

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUDITH MINGLE and U.S. POSTAL SERVICE,
POST OFFICE, Murfreesboro, TN

*Docket No. 99-1546; Submitted on the Record;
Issued January 26, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issue is whether appellant has met her burden of proof in establishing that she developed an emotional condition due to factors of her federal employment.

The Board has duly reviewed the case on appeal and finds it not in posture for decision.

Appellant, postal carrier, filed an occupational disease claim alleging that she developed post-traumatic stress disorder due to harassment while in the performance of duty. By decision dated August 14, 1997, the Office of Workers' Compensation Programs denied appellant's claim finding that she failed to establish a compensable factor of employment. Appellant requested an oral hearing and by decision dated January 28, 1999, the hearing representative affirmed the Office's August 14, 1997 decision

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 concept of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or to a requirement imposed by the employment, the disability is compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.¹

Appellant attributed her emotional condition to sexual harassment by two coworkers, Ricky Powers, also known as "Scooter," and Jerry Freeman, who later became appellant's supervisor.

¹ *Lillian Cutler*, 28 ECAB 125, 129-31 (1976).

For harassment or discrimination to give rise to a compensable disability under the Federal Employees' Compensation 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.²

Appellant alleged that Mr. Powers asked her whether she was a natural blonde and whether all of her hair was that color. She further stated that he asked if appellant was a lesbian and whether she had videotapes with Patricia Clarke, a coworker. Appellant alleged that Mr. Powers stated that other coworkers contended they followed appellant when she left work. In a statement dated May 8, 1997, Mr. Powers denied all of appellant's allegations.

In support of these claims, appellant submitted written statements from Tamera Whitehead, a coworker. On July 15, 1996 Ms. Whitehead stated, "I was constantly asked about where [appellant and Ms. Clarke] lived, if they dated men, what and where they went after work..." Ms. Whitehead stated that Mr. Powers asked if there were videos. She stated that Mr. Powers asked if appellant and Ms. Clarke were lesbians as the men in the employing establishment had a bet regarding appellant's sexuality. Ms. Whitehead stated that Mr. Powers wanted to settle the bet so that "certain people could quit following them down the highway to see which town they lived in, and if they lived together!"

In a separate statement dated July 16, 1996, Ms. Whitehead described an incident in which a male coworker spoke to appellant, but appellant did not hear. Mr. Powers allegedly stated that if the male coworker were a woman, appellant would have responded.

Appellant has submitted probative and reliable evidence to support her allegation of verbal harassment by Mr. Powers in the form of signed statements from Ms. Whitehead supporting that Mr. Powers questioned appellant's sexual orientation, made inquiry as to videotapes of her activities and indicated that either he or other male coworkers followed appellant after work to find out where she lived and with whom.

Appellant alleged that Mr. Freeman stated that if he could have appellant he would get a divorce. Mr. Freeman denied this allegation and stated that during the time period alleged by appellant he was not yet married. Appellant has submitted no evidence that Mr. Freeman made this remark.

Appellant further alleged that Mr. Freeman followed appellant on June 28. She stated that she had to return to her route as she had forgotten accountables. Appellant stated that her coworkers noticed Mr. Freeman driving in his personal vehicle. She stated that the next day Mr. Freeman asked where she had been going, mentioning the street she was traveling. Appellant alleged that Mr. Freeman had followed her. Appellant submitted statements from Ms. Clarke supporting her allegations. Ms. Clarke's statement does not indicate that she saw

² *Alice M. Washington*, 46 ECAB 382 (1994).

Mr. Freeman follow appellant. The fact that he asked about her whereabouts on the next day does not rule out an innocuous reason for noting her location.

At the oral hearing appellant alleged that Mr. Freeman stated that he was going “to get” both her and Ms. Clarke and that he referred to them as “bitches.” Appellant submitted a statement from Gerald Johnson, a coworker, dated July 16, 1996 alleging that Mr. Freeman stated on two separate occasions that if he was promoted he was “going to get those two bitches.” Mr. Johnson asserted that this statement referred to appellant and Ms. Clarke. Appellant has substantiated this employment factor.

Appellant further alleged that Mr. Freeman continued to harass her once he became her supervisor. She stated that he removed the labels from her case, moved her case to an inconvenient location, followed her on her route an excessive number of times, informed her on March 10, 1997 that she was not doing enough work, that he stared, glared and followed her during the course of her workday and that he would not allow her to talk to coworkers. These activities fall within the scope of Mr. Freeman’s discretion as appellant’s supervisor to undertake administrative duties. As a general rule, an employee’s emotional reaction to an administrative or personnel matter is not covered under the Act. But error or abuse by the employing establishment in what would otherwise be an administrative or personnel matter, or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.³ Although appellant has alleged that Mr. Freeman erred in the commission of these actions, she has submitted insufficient evidence of error or abuse and has failed to substantiate these occurrences as factors of employment.

Appellant also attributed her emotional condition to the failure of the employing establishment and John Ingram, the postmaster, to adequately address the issue of harassment. Mr. Ingram stated that he spoke to both Mr. Freeman and Mr. Powers and that both denied appellant’s allegations. Appellant also submitted a decision dated June 27, 1998 from the Equal Employment Opportunity Commission (EEOC) finding that the employing establishment had improperly dismissed appellant’s claim for harassment on October 17, 1996. The EEOC remanded appellant’s complaint for further processing in accordance with the applicable regulations. The Board finds that appellant has submitted evidence that the employing establishment did not exercise due diligence in adjudicating appellant’s claim of harassment and that this failure constitutes error or abuse in the handling of an investigation.

The Board has found that appellant has submitted evidence substantiating her allegations of specific instances of harassment by Mr. Powers and Mr. Freeman and that she has substantiated her allegation that the employing establishment failed to adequately conduct an investigation regarding these allegations.

Appellant’s attending physician, Dr. Jon W. Draud, a Board-certified psychiatrist, submitted a report dated November 12, 1998 diagnosing post-traumatic stress disorder which he

³ *Martha L. Watson*, 46 ECAB 407 (1995).

attributed to harassment at work. This report contains a diagnosis and an opinion that appellant's condition was caused by the accepted employment factor. This report raises an uncontroverted inference of causal relation between appellant's accepted employment factor and her diagnosed condition and is sufficient to require the Office to undertake further development of appellant's claim.⁴ On remand, the Office should prepare a statement of accepted facts and list of accepted factors and refer appellant to an appropriate physician for a determination of the causal relationship between her diagnosed emotional condition and her accepted factors of employment. After this and such development as the Office deems necessary, the Office should issue a *de novo* decision.

The January 28, 1999 decision of the Office of Workers' Compensation Programs is hereby set aside and remanded for further development consistent with this opinion.

Dated, Washington, DC
January 26, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

⁴ *John J. Carlone*, 41 ECAB 354, 358-60 (1989).