

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RENA HERTZNER and U.S. POSTAL SERVICE,
FARMINGDALE POST OFFICE, Farmingdale, NY

*Docket No. 00-2148; Submitted on the Record;
Issued November 29, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant sustained an emotional condition while in the performance of duty.

The Board has duly reviewed the case record and finds that appellant has failed to establish that she sustained an emotional condition while in the performance of duty.

On September 16, 1999 appellant, then a 50-year-old distribution clerk, filed a claim for an occupational disease alleging that on August 25, 1999 she first realized that her emotional condition was caused or aggravated by factors of her federal employment. Appellant stopped work on August 25, 1999.

By decision dated May 1, 2000, the Office of Workers' Compensation Programs found the evidence of record insufficient to establish that appellant sustained an emotional condition while in the performance of duty.

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

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

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 her federal employment.² To establish her claim that she sustained an emotional or physical condition in the performance of duty, appellant must submit: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the diagnosed condition.³

In this case, appellant has alleged that she was sexually and physically harassed and discriminated against by the employing establishment. In an October 28, 1999 narrative statement, appellant primarily has alleged that her numerous pleas for intervention by postmasters, supervisors, union representatives and the Equal Employment Opportunity (EEO) office of the employing establishment regarding her complaints of harassment and discrimination were ignored. The Board has held that actions of an employee's supervisors or coworkers which the employee characterizes as harassment may constitute a factor of employment giving rise to a compensable disability under the Act. For harassment or discrimination to give rise to a compensable disability there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.⁴

Appellant has alleged that at 5:30 a.m. on February 26, 1990 after she reported the actions of Peter Gilmartin, an employing establishment employee, to Postmaster William Maynes regarding Mr. Gilmartin's lack of work and excessive use of a walkman, she received an unwelcomed pornographic photograph on her desk, which depicted three naked women with belts and chains in a variety of explicit and sadomasochistic sexual positions. Appellant alleged that Paul Kavanaugh and Andrew Sullivan, employing establishment employees and Mr. Gilmartin, who had been circulating the photograph around the office for several days and displayed it openly over Mr. Gilmartin's workstation, placed the picture on her desk. Appellant stated that, upon showing the picture to Mr. Maynes, he told her to save it for EEO.

Appellant further alleged that two days later, a picture of a scantily clad woman was pinned up by the time clock. Appellant indicated that her supervisor, Lou Pelligrino, failed to get involved. During the following week, appellant alleged that Mr. Sullivan, Mr. Gilmartin and Mr. Kavanaugh harassed her by endangering her safety at work by placing flat buckets immediately behind her and in plain obstruction of her path, knocking into her with a U-cart, following her into the breakroom and wedging a U-cart between her chair and the wall obstructing her path to her chair. Appellant stated that the first two actions were done by Mr. Sullivan and upon further information she received and her belief, they were connected to

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

³ *Ruby I. Fish*, 46 ECAB 276 (1994); *Mary A. Sisneros*, 46 ECAB 155 (1994).

⁴ *William E. Seare*, 47 ECAB 663 (1996).

and in concert with Mr. Gilmartin and Mr. Kavanaugh. Appellant further stated that she brought these actions to the attention of Mr. Pellegrino, Mr. Maynes and Ms. Poggi, from the EEO office, who ignored her complaints.

Appellant alleged that over the years, she received numerous unwelcomed cartoons, drawings and photographs depicting women in humiliating and degrading scenarios on her desk that were permitted by Postmaster John Alleva and Salvatore Modena, an employing establishment supervisor, despite her objections.

Appellant contended that Mr. Kavanaugh slowly followed her in his car as she was walking down the street. Appellant also contended that Mr. Kavanaugh mouthed obscene and intimidating words to her, spit at her and on her car, placed obscene telephone calls to her home punctuating the call at the end with the sound of someone spitting, made lewd and leering gestures at her during work and made sexual comments. Appellant also contended that additional sexual remarks, the pinning of photographs and the playing of obscene music were done by Peter Furgiuele, Dave White and Nelson Gonzalez, employing establishment employees. She stated that Mr. Alleva ignored her complaints about these incidents and Mr. Modena ignored her requests for intervention. She further stated that Mr. Alleva encouraged a hostile environment by embarrassing her with his patronizing comments and by stating that her EEO complaints contained false allegations.

