U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NENET M. CATLE and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Bay Pines, FL

Docket No. 00-803; Submitted on the Record;
Issued November 5, 2001

DECISION and ORDER

Before MICHAEL E. GROOM, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant sustained an emotional condition while in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's February 18, 1999 request for a hearing as untimely.

The Board finds that appellant has not established that she sustained an emotional condition while in the performance of duty.

On June 4, 1998 appellant, then a 37-year-old health technician and phlebotomist in a one-year probationary status, filed an occupational disease claim for depression with anxiety and paranoia, which she attributed to sexual harassment at work from coworker, James Withrow, interference with internal mail, and management's sharing of confidential testimony related to her charges of sexual harassment. Appellant also alleged that management's attempts to force her to work with Mr. Withrow after she charged him with sexual harassment, and her June 26, 1998 termination from the employing establishment on disciplinary grounds, caused or contributed to her emotional condition.

By decision dated January 13, 1999, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found that appellant's allegations of sexual harassment, interference with her workplace mail and a hostile work environment were unsubstantiated.

By decision dated October 5, 1999, the Office denied modification of its prior decision on the grounds that the evidence submitted was insufficient. The Office found that the June 8, 1999 deposition of Susan Tanner, appellant's supervisor, which supported appellant's allegations of sexual harassment against Mr. Withrow, was of diminished probative value as the employing establishment asserted that Ms. Tanner was a friend of appellant's and her testimony was thus biased. The Office also found that appellant's termination was an administrative matter not within the performance of duty. The Office concluded that there were "many conflicts in

testimony and disputed issues," and that an Equal Employment Opportunity (EEO) investigation had failed to substantiate appellant's allegations of discrimination, harassment or reprisal.

To establish harassment as a compensable factor of employment under the Federal Employees' Compensation Act,[1] there must be evidence that harassment did in fact occur. Unfounded perceptions of harassment do not constitute an employment factor, and mere perceptions are not compensable under the Act.[2] In this case, the Board finds that appellant has not submitted sufficient corroborating evidence to establish her allegations of sexual harassment on May 30 and July 10, 1997 by Mr. Withrow.

Appellant alleged that, on May 30, 1997, Mr. Withrow trapped her in the office of Ms. Tanner by sitting in a chair and blocking the door. Ms. Tanner discovered Mr. Withrow blocking the door when she attempted to enter. In a June 8, 1999 deposition, Ms. Tanner recalled going to her office on May 30, 1997 to check on paperwork and finding Mr. Withrow inside the office, sitting in a chair blocking the door. Appellant was sitting in another chair "with her hands wrapped around her purse, just sitting there in a sort of frozen-type position."

The Board finds that Ms. Tanner's statement is sufficient to corroborate that, on May 30, 1997, appellant and Mr. Withrow were in Ms. Tanner's office together and that Mr. Withrow was seated in a chair blocking the door. However, Ms. Tanner did not describe any incident of harassment, unwanted or offensive speech or other conduct by Mr. Withrow, nor did appellant allege such events occurred. The mere presence of appellant and Mr. Withrow together in Ms. Tanner's office does not establish that harassment occurred.

Appellant also alleged that on July 10, 1997 Mr. Withrow had a Band-Aid on his nose, and told appellant "that the reason why … [was] because he [wa]s using his nose for oral sex to his wife…." Appellant noted that Ms. Tanner overheard these remarks. In a June 8, 1999 deposition, Ms. Tanner noted that when Mr. Withrow had redness on his nose due to medical treatment, he made a joke to appellant and a group of other workers that "his nose was red because he was using it to satisfy his wife.…" Ms. Tanner told Mr. Withrow that his remarks were inappropriate and would not be tolerated.

The Board finds that there is insufficient evidence to establish that Mr. Withrow directed these remarks specifically at appellant. According to Ms. Tanner's statement, Mr. Withrow made a crude joke about the Band-Aid to a group of employees, and not only to appellant. The record does not indicate anything more than that appellant merely overheard this remark. The Board finds that Mr. Withrow's comments about the Band-Aid does not constitute harassment of appellant.

The Board also finds that appellant did not submit sufficient corroborating evidence to establish the following incidents of alleged harassment as factual: in June 1996, Mr. Withrow told appellant that his wife was ugly and that he would have rather married appellant, that he fantasized about appellant while being intimate with his wife, and that he had been accused of

[1] 5 U.S.C. §§ 8101-8193.

