

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIA FERJAOUI and EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, OFFICE OF THE CHAIRMAN, San Antonio, TX

*Docket No. 03-2092; Submitted on the Record;
Issued December 22, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant established that she sustained an emotional condition in the performance of duty as alleged.

On July 3, 2002 appellant, then a 54-year-old secretary, filed an emotional condition claim alleging that in October 2001 she experienced increased stress at work caused by her supervisor, Robert Harwin, a regional attorney. Appellant stated that she had controlled her type II diabetes for many years but in October her diabetes readings became higher and that her doctor started her on insulin injections in addition to oral medications. She stated that the "stress and hostile environment in the legal unit became overwhelming." Appellant stated that her doctor recommended that she go on sick leave. She stopped work on April 1, 2002. Appellant submitted medical reports and disability notes dated March 28 through May 28, 2002, indicating that she had a major depressive disorder, insulin-requiring type II diabetes, and that she was unable to work.

By letter dated July 16, 2002, the Office of Workers' Compensation Programs informed appellant that additional evidence was required, including a description of the employment-related incidents that she believed contributed to her illness and a narrative report from her physician explaining how such incidents contributed to her condition.

Appellant additionally submitted a statement to the Office dated July 25, 2002, explaining that harassment by Mr. Harwin caused her to seek medical treatment with different doctors. She alleged that Mr. Harwin accused her of doing something wrong no matter what she prepared; being "very negative" toward her "on anything I would suggest or do on a daily basis;" and when he spoke to her, it was in an angry tone of voice. Appellant alleged that Mr. Harwin did not promote her even though a promotion was supposed to go into effect on April 7, 2002. Appellant alleged that he would call her into his office and make her cry "only to have her diabetes go out of control" because of the way he was treating her. She alleged that he told her that, if she thought she was getting "hell," if she ever informed the legal unit of "what was going on," then she would really get to know what "hell" was. Appellant stated that Mr. Harwin used

“arrogant tactics” against her without cause, and that he once took her into his office to tell her that, if she ever reported “anything” to headquarters, he would charge her with an adverse action. She stated that he said that he knew people in the employing establishment’s office in Washington, DC, that they did not know she existed and they would believe him before they believed her.

By letter dated June 25, 2002, the Equal Employment Opportunity (EEO) Commission stated that it had received her complaint. It attached an EEO counselor’s report dated June 25, 2002. The counselor stated that Mr. Harwin felt that no discrimination occurred, and that he offered appellant a GS-6/legal technician position where she would have a different immediate supervisor, as a full resolution of the EEO matter, but appellant declined the offer. The counselor advised appellant of her right to file a discrimination complaint.

By letter dated August 14, 2002, Mr. Harwin responded, noting that appellant’s allegations were “generally untrue.” He stated that he did not believe that her diabetes and other illnesses were in any way caused by him, as alleged. Mr. Harwin also denied that appellant was harassed on a daily basis or at any time. He stated that appellant was angry because he and two other women decided not to promote her. In an email to “Sharon Johnson,” Mr. Harwin stated that stress was never raised as an issue until five months after she left work. He stated that the employing establishment offered appellant a reassignment as an accommodation, but he did not believe that she qualified as an individual with a disability.

By decision dated September 26, 2002, the Office denied appellant’s emotional condition claim on the grounds that she did not establish any compensable employment factors.

By letter dated October 21, 2001, appellant requested an oral hearing before an Office hearing representative which was held on April 29, 2003. Appellant’s representative noted that appellant was alleging that she sustained an emotional condition, not that work caused her diabetes. Appellant stated that not being promoted was not what led her to file a workers’ compensation claim and that a discrimination complaint was filed on June 18, 2002 and was still pending. She countered that the employing establishment had not offered to reassign her and stated that the “real” reason for the reassignment was because of her filing a complaint against Mr. Harwin. She reiterated that Mr. Harwin consistently accused her of doing things wrong and was “very negative” towards her. Appellant stated that he used intimidating and harassing tactics against her and subjected her to a hostile work environment.

Appellant first began to work for Mr. Harwin on April 7, 2001. She explained that from April 7, 2001 to February 2002 she had five and a half days of training. Appellant alleged that she had difficulty completing a “396” report and had asked Mr. Harwin for more time and training to complete it. He referred to a handbook to assist her but appellant told him it was not enough. Eventually, appellant got help and completed the report.

