U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELLEN E. PANEOK and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Anchorage, AK

Docket No. 03-506; Submitted on the Record;
Issued August 1, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

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

On April 9, 2001 appellant, then a 41-year-old aviation safety inspector filed an occupational disease claim for anxiety and stress.[1] She attributed her emotional condition to the actions of her supervisor Dave McGlothen who appellant asserted began a "systematic campaign" of intimidation towards her. She alleged that Mr. McGlothen used a variety of tactics, including interrogation, bullying and removing documents from her workplace in order to psychologically intimidate her. Appellant indicated that the cumulative effect of this daily harassment aggravated her level of stress to the point that she had a grave concern for her health. She took a temporary unpaid leave of absence from work for a six-month period beginning in April 2001. The record does not reflect whether appellant returned to work after April 2001.

Appellant submitted narrative and supporting statements, medical documentation and copies of grievances filed against her supervisor in support of the claim. In several narrative statements, appellant outlined specific incidents involving Mr. McGlothen, which allegedly exposed her to stress.

Appellant maintained that her supervisor, Mr. McGlothen began harassing her soon after he became supervisor in April 2000. On December 6, 2000 the day following the death of her mother, appellant informed her supervisor and staff of her loss and that afternoon appellant claimed that Mr. McGlothen demanded that she undergo two performance reviews concerning an operators' manual and her flying requirements. She stated that she had already been reviewed that year and it was customary that an employee's performance only be reviewed annually. Appellant indicated that she was assigned work following her mother's death in the city of her mother's funeral by another inspector so that she might be able to perform the work "en route" to

[1] The Form CA-2 notice of occupational disease and claim for compensation is not of record.

the funeral, however, Mr. McGlothen denied her request, purportedly for the reason that appellant would not normally be assigned this work. She indicated that her supervisor denied her request despite the fact that a male inspector had previously been approved to "en route" for his mother's funeral and another inspector was approved an en route assignment to care for a sick parent. Appellant also indicated that the day before her travel to her mother's funeral, Mr. McGlothen reprimanded her in his office. He allegedly stated angrily that he and other managers were "pissed" at appellant, because they had to stay 15 minutes late that Friday to inform a coordinator for an aviation function that appellant was supposed to attend and that she would not be attending as originally planned under the circumstances. She noted that the heated harangue devastated her. Appellant indicated that she left his office so upset that she was unable to perform her work duties and that she cried inconsolably. She stated that she left work that day at 10:00 am in order to separate herself from the enormous stress and that on the day of her return from the funeral, Mr. McGlothen accelerated his intimidation tactics toward her and pursued her relentlessly, which had affected her work. Appellant stated that she filed a grievance stating that her supervisor created a hostile work environment and that the union agreed with management that Mr. McGlothen would receive training regarding employee rights.

Appellant stated that Mr. McGlothen continued to be disrespectful towards her and regularly left her "snide" voice mail messages and "nasty" written mail messages concerning paperwork and her work duties. She stated that on March 20, 2001, Mr. McGlothen informed her that she was to accompany him to his office to attend a meeting with the union president and that, during the meeting he informed her, in a belittling manner, that he was unhappy with her performance and that she spent too much time "flitting" around the office. She stated that her supervisor asked her repeated questions concerning how she was able to perform so many work functions in one day and he did so in a manner which made her feel as if she were a child being reprimanded. Appellant asserted that she informed Mr. McGlothen that she did not appreciate being treated as if she were a little girl and asked him to stop the behavior, that she felt that he used intimidation and interrogation tactics and tried to demean her and that he only responded that she had ten days to go through a manual and report back to him with her findings on the items that they had discussed. She indicated that her supervisor then repeatedly asked her to outline the four things that they had discussed during this meeting as if she were a child and continued to do so until the union president interjected that "this was a waste of everybody's valuable time" and ended the meeting.

Appellant stated that on March 29, 2001, she had another meeting scheduled with her supervisor and her union president and that because the union president was out of town, she requested that the meeting be rescheduled so that the union president could be present. She asserted that her supervisor initially indicated that he would think about it and 30 minutes later he came into her workspace looking angry and stated that "you *will* be in my office at 8:00 a.m. tomorrow and you *will* bring *any* representative." (Emphasis added.) Appellant indicated that on the following day, another union representative accompanied her to the meeting with Mr. McGlothen, however, she informed her supervisor that she wished to wait for the union president since he was the original representative. She alleged that her supervisor stated, "we *will meet now*" and demanded that appellant bring an operators' manual "*right now*." (Emphasis added.) Appellant indicated that she held her ground and stated that she wanted to wait and that her supervisor glared at her and stated, "I [am] tired of this shit! I [am] giving you an oral admonishment! We are going to see [the] Office Manager Hugh McLaughlin right now!" She

stated that when they reached Mr. McLaughlin's office, he asked her if she refused to give her supervisor the operators' manual and she indicated that she only wished to wait for her original union representative. Appellant then indicated that she agreed to give Mr. McGlothen the manual at the manager's request.