[2] *Kathleen D. Walker*, 42 ECAB 603 (1991).

molesting his daughter; in June 1996, Mr. Withrow then threatened to tell coworkers that appellant was giving him sexual favors; in July 1996, after appellant and Ms. Tanner visited Mr. Withrow at his home to meet his wife, who was Filipino as was appellant, Mr. Withrow repeatedly invited appellant to his home again when his wife was not home, and appellant refused; on May 30, 1997, in an elevator, Mr. Withrow asked appellant to kiss him, while "holding his penis," and followed her into the corridor, gesturing lewdly; on July 10, 1997, Mr. Withrow rubbed her shoulders and told her that he loved her; on July 11, 1997, Mr. Withrow pressed his whole body against her in an elevator;[3] in February 1998, Mr. Withrow placed portions of confidential investigative transcripts related to the sexual harassment charge in her workplace mailbox; in February to April 1998, management tried to force her to work with Mr. Withrow.

The Board notes that an October 2, 1997 Administrative Board of Investigation (ABI) report and a December 19, 1998 EEO investigative summary concluded that there was insufficient evidence to corroborate appellant's allegations of harassment by Mr. Withrow.[4] Also, a March 29, 1999 investigative summary regarding appellant's EEO discrimination complaint concluded that appellant had not been discriminated against on the basis of "race (Asian, Pacific Islander)," "disability (mental) or national origin (Filipino)."

Appellant also alleged her claimed emotional condition to an incident of tampering with her interoffice mail in May 1998.

Appellant alleged that in May 1998, a letter to her from Dr. Roger Zitman, an employing establishment official, regarding management's attempts to have her work with Mr. Withrow, was opened and tampered with. Alyce Carlson, an employing establishment manager, noted in an August 12, 1998 letter that the envelope appellant opened on May 8, 1998 was of different

[3] After the July 11, 1997 incident, appellant filed an EEO claim regarding Mr. Withrow's alleged sexual harassment.

[4] Regarding the December 1996 incident in which appellant alleged she was propositioned by Jim Withrow while in the elevator, the May 30, 1997 office incident and the July 1997 shoulder touching incident, Mr. Withrow denied each event and there was no witness corroboration. While the April 1997 incident in the elevator was witnessed by employees Ron Castle and Marcella St. Onge, neither observed physical contact between appellant and Mr. Withrow, although Ms. St. Onge suggested that appellant "seemed to shout over Mr. Withrow." The review board recommended that a perceived "relationship between [appellant] and her supervisor [Ms. Tanner]" had "great potential for creating a hostile work environment." Appellant was advised of the ABI findings in a November 4, 1997 memorandum.

stationery than Dr. Zitman's stock.[5] In an August 13, 1998 letter, Dr. Zitman affirmed that the envelope in which appellant received his letter was a different color than his stationery, did not show a faint line present on all his other envelopes, and did not have appellant's name on it, although he recalled writing appellant's name on the envelope when he placed it in her mailbox on May 1, 1998.

The Board finds that the record contains sufficient evidence to cast doubt on whether the May 1, 1998 letter was in its original envelope when appellant received it on May 8, 1998. However, there is nothing in the record explaining what caused this discrepancy. Appellant has submitted insufficient evidence to establish any mail tampering to any individual, or to identify the date on which tampering occurred. Thus, the evidence of record is too vague to establish appellant's allegations of mail tampering. As appellant did not establish that mail tampering occurred, her allegation of harassment predicated on such tampering is also not established.

Appellant also attributed her claimed emotional condition to being terminated from the employing establishment effective June 26, 1998, which she alleged was in retaliation for filing the sexual harassment complaint against Mr. Withrow. The Board has held that termination of employment is an administrative or personnel matter, unrelated to the employee's regular or specially assigned work duties, and does not fall within the coverage of the Act.[6] However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[7]

The record does support that appellant was terminated from the employing establishment effective June 26, 1998 for a combination of disciplinary and personnel matters. In a June 9, 1998 letter, appellant was advised that she had been terminated from the employing establishment effective June 26, 1998 during her one-year probationary period which began on July 6, 1997. The employing establishment stated that appellant was terminated due to "demonstrated performance and conduct, … requests for special scheduling and/or assignments unsubstantiated allegations about a coworker, and lack of focus on patient care." The employing establishment concluded that appellant's conduct had "contributed to gossip and reduced morale disrupted the equitable distribution of workload and assignments and created a perception by [her] peers and management that a hostile working environment exists." Upon review of this

