumors about appellant sleeping with someone to get a promotion. Ms. Peterson stated that due to appellant's inability to get to work and cope with personal problems, she had to justify her actions and absurd statements involving her coworkers.

In a March 23, 1994 letter, appellant submitted a list of medical providers, correspondence with the EEOC and employing establishment regarding her complaint and medical releases. In further response, appellant submitted an undated EEOC report regarding appellant's informal complaint indicating that it could not grant appellant's requested relief for an early out retirement with a cash bonus due to her ineligibility, placement in a private office, reassignment to a grade level 12 computer programming position and a position providing administrative support to the commander. The report also revealed that Mr. Stringer did grant appellant two days to handle her father's estate, but that appellant was adamant about taking 48 hours. In addition, appellant submitted an October 6, 1993 letter reiterating her allegations concerning Ms. Gray's warnings and Mr. Manis' statements.

By decision dated March 31, 1994, the Office of Workers' Compensation Programs found the evidence of record insufficient to establish that appellant sustained an injury as alleged. The Office found that the evidence submitted did not support any compensable factors of employment.

In a May 3, 1994 letter, appellant, through her counsel, requested reconsideration of the Office's March 31, 1994 decision. By letter dated April 30, 1994, appellant reiterated her previous allegations. In an undated statement, appellant alleged that Mr. Brookins made degrading comments, Ms. Battey assigned work to her while she was at home and arbitrarily told her that she did not work compensatory time when she actually did so, that Sandra Iverson, an employing establishment secretary, verbally threatened to hurt her and was not disciplined by the employing establishment and that she received a bad appraisal. Appellant also alleged that she was not getting the work experience of a computer programmer, that she was not qualified to perform a certain task and that she was performing the work of her coworkers. Further, appellant submitted a January 14, 1987 statement pertaining to Mr. Toler.

Appellant submitted July 5, 1989 narrative statements of her coworkers, Edward L. Bullard and Keith Mason, indicating that appellant was working on June 16, 1989. Appellant submitted a February 15, 1990 memorandum, revealing that she had a verbal confrontation with Mr. Brookins on that date concerning the whereabouts of Mr. Potts and that Mr. Whorton did not respond to her complaints about Mr. Brookins. Appellant's accompanying June 12, 1990 memorandum indicated a meeting on that date with Mr. Brookins and Mr. Whorton regarding the former's conduct towards appellant, comments made by Charlie Sullivan, appellant's coworker, and Mr. Brookins about appellant's preparation of a memorandum of the meeting. In an August 12, 1990 memorandum, appellant made allegations as to Mr. Allen's behavior.

Appellant submitted correspondence with the EEOC, the employing establishment and the inspector general, the inspector general's report revealing that the employing establishment failed to follow proper procedures monitoring and controlling its acquisitions, an undated and anonymous letter concerning Mr. Pike's bragging that he did not work while he was stationed in Saudi Arabia and a statement from Mr. Nehaus regarding the behavior of an unnamed employing establishment employee. Appellant's statement covering the period February 15 through April 23, 1990 indicated that Mr. Brookins had a verbal confrontation with appellant regarding her inability to help him with a project and her failure to get a response from Mr. Whorton to review a particular document. Appellant submitted memoranda regarding the findings of an investigation of her conduct. In an accompanying narrative statement, appellant described an incident where on July 29, 1991, two of her coworkers' were laughing at students and her dislike for this action. Another accompanying statement revealed that Ms. Iverson had a rude conversation with appellant and that she received preferential treatment from the employing establishment. Appellant's statement covering the period July 15 through September 1991, reiterated the incident where Ms. Battey assigned work to her while she was at home. Another statement reiterated appellant's allegation that she had to perform the work of others and provided that she was behind in her work. Appellant submitted a September 26, 1991 memorandum indicating that she did not wish to accept deliverables before a proper review. In a memorandum of the same date, appellant reiterated her inability to perform her duties as a computer programmer, receipt of a low performance appraisal and her performance of her coworkers' duties.

