

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SANDRA SUTTON and U.S. POSTAL SERVICE,
POST OFFICE, North Suburban, IL

*Docket No. 02-620; Submitted on the Record;
Issued October 2, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant has met her burden in establishing that she sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant further review of the merits of her case.

On June 1, 2000 appellant, then a 41-year-old former postal clerk filed an occupational disease claim alleging that she suffered an emotional condition in the performance of duty.¹ Appellant asserted that she first became aware of her emotional condition on March 7, 1989 and first realized that the disease or illness was caused or aggravated by her employment on August 7, 1997. Appellant stopped work on April 3, 1992 and has not returned.

In support of her emotional condition claim, appellant alleged that she was continually harassed and denied sought after positions and promotions because she had rhino conjunctivitis and a propensity for illness. Appellant also alleged that during a period of disability, the employing establishment continued to harass and follow her and attempted to find a physician who would certify that she was not ill or disabled. Appellant also asserted that, following her return to work, Jim Callo, her supervisor denied her a break because she had already spent time in the bathroom while sick with diarrhea. Appellant further alleged that on other occasion, she was working on mechanic and nonmechanic machinery while her equilibrium was off from medication and when she asked to sit down her supervisor initially denied her request. Appellant alleged that on another occasion, she was first in line to return her card to the rack, however, appellant's supervisor removed her card and told her to wait until other employees put their cards in the rack. Appellant also alleged that during a meeting with Mr. Callo and a union

¹ On October 4, 1989 she filed an occupational disease claim alleging that she had become ill due to changing climactic conditions in her work area and "air ducts." The claim was denied on April 10, 1990. On May 24, 1991 the Office accepted an occupational disease claim for pelvic strain/sprain and on June 4, 1991 rescinded the acceptance. On April 22, 1992 the Office approved appellant's claim for rhino conjunctivitis.

representative, Mr. Callo talked about her being sick and about her mother. Appellant also alleged that on one occasion during her pregnancy, appellant's physician requested that Mr. Callo release her from work because she was not feeling well. Appellant alleged that he stood beside her and stated that he was not her glorified secretary and that her time off would be considered unscheduled leave. Appellant alleged that he further stated that white girls do not have problems with pregnancy but that black girls are pregnant the moment they have sex. Appellant indicated that she began spotting and that another supervisor took her to the medical unit and that later that evening she had a miscarriage. Appellant asserted that when she returned to work, Mr. Callo rescheduled her for everything that he had previously unscheduled due to her baby. Appellant also alleged that another supervisor told her that she was too young to be sick. Appellant further alleged that she was charged for not wearing a badge, although other employees were not wearing badges at the time and that the charges were subsequently dropped. Appellant further alleged that her supervisor refused to adjust the air conditioner unit when she made a complaint about the cold environment because appellant was the only one cold.

By decision dated February 9, 2001, the Office denied appellant's emotional condition claim on the grounds that she failed to establish compensable factors of her employment.

In a letter dated March 8, 2001, appellant requested reconsideration. In her request letter, appellant reargued that she was continually harassed and labeled as a complainer due to her medical condition. Appellant further alleged that the employing establishment erroneously converted her to full-time employment after other part-time flexible employees because she was on a leave without pay (LWOP) status. Appellant submitted documentation concerning her various claims to the Office for compensation beginning in 1989. Appellant further submitted witness statements, grievance and Equal Employment Opportunity Commission (EEOC) complaints and investigation forms dated from December 20, 1985 to July 30, 1991, a videotape and medical documentation.

In a statement dated February 26, 2001, Katherine Gethers discussed appellant's rhino conjunctivitis illness and Ms. Gethers belief that supervisors of the employing establishment harassed appellant and caused her stress because of her medical condition. She alleged that appellant was forced to lift trays weighing 40 to 50 pounds, which eventually led to her miscarriage, that appellant was denied requests for sick leave by management who made negative comments regarding her illnesses. Ms. Gethers further discussed that appellant was denied a break after spending time in the bathroom while sick with diarrhea and that appellant was forced to work when her equilibrium was off due to medication.