[5] In a series of electronic mail messages between appellant and Ms. Carlson, a laboratory manager, from April 29 to June 5, 1998, appellant alleged that her letter from Dr. Zitman had been tampered with and its contents shared with others, and that Dr. Zitman was attempting to force her to work with Mr. Withrow. She alleged that she sustained an emotional condition due to harassment, discrimination, and reprisal for filing the sexual harassment charges. In his May 1, 1998 letter, Dr. Zitman attempted to clarify to appellant details of her work schedule for April 29, 1998. Appellant thought that Dr. Zitman asked her to stay until 3:30 p.m., which would mean that she would encounter Mr. Withrow at the beginning of his shift. Dr. Zitman emphasized that he would not require her to work in proximity to Mr. Withrow.

[6] *See Jimmy Gilbreath*, 44 ECAB 555 (1993).

[7] *See Richard Dube*, 42 ECAB 916 (1991).

evidence, the Board finds that the employing establishment acted reasonably in terminating appellant for disciplinary reasons and poor job performance.

A December 19, 1998 EEO investigative summary found that appellant's "termination from employment on June 26, 1998 was the result of a reprisal action taken by management and is an outgrowth of [her] previous complaint of discrimination filed on April 3, 1998, which alleges [she was] subjected to sexual harassment."[8] However, a March 29, 1999 EEO investigative summary concluded that appellant had not been discriminated against on the basis of "race (Asian, Pacific Islander)," "disability (mental) or national origin (Filipino)." The Board notes that neither EEO investigative summary constitutes a final decision on the issues of discrimination or retaliation. Therefore, the Board finds that there is insufficient evidence of record to establish a wrongful termination.

Consequently, appellant has failed to establish that she sustained an emotional condition in the performance of duty as she failed to establish any compensable factors of employment.

The Board also finds that the Office properly denied appellant's February 18, 1999 request for a hearing as untimely.

The Act[9] is unequivocal that a claimant not satisfied with a decision of the Office has a right, upon timely request, to an oral hearing or written review of the record before a representative of the Office.[10] Section 8124(b) of the Act states, in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[11] The Office's procedures require it to exercise its discretionary authority to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a). The Board has held that the Office's exercise of this discretion is a proper interpretation of the Act and Board precedent.[12]

In this case, appellant disagreed with the Office's January 13, 1999 decision denying her claim, and in a February 11, 1999 letter postmarked February 18, 1999, requested an oral hearing before a representative of the Office's Branch of Hearings and Review. By decision dated March 30, 1999, the Office denied appellant's request for an oral hearing as untimely, as her request was postmarked February 18, 1999, more than 30 days following the issuance of the

[8] Mr. Withrow alleged that appellant had once stopped by his house unannounced, once when appellant had been invited to meet his wife and when invited to his son's birthday party. Dakila DeVega, the night shift supervisor, stated that appellant did not report harassment to him and that he only learned of appellant's allegations from Ms. Tanner.

[9] 5 U.S.C. §§ 8101-8193.

[10] 5 U.S.C. § 8124(b); *Joe Brewer*, 48 ECAB 411 (1997); *Coral Falcon*, 43 ECAB 915, 917 (1992).

[11] 5 U.S.C. § 8124(b)(1).

[12] *Henry Moreno*, 39 ECAB 475 (1988).

January 13, 1999 decision. The Office exercised its discretion and determined that appellant's request could be addressed equally well by submitting new and relevant evidence accompanying a valid request for reconsideration. In a June 28, 1999 letter, appellant, through her representative, requested reconsideration and submitted Ms. Tanner's June 8, 1999 deposition.

The Board finds that the Office properly determined that appellant's February 18, 1999 request for an oral hearing was made more than 30 days after issuance of the January 13, 1999 decision. The Board further finds that the Office properly exercised its discretion in determining that appellant could develop her claim equally well by submitting new, relevant evidence on reconsideration. Thus, the Office's denial of appellant's request for an oral hearing was proper.

The decisions of the Office of Workers' Compensation Programs dated October 5, March 30 and January 13, 1999 are hereby affirmed.

Dated, Washington, DC
November 5, 2001

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member