Appellant contended that Mr. Kavanaugh placed a picture of a female letter carrier on a light switch plate in the women's bathroom so that the switch was located in the crotch area of the woman. Appellant further contended that, in January 1992, after recuperating from a severe car accident and waiting for knee surgery, Mr. Sullivan deliberately crashed into her with a piece of heavy equipment filled with mail. She stated that neither Mr. Pellegrino nor Mr. Maynes showed any concern about this incident and no action was taken.

Additionally, appellant contended that, in March 1993, Mr. Alleva told Mr. Kavanaugh that he had no problem with a lewd cartoon that Mr. Kavanaugh had taped to the back of a clipboard he used to collect money for coffee, as long as it was put away when employing establishment inspectors were in the building.

Appellant alleged that, in December 1994, Mr. Kavanaugh made an insulting and demeaning remark about her single status when referring to an ad for an animal shelter.

Appellant also alleged that, in February 1995, Mr. Kavanaugh called her a "bitch" and followed her out to the dock and that he continued to call her this name over and over again. Appellant stated that this incident was witnessed by Stewart Rubin, appellant's supervisor, who did not react and by her coworker, Lorraine Kraft.

Appellant further alleged that Gary Besemer, an employing establishment employee, threw a letter tray filled with mail and weighing 10 to 12 pounds at her while her leg was in a cast.

Appellant then alleged that on September 10, 1997 a pornographic picture of a naked woman with objects in her anus and vagina was displayed in the work area. Appellant stated that

she took the picture to Mr. Alleva who suggested that maybe the picture blew in the door or window.

Appellant stated that no action was taken by Mr. Modena when she reported that Mr. Gonzalez made derogatory comments about her being Jewish and raced at her with his employing establishment jeep. Appellant further stated that she found a bullet on the ground on the driver's side of her car while parked at the employing establishment and another one outside her home and that her car tires had been flattened while parked near the employing establishment.

Appellant alleged that, on January 30, 1998, Mr. Kavanaugh left a magazine open displaying an offensive cartoon character for her to see while working. Appellant further alleged that on March 21, 1998 two employing establishment employees displayed two postcards with written comments referring to sexual acts and that no action was taken. Additionally, appellant stated that she was encouraged by her supervisors to not file a complaint of harassment and discrimination and that, when she did file a complaint, no action was taken.

Appellant contended that she was called hurtful names at the employing establishment and noted verbal sexual harassment of her coworkers, Terry Check, Maureen Daughtery and Irene Marmo. Appellant stated that Ms. Check was harassed by Mr. Sullivan, Mr. Gilmartin and Mr. Kavanaugh and that Ms. Marmo was verbally harassed by Kenny Rogenkamp, an employing establishment employee.

Appellant further contended that a picture of a woman with the words "Happy! Happy! Big Time!" referring to a woman being gay was displayed. Appellant stated that the picture indicated that the woman was happy because she had been with someone's wife. Appellant also stated that management did not take any action.

Appellant stated that, after she complained to management, a hand drawn picture of a pair of pants was placed above the EEO notice next to the women's restroom with a paper penis sticking out of the pants. She stated that, despite her complaints, the picture remained on the wall for a period of time and no one was disciplined for such an act.

Finally, appellant contended that one week before her last day at the employing establishment, she asked Mr. Pellegrino to keep Mr. Kavanaugh away from her and she became upset when Mr. Pellegrino called her into his office to say that Mr. Kavanaugh did not like her telling Mr. Pellegrino to keep him away from her.