Appellant's April 30, 1994 response was accompanied by medical evidence. Dr. Simpson's September 3 and 17, October 15 and November 19, 1993 and March 4, 1994 letters addressed periods of appellant's disability. His October 15, 1993 medical treatment notes indicated the treatment of appellant's emotional condition. In a November 3, 1993 attending physician's report, Form CA-20, Dr. Simpson diagnosed atypical bipolar disorder and indicated that appellant's alcohol abuse was in remission. Dr. Simpson placed a checkmark in the box marked "yes" in response to the question whether appellant's condition was caused or aggravated by her employment. He explained that appellant presented a detailed history supporting that harassment aggravated her condition. A September 27, 1993 report from an individual whose signature is illegible provided that appellant had stopped drinking, that she had some depression and that she was not suicidal and described appellant's medical treatment. The treatment notes of a person whose signature is illegible covering the period August 30 through October 18, 1993 revealed the treatment of appellant's emotional condition.

In a November 16, 1993 narrative statement, Mr. Stringer responded to appellant's allegations explaining that he denied appellant's pre-approved leave without pay based on the mission work load, personnel shortages due to hiring freezes and appellant's past leave record, which revealed that beginning January 10, 1993, appellant had been off work approximately 60 percent of the time. Mr. Stringer denied that he had prior knowledge and had approved the additional hours of leave without pay. He further denied that he had knowledge of the location of appellant's security badge, proximity reader card, Diner's Club card and office keys. Mr. Stringer stated that appellant's personnel file was in the same location as other division employees' files and that he did not keep personnel records in his office. He denied appellant's allegation that he directed her to change her work hours noting that he would have been required to submit a memorandum through the local union and civilian personnel office for coordination prior to implementing a change in her work hours. Mr. Stringer stated that Ms. Banks, a Fort Sam Houston EEOC representative, informed him on August 18, 1983 that none of the witnesses that she had interviewed substantiated any of appellants allegations and that the current pattern of leave usage dated back to at least 1987.

By decision dated May 9, 1994, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was repetitious and cumulative in nature and thus, insufficient to warrant review of the prior decision.

In a December 13, 1994 letter, appellant, through her counsel, requested reconsideration of the Office's decision accompanied by Dr. Simpson's June 22, 1994 medical report diagnosing several emotional conditions, an employment record and an August 19, 1994 decision from the Social Security Administration granting appellant disability benefits.

By decision dated December 20, 1994, the Office denied modification of its prior decisions.

By decision dated June 16, 1995, the Office denied modification of its prior decisions.

In a March 29, 1995 letter, appellant requested reconsideration of the Office's decision accompanied by Dr. Simpson's March 28, 1995 medical report indicating that harassment in the workplace was a contributing factor of appellant's emotional condition and transcripts of hearings held before the EEOC on August 25 and September 6, 1994.

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 the Federal Employees' Compensation Act. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned work duties or requirements of the employment, the disability comes within the coverage of the Act. On the other hand, where disability results from such factors as an employee's emotional reaction to employment matters unrelated to the employee's regular or specially assigned work duties or requirements of the

employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the scope of coverage of the Act.[1]

Perceptions and feelings alone are not compensable. 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 his federal employment.[2] To establish her claim that he 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.[3]

In this case, appellant has alleged that she sustained an emotional condition due to various incidents at work. Several of appellant's allegations fall into the category of administrative or personnel actions. An emotional reaction to certain administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, does not fall within coverage of the Act, unless error or abuse is established on part of the employing establishment.[4] The incidents and allegations made by appellant that fall into this category of administrative or personnel actions include the August 22, 1988 verbal reprimand from Captain Edwards, Mr. Pike's request that appellant write a letter of apology for notes she took during a meeting and Mr. Stringer's threat to terminate appellant which involve disciplinary matters,[5] the denial of a promotion twice in January 1989,[6] the employing establishment's transfer of appellant in February 1989 and appellant's request for a transfer,[7] the May 1989 investigation of appellant,[8] the use and denial of leave,[9] the filing of an informal and formal EEOC complaint against the employing establishment, the employing establishment's refusal to give appellant a cash award and low performance appraisal.[10] Appellant has not submitted any evidence to establish that the employing establishment's disciplinary actions, denial of appellant's request for a transfer, a cash award and return to computer programming duties, appellant's transfer and

[1] *Lillian Cutler*, 28 ECAB 125 (1976).

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

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

[4] *Joseph C. DeDonato*, 39 ECAB 1260 (1988).

[5] *Barbara E. Hamm*, 45 ECAB 843 (1994); *Joe E. Hendricks*, 43 ECAB 850 (1992).

[6] *Michael Thomas Plante*, 44 ECAB 510 (1993).

[7] *Goldie K. Behymer*, 45 ECAB 508, 511 (1994); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

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

[9] *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Michael Thomas Plante*, *supra* note 6.