In a statement dated March 8, 2001, Anna Moore, a coworker asserted that work factors including dust and lack of ventilation caused appellant's medical condition and disability. She alleged further that when appellant was sick with diarrhea, Mr. Callo stated that she "couldn't go anymore." Ms. Moore also alleged that on one occasion when appellant broke out in red bumps, Mr. Callo indicated that her condition was contagious and sent her home. She noted that when appellant returned with a medical note, he told her to take off again. Ms. Moore indicated that Mr. Callo would harass appellant and cause her so much stress that appellant would go into the lunchroom and cry. Ms. Moore indicated that every employee would complain about the cold environment and dust, however, when appellant complained, Mr. Callo would tell her if she did

not like it there she could go home. Ms. Moore indicated that appellant complained of the harassment to the union and that when Mr. Callo heard of this, he indicated that appellant would turn her mother in with her complaints. Ms. Moore indicated that after this event, Mr. Callo would torment appellant everyday until she had a miscarriage due to stress. Appellant further alleged that when she returned to work following her miscarriage, she was assigned extra work and was continually harassed.

On May 30, 2001 Gilbert Lopez, a representative of the employment establishment, responded to the issues raised by appellant in her request for reconsideration. Mr. Lopez provided no comment to many of the allegations made by appellant and noted that certain allegations were unsubstantiated and irrelevant to the claim filed. He further indicated that Mr. Callo had retired and that certain allegations could not be confirmed. Mr. Lopez did not respond to the issues set forth in the EEOC case as the outcome of the case was not furnished for comment. He further asserted that proper procedures were followed when appellant's medical condition prevented her from working and that her alleged stress was self-generated. Mr. Lopez also challenged appellant's claim regarding employee badges, noting that all employees were required to wear identification with no exceptions. He further submitted a statement from management indicating that an electronic air cleaner was installed specifically for appellant to increase air quality, however, complaints from appellant alone regarding the air temperature did not warrant a change.

In a merit decision dated June 7, 2001, the Office found that the evidence submitted in support of the request for reconsideration of the Office's decision was insufficient to warrant modification of the prior decision.

In a letter dated August 28, 2001, again appellant requested reconsideration. She reiterated various allegations of harassment and discrimination and submitted statements from family members and friends who further discussed appellant's medical condition and employment.

By decision dated September 14, 2001, the Office denied appellant's request for further review of the merits of her case on the grounds that the evidence submitted was of a cumulative nature and insufficient to warrant review of the prior decision.

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.

To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has an emotional or psychiatric disorder; (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 her emotional condition.² Workers' compensation law is not applicable to each and every injury or illness that is somehow related to employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come

² *Donna Faye Cardwell*, 41 ECAB 730 (1990).

within the coverage of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within coverage of the Federal Employees' Compensation Act.³ On the other hand, there are situations when an injury has some connection with the employment, but nonetheless does not come within the coverage of workers' compensation because it is not considered to have arisen in the course of the employment.⁴

Appellant alleged that the employing establishment harassed and followed her during a period of disability and attempted to find physicians who would certify that she was not disabled. Appellant also alleged that her supervisors made racial and intimidating remarks to her about appellant's pregnancy, illness and mother and that her supervisor discriminated against appellant when other employees were allowed in front of her to turn in timecards. Appellant further alleged that her supervisor refused in error to adjust the temperature in the Office because she was the only employee cold. Appellant has not substantiated any of these allegations with sufficient supporting evidence. The Board notes that unfounded perceptions of harassment do not constitute an employment factor and that mere perceptions are not compensable under the Act.⁵ She has submitted no evidence establishing that the alleged harassment and discrimination occurred. Appellant, therefore, failed to establish these factors of employment.

Appellant further alleged that stress and harassment by Mr. Callo caused her to have a miscarriage. The evidence of record pertaining to appellant's miscarriage is vague and does not establish that management made any inappropriate threats or remarks leading to this event. Further, appellant's factual history concerning the miscarriage conflicted with the witness statements and those of the employing establishment. For harassment or discrimination to give rise to a compensable disability under the 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.