In support of her claim, appellant submitted pictures and cartoons of a sexual nature. Appellant also submitted the EEO affidavit of Diane Segarra, appellant's coworker. In this affidavit, Ms. Segarra stated that she had heard inappropriate remarks from the workroom floor and that appellant had shown her pictures that she found at her case more than once. Ms. Segarra also stated that appellant came to her room crying over comments that were whispered to her in passing. She further stated that she saw the drawing of a penis over the EEO poster by the ladies' room and about two hours later it was washed away.

Appellant has failed to submit any evidence to corroborate her allegations of harassment and discrimination by the employing establishment. Appellant has not established that the

pictures she submitted relate to her regular or specially assigned work duties. Further, Ms. Segarra did not state that she actually heard inappropriate remarks made to appellant by either her coworkers or supervisors. Ms. Segarra did not identify the person or persons who placed the pictures at appellant's case or the drawing over the EEO poster.

Further, the employing establishment submitted numerous declarations and affidavits from its employees controverting appellant's allegations. Mr. Sullivan denied appellant's allegation that he tried to physically harm her and that he placed pornographic pictures on her desk. Mr. Gilmartin denied appellant's allegations, especially those made after May 1993, when he stopped working at the employing establishment's New York office. Mr. Maynes stated that he had never seen the pornographic photographs before appellant showed them to him. He further stated that he explained to appellant at that time that he took her complaints seriously and that he intended to conduct an investigation. He noted that the employees he questioned denied appellant's allegations of harassment and that he reviewed the employing establishment's sexual harassment policy with them.

Mr. Alleva denied appellant's allegations that he prevented her from moving upward at the employing establishment, condoned any of the alleged behavior directed towards her including the display of pornographic pictures, discouraged her from reporting unacceptable behavior and made patronizing comments. He explained the statement about the happy woman on the picture of the employing establishment employee, Joann Planz, the golf cartoon and the use of the word "homo" by Dave White, appellant's coworker, which were not done to harass appellant. Ms. Planz explained that she brought in the picture of herself and gave it to a coworker who wrote the words happy on it in reference to her smile. Ms. Planz stated that she was not offended. She further stated that one time a rate chart by her desk had a picture of breasts on it and she did not know who drew the picture. She then stated that she took the picture to Mr. Alleva who said he would look into it and that this action never happened again.

Regarding appellant's request to keep Mr. Kavanaugh away from her, Mr. Alleva stated that appellant had no basis for granting her request because appellant had no evidence to support her claim that Mr. Kavanaugh had done anything improper. Mr. Pellegrino stated that he spoke to Mr. Kavanaugh about being near appellant and Mr. Kavanaugh explained that he was answering a question about a breakfast order that he was filling for some of his coworkers. Mr. Pellegrino further stated that Mr. Kavanaugh was annoyed because he had not done anything wrong. Mr. Pellegrino also stated that he and Mr. Alleva listened to appellant's complaints and that later in the day he granted appellant's request for sick leave. Regarding appellant's allegation that he ignored her complaints, Mr. Pellegrino stated that he was unaware of most of appellant's allegations and noted that Mr. Maynes had a discussion with appellant's coworkers concerning her allegations. Mr. Pellegrino stated that appellant never mentioned or complained to him that those things had not been resolved.

Mr. Kavanaugh denied appellant's allegations that he stalked her, spit at her and on her car, made lewd and leering gestures at her, placed obscene telephone calls to her home, tried to physically harm her, made anti-Semitic comments, called her a "bitch," and displayed sexually explicit pictures. He also denied appellant's allegation that he was trying to harass her when he was near her workstation. Mr. Rubin denied hearing Mr. Kavanaugh call appellant a "bitch" and

stated that if he had heard him talk to appellant in such a manner he would have spoken to him about his behavior and taken the appropriate disciplinary action.

Mr. Furgiuele denied making any sexually explicit remarks to appellant, displaying any pin-up photographs that were sexual in nature on the walls at the employing establishment and playing obscene music. Similarly, Mr. White denied appellant's allegations that he made derogatory comments to her, displayed pornographic pictures and played obscene music. He also denied speaking to Ms. Check in a lewd and abusive way or glaring at her.