Appellant stated that she had sought counseling on gaining a stronger and healthier standard of functioning under the duress that she had received in the workplace. She indicated that she had also contemplated resigning from her position due to workplace harassment. Appellant stated that on April 2, 2001 she was informed that Mr. McLaughlin, who served as union president, would advise her on some options concerning her work status and requested that she listen with an "open heart." She noted that on April 4, 2001, Mr. McLaughlin advised that appellant could have a counseling session with her supervisor in order to express her concerns and she then requested, through the union president, that she be removed from her hostile work environment. Appellant indicated that her supervisor confronted her again regarding the disputed work manual and that Mr. McLaughlin instructed Mr. McGlothen to cease any contact with appellant. She indicated that on April 5, 2001 she presented Mr. McLaughlin with a letter requesting an emergency leave of absence due to workplace stress with a letter from her counselor indicating that she should be removed from her position in order to regain her health. She noted that April 6, 2001 was to be her last day.

Appellant submitted a March 20, 2001 letter from Boyd Waltman, a union representative, which outlined the discussion he allegedly witnessed between appellant and Mr. McGlothen in the March 20, 2001 meeting. Mr. Waltman recalled the factual incident much like that reported by appellant in the claim. He indicated that during the meeting Mr. McGlothen repeatedly questioned appellant about her work and requested that she repeat back to him what had been discussed until she stated that she felt like a schoolgirl. The representative noted his opinion that Mr. McGlothen treated appellant with little respect and used interrogation tactics in his questioning.

Appellant submitted another statement from a union representative with an illegible signature regarding the meeting on or about March 30, 2001 that appellant had with her supervisor, which the representative allegedly attended. The statement provided:

> "[Appellant] and I walked into [Mr.] McGlothen's office and [Mr. McGlothen] said good morning. [Appellant] replied '[Mr. McGlothen] I am not going to do the counseling today because [Mr.] Waltman is not her [sic] and I do [not] feel it [is] fair to bring another union rep[resentative] in the middle of counseling.' Mr. McGlothen] replied '[y]es you are. I have given you 40 hours to prepare for this and you are going to give me that manual right now.' [Appellant] replied, 'I do [not] think I want to bring you the manual until I can meet with you and [Mr.] Boyd in attendance.' [Mr.] McGlothen bolted from his chair, red faced, (very angry) and said 'I [am] tired of this shit! I [am] going to give you an oral admonishment. Are you going to give me that manual? [Appellant] replied, '[n]o' [Mr. McGlothen] said, '[w]e are going to see [Mr. McLaughlin] right now."

Appellant further submitted a July 3, 2001 statement from a coworker named Lee McGarr which stated:

> "On or about August 14, 2000 I went to visit Payton Starr at his cubicle as I recall, after the Monday morning meeting. When I arrived, [Mr.] McGlothen was discussing something with [Mr. Starr] and I waited for a moment then decided to leave. Just before I turned to leave, he stated that 'with this letter I [will] get those two bitches out of civil service within two weeks.' With that I stopped and listened for a moment longer as I thought it was such a contrary thought for our office and for a new supervisor to say. He was speaking of Dawn and [appellant] as he stated shortly after…. As to the exact date and time of the event, I cannot recall."

In a statement dated April 11, 2001, appellant's supervisor, Mr. McGlothen refuted appellant's claim indicating that she was alleging harassment because of her failure to provide proper oversight in her work. Mr. McGlothen indicated that as operations supervisor, he conducted systematic and random reviews of all of the inspector's workload and operator's manuals and that he had found serious problems with her manuals. The supervisor indicated that he continued to review her work, which revealed complete lack of oversight and incomplete paperwork and that he also received complaints that appellant had not been returning telephone calls. He indicated that they had ongoing discussions on her work performance and her need to be brought back into compliance and he requested that she produce one of her work manuals for review. Mr. McGlothen indicated that with regard to appellant's request to en route to attend her mother's funeral, he explained that he had no job function to give her that would allow her to en route and that everyone in her circumstance had been required to buy their own ticket and that he even offered to help her with the cost. He further indicated that appellant had not completed a work assignment, which had been overdue and that a meeting was arranged to discuss her continuing unacceptable work performance. Appellant had sought union representation and noted her allegations of harassment and refused to produce the requested work documentation, although she denied this to union officials. Mr. McGlothen asserted that during their meetings on her work performance, appellant conducted herself in a very belligerent, sarcastic and juvenile manner, for which on one occasion she apologized. He indicated that appellant eventually presented the requested manual but later requested that future performance reviews be halted. Mr. McGlothen discussed that appellant took a leave of absence in April 2001 although mediation was given as an option to resolve their differences.

By decision dated October 16, 2001, the Office denied appellant's emotional condition claim on the grounds that appellant failed to establish that the factors alleged in her claim were in the performance of duty. In a letter received on November 28, 2001, appellant advised that she retained counsel to assist with the claim and requested an oral hearing, which was held on July 10, 2002.