Appellant also alleged that she was denied certain positions and promotions because of her illness. She further alleged that her supervisor denied her breaks after she spent time in the bathroom while sick with diarrhea and did not initially allow her to sit down when her equilibrium was off due to medication. Appellant further alleged that she was singled out and charged for not wearing a badge when other employees had also failed to wear their badges. She further alleged that when her physician requested that she be sent home because she felt ill during her pregnancy, her supervisor gave her unscheduled leave. The Board notes that these above-described matters relate to administrative or personnel matters unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.⁶ Although work assignments, disciplinary actions, employment evaluations, promotions, transfers and leave determinations are generally related to the employment, they are administrative

³ 5 U.S.C. §§ 8101-8193.

⁴ *Joel Parker, Sr.*, 43 ECAB 220 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Kathleen D. Walker*, 42 ECAB 603 (1991).

⁶ *See Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

functions of the employer and not duties of the employee.⁷ 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.⁸ There is no evidence to support that appellant was denied promotions and certain positions because of her illness. Further, the only evidence supportive of appellant's claims that Mr. Callo denied appellant breaks when sick are witness statements from coworkers who simply reasserted appellant's allegations and expressed their opinions regarding Mr. Callo's actions. These employees do not indicate whether they actually witnessed any of the alleged incidents. As such, these statements do not sufficiently establish any allegation of harassment or establish error or abuse by the employing establishment.

Appellant submitted a 1994 EEOC complaint and cover page of the final decision in support of her general allegations of harassment and discrimination related to her medical condition, however, it fails to provide a finding by any appropriate authority that appellant was the victim of harassment or discrimination. Appellant alleged disparity of treatment in that she was the last part-time flexible employee to be converted to full-time employment because appellant was in LWOP status, however, the evidence does not establish this specific allegation.

Appellant also submitted grievance settlements between appellant and the employing establishment from 1989 to 1991, concerning policies of unscheduled leave, work breaks for "part-time flexis," a warning discussion by a supervisor, an allegation of harassment, rotations of duty assignments between employees and the conduct between subordinates and management. This evidence, however, fails to establish harassment or any error or abuse by the employing establishment. The factual details outlined in each of the grievance settlements of record are vague and do not expand on the incidents, which led to each personnel action or final agreement. There is no way of determining whether these actions are related in any way to specific allegations set forth in this claim. Further, the mere fact that personnel actions are later modified or rescinded does not, in and of itself, establish error or abuse on the part of the employing establishment.⁹ Therefore, the evidence discussed here does not support appellant's allegations of harassment and discrimination by supervisors.

Appellant has not met her burden in establishing compensable factors of employment. Since appellant has not established a compensable work factor, the Board will not address the medical evidence.¹⁰

The Board further finds that the refusal of the Office to reopen appellant's claim for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

⁷ *Id.*

⁸ See *Martha L. Watson*, 46 ECAB 407 (1995).

⁹ See *Mary L. Brooks*, 46 ECAB 266 (1994).

¹⁰ See *Margaret S. Krzycki*, 43 ECAB 496 (1992).

Under section 8128(a) of the Act,¹¹ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,¹² which provides that a claimant may obtain review of the merits of the claim by:

“(i) Showing that [the Office] erroneously applied or interpreted a specific point of law, or

“(ii) Advancing a relevant legal argument not previously considered by [the Office], or

“(iii) Constituting relevant and pertinent new evidence not previously considered by [the Office].”

Section 10.608(b) provides that any application for review of the merits of the claim which fails to meet at least one of the standards described in section 10.606(b)(2) will be denied by the Office without reopening the case for a review of the merits.¹³

In the instant case, appellant submitted no new, relevant and pertinent evidence in support of her August 28, 2001 request for reconsideration, nor did appellant show that the Office erroneously applied or interpreted a point of law. Accordingly, the Office properly denied appellant’s request for review on the merits.

¹¹ 5 U.S.C. § 8128(a).

¹² 20 C.F.R. § 10.606(b)(2) (1999).

¹³ 20 C.F.R. § 10.608(b) (1999).

The September 14, June 7 and February 9, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
October 2, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member