In response to appellant's allegation that she was called a derogatory name regarding her race as a Jew by Mr. Gonzalez, Mr. Modena noted that Mr. Gonzalez had been terminated from the employing establishment for misconduct. Mr. Modena, however, did not indicate that Mr. Gonzalez's misconduct was directed towards appellant. Mr. Modena described an incident where Mr. Pursino, an employing establishment employee, called appellant a "Jew mocky" and he reprimanded Mr. Pursino. Mr. Modena stated that appellant told him it was okay for Mr. Pursino to call her that name. He noted other occasions where Mr. Pursino used offensive language towards appellant and she was not offended. He also explained the golf cartoon that appellant submitted and noted that when he asked two employees whom appellant had accused of calling her a "homo" about the incident, the employees denied the allegation. He also noted that his attempts to investigate appellant's complaints of harassment and that he was unsuccessful in determining who placed a Pennysaver advertisement on appellant's desk indicating that she was a drinker. Mr. Modena's further investigation revealed that the message "back off" that was placed on the side of appellant's case was not done so to harass her. He noted that appellant did not want him to do anything about the obscene telephone calls she received at home.

Mr. Maynes noted appellant's allegation of religious harassment. He stated that he and the postmaster at that time, Pete Puzzo, were married to Jewish women and their children were raised in the Jewish faith, thus, they would have been sensitive to this type of harassment.

Michael Lamendola, appellant's coworker, stated that the postcards were sent to him and that he neither passed them around nor was aware of anyone else who passed them around. He also denied displaying the postcards.

Ms. Check indicated that contrary to appellant's allegation, she had not been subjected to daily abuse based on her gender. She stated that she was not aware of any male coworker who called her derogatory names. Ms. Check further stated that, since she had not been subjected to such abuse, she did not complain to management about this matter. She also noted that Mr. Alleva held service talks about the employing establishment's sexual harassment policy and warning of disciplinary action.

Similarly, Ms. Dougherty stated that, contrary to appellant's allegations, she was not afraid to file a complaint regarding sexual discrimination and that she did not believe that women at the employing establishment worked in an atmosphere of fear that was created and fostered by management. Ms. Dougherty stated that, occasionally, if language got out of hand or an employee did not listen to her, she asked Mr. Rubin, Mr. Pellegrino and Mr. Modena to intervene on her behalf and they did so. She recalled an incident where a female coworker made sexually

graphic remarks prompting her to go to Mr. Modena who responded by asking this woman to stop talking in such a manner. Ms. Dougherty stated that Mr. Kavanaugh did not say anything to appellant when he was near her workstation. Ms. Dougherty noted that Mr. Alleva has held service talks regarding the employing establishment's sexual harassment policy and had warned that disciplinary action would be taken against those who violated the policy.

Ms. Marmo explained that Mr. Rogenkamp called her a derogatory name, but that she did not complain to Mr. Rubin about the incident. Rather, Mr. Rubin asked her if anything was wrong and she told him she was okay and requested that he not intervene. She noted that appellant was not working on the day of the incident, but that appellant approached her about it three days later. Ms. Marmo concluded that in her 15 years of employment at the employing establishment, she had not observed conduct she believed to be sexually harassing. She noted that periodically, Mr. Alleva, Mr. Rubin and Mr. Modena held service talks. Further, Mr. Rubin stated that he did not hear the words exchanged between Ms. Marmo and Mr. Rogenkamp. He also stated that Ms. Marmo made it clear that she did not want him to intervene because generally she had a good working relationship with Mr. Rogenkamp and that she believed this was an isolated incident that would blow over.

Inasmuch as appellant has not submitted sufficient evidence that she was harassed and discriminated against by the employing establishment, she has not established a compensable factor of employment under the Act. Therefore, it is unnecessary to address the medical evidence in this case.⁵

The May 1, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 29, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

⁵ *Garry M. Carlo*, 47 ECAB 299, 305 (1996).