Appellant alleged that Mr. Harwin nitpicked by telling her he did not like the way she had stapled papers and had her restaple them, that the quality of paper she had xeroxed was bad, and that she should find another copier to make a copy even though all the copiers were new. Appellant claimed that Mr. Harwin would tell her to do a project a certain way and, when she complied, he would have her do it the original way. She also testified that he would have her

relabel files because he did not like the color of the label, and if she put the labels on the left side, he wanted them on the center, which was a designation for dead files. Appellant found Mr. Harwin going through her trash one day and believed that he was looking for papers she had made errors on and thrown away. Appellant sent a letter to Nicholas Enzio in Washington, DC to let him know what was happening, and then “things got really bad.” She stated that Mr. Harwin threatened to charge her with an adverse action and that, if she ever did “anything” again, she was going to regret it. Appellant stated that she had a chance encounter in the hallway with Mr. Harwin when, while she was on leave, she went into the office to have some personnel papers signed. She said that Mr. Harwin approached her and said to her, “Did n[o]t I tell you not to file anything? Did n[o]t I tell you not to go against me? Did n[o]t I tell you not to let anyone on the outside know what was going on here?”

By decision dated July 28, 2003, the Office hearing representative affirmed the Office’s September 26, 2003 decision.

The Board finds that appellant did not sustain an emotional condition in the performance of duty, as alleged.

To establish that she has sustained an emotional condition causally related to factors of her federal employment, appellant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to her condition; (2) rationalized medical evidence establishing that she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that her emotional condition is causally related to the identified compensable employment factors.¹

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 an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers’ compensation. Where the disability results from an employee’s emotional reaction to her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees’ Compensation Act.² On the other hand, the disability is not covered where it results from such factors as an employee’s fear of a reduction-in-force or her frustration from not being permitted to work in a particular environment or to hold a particular position.³

¹ *Robert W. Johns*, 51 ECAB 137, 141 (1999).

² *Lillian Cutler*, 28 ECAB 125 (1976).

³ *Clara T. Norga*, 46 ECAB 473, 480 (1995); see *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff’d on recon.*, 42 ECAB 566 (1991).

Where an employee alleges harassment and cites to specific incidents and the employer denies that harassment occurred, the Office or some other appropriate fact finder must make a determination as to the truth of the allegations.⁴ The issue is not whether the claimant has established harassment or discrimination under standards as applied by the EEO. Rather the issue is whether the claimant has submitted evidence sufficient to establish an injury arising in the performance of duty.⁵ To establish entitlement to benefits, the claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.⁶

To the extent that disputes and incidents alleged as constituting harassment by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.⁷ However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.⁸

Appellant made general contentions that Mr. Harwin harassed her, yelled at her, acted in a negative manner towards her and created a hostile environment. She stated that he would tell her to do a project a certain way than tell her to do it in a different way. She made many allegations of harassment, such that he unreasonably wanted her to recopy documents, change the position of color and labels on old files, change the way she stapled documents, complete a 306 report when she felt she needed training, threatening an adverse action against her headquarters and threatened to make her life really "hell" if she ever informed the legal unit of what was going on. Appellant, however, has not submitted sufficient evidence that these incidents happened, as alleged. There are no witness statements supporting her allegations. In many instances, her allegations are vague and not specific as to the date, place or locations relevant to the incident described. Appellant did not present any evidence to show that the reason Mr. Harwin offered her a reassignment was in retaliation for her filing a complaint. Absent such supporting evidence that these incidents occurred as alleged, appellant has not established that she was harassed.⁹ In his August 14, 2002 letter, Mr. Harwin denied appellant's allegations of harassment. He indicated that appellant was angry because he did not promote her. While the results of discrimination complaints with the EEO, while not determinative of the outcome of a claim, may support it.¹⁰ Appellant's discrimination complaint is pending and there is no final decision pertaining to her allegation. Appellant suggested at the hearing that being denied a promotion was not the reason why she filed her emotional claim. The Board notes that denials by an employing establishment of a promotion is not related to the employee's work

⁴ *Michael Ewanichak*, 48 ECAB 364, 366 (1997); *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

⁵ *See Martha L. Cook*, 47 ECAB 226, 231 (1995).

⁶ *Barbara E. Hamm*, 45 ECAB 843, 851 (1994).

⁷ *Clara T. Norga*, *supra* note 3 at 481; *David W. Shirey*, 42 ECAB 783, 795-796 (1991).

⁸ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

⁹ *See Brian H. Derrick*, 51 ECAB 417, 421 (2000).

¹⁰ *See Barbara E. Hamm*, 45 ECAB 843, 851-52 (1994).

duties but is an administrative matter.¹¹ The denial of a promotion is not a compensable factor unless appellant demonstrates that the denial of her promotion constituted error or abuse.¹² Appellant had not made that showing. For this reason, her emotional condition must be self-generated based on her desire to work in a different position. Appellant has not established any compensable factors of employment and has failed to establish her claim.¹³

The July 28, 2003 and the September 26, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
December 22, 2003

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹¹ See *William Karl Hansen*, 49 ECAB 140 (1997).

¹² See *Ernest J. Malagrida*, 51 ECAB 287, 289 (2000).

¹³ Since appellant did not establish a compensable factor of employment, the medical evidence need not be addressed. *Sharon R. Bowman*, 45 ECAB 187, 194 (1993).