[10] *James E. Woods*, 45 ECAB 556 (1994).

investigation of appellant were improper. Appellant has failed to submit sufficient evidence to support her allegation that Captain Edwards purposely avoided giving her the promotions. Mr. Stringer, appellant's supervisor, denied appellant's request for leave without pay to handle her father's estate based on the work load, staff shortage and appellant's less than adequate leave record. Further, appellant failed to submit evidence that Mr. Stringer had talked to Mr. Potts, appellant's former supervisor, about the approved leave. In addition, the EEOC did not render a finding that the employing establishment had committed error or abuse in denying appellant's request for leave. Therefore, the Board finds that appellant has failed to establish a compensable employment factor.

Appellant has alleged that she was sexually harassed by the statements and actions of Captain Edwards, Mr. Allen, Mr. Brookins and Mr. Sullivan, appellant's coworkers and Mr. Pike, Mr. Stringer and Mr. Whorton, appellant's supervisors, on several occasions. Although appellant contended that Mr. Manis, appellant's coworker, told her that Mr. Brookins, Mr. Pike and Mr. Whorton made sexually degrading comments about her, Mr. Manis has denied doing so. Further, contrary to her statement that there were witnesses to the sexual harassment, she failed to submit such evidence. Regarding appellant's other allegations of harassment, appellant has failed to submit sufficient evidence that she was being harassed in these incidents. Rather, she has merely presented her perception that she was being harassed by the employing establishment and thus, she has not established that harassment did, in fact, occur. Regarding appellant's allegation that she was being watched by the employing establishment and that it planned to terminate her, it is an administrative function to supervise employees and see that they are tending to their tasks during work hours.[11] Further, although Ms. Gray, appellant's coworker, did warn appellant to watch herself, she stated that Mr. Stringer's name was not mentioned and that she did not say that appellant was being "set up." Ms. Gray also stated that appellant told her that she "preferred to work" on special projects directly for Mr. Stringer and/or the project manager's office. In addition, Ms. Battey, appellant's coworker, stated that she had alone or in concert with Mr. Stringer been "out to get" appellant. Also, Mr. Pike denied appellant's allegations. Ms. Peterson, appellant's coworker, denied that she spread rumors about appellant sleeping with someone to get a promotion. Mr. Stringer denied that he knew the location of appellant's proximity reader card, Diner's Club card and office keys and that he kept appellant's personnel file in his office. Inasmuch as the factual basis for the allegations of harassment are not established by the record, they are not, therefore, found to be compensable factors of employment.

Appellant's allegation that Mr. Stringer directed her to change her tour of duty would constitute a compensable employment factor, however, appellant has failed to show that this occurred. Mr. Stringer denied this allegation noting the extensive procedure he would have to follow prior to changing appellant's work schedule. Appellant's allegations regarding the employing establishment's illegal contracting, a request that she return to work while she was out on leave and reassignment of Mr. Allen's work to appellant while she was at home and method for signing contract invoices constitute compensable employment factors, which arose in the performance of appellant's employment duties. Additionally, appellant's requests for monthly progress reports and additional assistance on a special project, the problems appellant

[11] *Jimmy Gilbreath*, *supra* note 9; *Michael Thomas Plante*, *supra* note 6.

encountered while working on this project, lack of qualifications to perform a certain task, performance of the duties of her coworkers causing her to be behind in her own work and unwillingness to accept deliverables before a proper review constitute compensable employment factors. All of these events are established as having occurred by evidence present in the case record and by their nature, they arise out of and in the course of appellant's assigned duties. However, appellant's burden of proof is not discharged by the fact that she has established employment factors, which may give rise to a compensable disability under the Act. To establish her occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that she has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.[12]

The medical evidence of record in this case fails to establish that appellant's emotional condition was caused by the accepted compensable employment factors. The disability certificates, medical treatment notes and June 22, 1994 medical report of Dr. Simpson, a Board-certified psychiatrist and the medical reports and treatment notes of an individual whose signature is illegible do not constitute probative medical opinion evidence inasmuch as they did not identify specific compensable employment factors and are devoid of a rationalized medical opinion relating appellant's emotional condition to compensable employment factors. Dr. Simpson failed to provide any medical rationale in his November 3, 1993, Form CA-20, for his opinion that appellant's history supported that harassment aggravated her emotional condition.

The June 16, 1995 and December 20, 1994 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
October 27, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[12] *William P. George*, 43 ECAB 1159, 1168 (1992).