By decision dated September 10, 2002, an Office hearing representative affirmed the prior decision finding upon review of the record and testimony that appellant provided no probative evidence to establish a compensable work factor.

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

In order to establish that an employee sustained an emotional condition in the performance of duty, the employee must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the emotional condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.[2] Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the employee's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[3]

Workers' compensation law is not applicable 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 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.[4] 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.[5]

Appellant alleges that she sustained an emotional condition due to harassment by her supervisor. As a general rule, appellant's reaction to administrative decisions undertaken by her supervisor would fall outside the scope of coverage under the Act,[6] however, an administrative or personnel matter will be considered an employment factor where the evidence discloses error or abuse on the part of the employing establishment.[7] In determining whether the employing establishment erred or acted abusively, the Board determines whether the employing establishment acted reasonably.

[2] *Sandra Davis*, 50 ECAB 450 (1999); *Bonnie Goodman*, 50 ECAB 139 (1998); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

[3] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[4] 5 U.S.C. §§ 8101-8193.

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

[6] *See Michael L. Malone*, 46 ECAB 957 (1995).

[7] *See Mary A. Sisneros*, 46 ECAB 155 (1994).

Regarding her allegations that her supervisor improperly denied her the en route work assignment and request that she undergo performance reviews concerning an operators' manual and her flying requirements, the Board finds that these allegations 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.[8] 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.[9] Appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to denying this work assignment and the employing establishment explained that the en-route request was denied because appellant would not normally be assigned that type of work. Further, the record does not indicate that appellant's supervisor acted unreasonably in requesting that appellant's work performance be reviewed. Mr. McGlothen indicated, in his statement of record, that shortly after he was promoted to supervisor in June 2000, he conducted a systematic review of the inspector's workloads to evaluate performance and that his reviews were sometimes at random. There is no evidence of record to show error on the part of appellant's supervisor in this regard. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

The Board does not find error or abuse by the employing establishment concerning the heated discussions which took place, after appellant lost her mother, regarding an aviation conference and meetings between appellant and her supervisor on or about March 20 and 30, 2001. Although the Board has recognized the compensability of verbal altercations or abuse in certain circumstances,[10] this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.[11] The incident on March 20, 2001 pertained to questions involving appellant's work performance and although appellant felt belittled and the union representative generally opined that Mr. McGlothen spoke to appellant in a disrespectful manner, there is no substantive evidence to support her allegation that Mr. McGlothen belittled appellant and treated her like a schoolgirl. The incident on March 30, 2001, described by appellant and another union representative, appears to be an isolated incident in which Mr. McGlothen used inappropriate language while requesting that appellant produce an operators' manual. While Mr. McGlothen was arguably insensitive, the Board does not find that this incident rose to the level of verbal abuse or otherwise falls within the coverage of the Act.[12]

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[8] *See Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[9] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[10] *See, e.g., Abe E. Scott*, 45 ECAB 164 (1993) (finding that a supervisor's use of the epithet "ape" was a compensable employment factor).

[11] *Harriet J. Landry*, 47 ECAB 543 (1996).

[12] *See Daniel B. Arroyo*, 48 ECAB 204 (1996) (finding that claimant's supervisor used profanity in the workplace but there was no evidence that this was directed at claimant in an attempt to harass him).

Similarly, Mr. McGlothen's one time use of the word "shit" is not in and of itself evidence of harassment.[13]

A claim based on verbal altercations or a difficult relationship with a supervisor must be supported by the record.[14] The Board has recognized the compensability of verbal abuse under certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[15] Appellant did not provide any factual support in the form of a reliable witness statement to show that Mr. McGlothen was verbally abusive in any of these incidents.

Furthermore, there is no factual support to substantiate the claim made in the witness statement that appellant submitted from Lee McGarr on July 3, 2001 that Mr. McGlothen was referring in part to appellant when he said, "I [will] get those two bitches out of civil service within two weeks." Moreover, there is no evidence that the remark was made in appellant's presence. The Board finds therefore, that this evidence lacks probative value and is insufficient to establish a compensable factor of employment in this case.[16]

Because appellant did not establish any compensable employment factors, it is unnecessary for the Board to consider the medical evidence of record.[17]

[13] It should be noted that Mr. McGlothen expressed frustration with his efforts to have appellant hand over the operators' manual on several occasions.

[14] *Bonnie Goodman*, 50 ECAB 139 (1998).

[15] *Frank B Gwozdz*, 50 ECAB 434 (1999).

[16] Appellant filed grievances concerning some of her claimed employment factors, but the record does not contain any favorable decisions relating to these grievances.

[17] *John Polito*, 50 ECAB 347 (1999).

The decision of the Office of Workers' Compensation Programs dated September 30, 2002 is affirmed.

Dated, Washington, DC
August 1, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member