U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. BANNERMAN and U.S. POSTAL SERVICE,
POST OFFICE, Charleston, WV

Docket No. 03-2171; Submitted on the Record;
Issued November 19, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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

On September 25, 2001 appellant, then a 53-year-old secretary, filed a notice of occupational disease alleging that she suffered from stress, depression and anxiety as a result of being harassed in the workplace. Appellant stopped work on June 25, 2001 and did not return.

Submitted with appellant's claim were materials relating to Equal Employment Opportunity (EEO) suits filed by appellant. She alleged that, from November 1997 to March 11, 1998, she was sexually and racially harassed by a supervisor, William Radar, who made unwelcome and offensive sexual gestures toward her in the workplace. Appellant alleged that Mr. Radar grabbed his crotch area and made comments such as "I [ha]ve also wanted a young blonde blue-eyed secretary" and "There [i]s no banana big enough for her." She perceived the blue-eyed secretary comment to be a racial slur since she is black. Appellant stated that on March 3, 1998 she entered Mr. Radar's darkened office, thinking he had left for the day, at which time he surprised her and made a sexual innuendo by stating "Do n[o]t worry I can find it in the dark." She alleged that Mr. Radar laughed at her when she warned him of possible sexual harassment charges. Appellant further alleged that she felt her job was in jeopardy when, on March 11, 1998, Mr. Radar commented to another employee that he had no secretary.

In a letter dated October 12, 2001, the Office of Workers' Compensation Programs advised appellant of the factual and medical evidence required to establish her claim. The Office noted that the information submitted by appellant in support of her claim was insufficient to establish her claim of harassment.

In a statement dated November 26, 2001, appellant related that her problems with Mr. Radar began when a fellow coworker, Rosa Baker, filed an EEO complaint for harassment. Appellant was friends with Ms. Baker and Mr. Radar treated appellant with hostility by not letting her have access to personnel documents pertaining to Ms. Baker. She felt that Mr. Radar

tried to humiliate her by asking Marilyn Dougherty to check her work for errors. Appellant complained that Mr. Radar waited until the last minute on Friday to give her work assignments.

Appellant also alleged that she was sexually harassed by a fellow coworker, Sherry Cox, on June 20, 2001. Ms. Cox allegedly touched appellant on her lower back and buttocks and asked her if "this was how Lance Powers did it." She indicated that the incident was witnessed by Rodney Bumgardner, Melissa Lockhart and Ms. Dougherty. She further alleged that Ms. Cox commented to her that she wished God would hurry up and take her.

In a decision dated February 1, 2002, the Office denied compensation. The Office found that appellant had not established a compensable factor of employment and failed to meet her burden of proof to establish that she sustained an emotional condition in the performance of duty.

Appellant requested a hearing, which was held on February 27, 2003. In a decision dated June 3, 2003, an Office hearing representative affirmed the Office's February 1, 2002 decision.

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

Workers' compensation law does not apply to each and every injury or illness 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. These injuries occur in the course of employment and have some kind of causal connection with it but nevertheless are not covered because they are not found to have arisen out of the employment. Disability is not covered where it results from an employee's frustration at not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within coverage of the Federal Employees' Compensation Act.[1] 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 employment factors.[2]

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworker are established as occurring and arising from a claimant's performance of his or her regular duties, these could constitute employment factors.[3] However, for harassment to give rise to a compensable disability there must be evidence that harassment did, in fact, occur. A claimant's mere perception of harassment is not compensable. Allegations of harassment must be substantiated by reliable and probative evidence.[4]

[1] 5 U.S.C. §§ 8101-8193.

[2] *Brian H. Derrick*, 51 ECAB 417 (2000).

[3] *Id*.

[4] *James P. Guinan*, 51 ECAB 604 (2000); *Robert W. Johns*, 51 ECAB 137 (1999).

The Board finds that appellant submitted insufficient evidence to support her allegations of sexual and racial harassment. The record contains a copy of a decision rendered by the EEO, finding that appellant's allegations of sexual and racial discrimination were unsubstantiated. The EEO decision, while not binding on this Board, does not provide evidentiary support from which to conclude that Mr. Radar or Ms. Cox made inappropriate comments to appellant.

Mr. Radar denied that he made inappropriate sexual remarks to appellant as alleged, noting that the banana reference and the blue-eyed blonde secretary comments were made as jokes to other people, and he had no idea that appellant was listening to his conversations. With respect to the light incident, he denied that his comment about being able to find it in the dark was in reference to anything sexual. He stated that he did not make any lewd gestures with his crotch or otherwise inappropriate sexual comments or actions towards appellant. He acknowledged telling someone in the office that he had no secretary but felt that the comment was appropriate since appellant was not specifically assigned to work for him. He had no knowledge that appellant had overheard the remark or that she was offended by it.

The Board also notes that Ms. Cox denied having touched appellant on June 20, 2001 and the witness statements from Mr. Bumgardner, Ms. Dougherty and Ms. Lockhart do not support appellant's claim of harassment. Each witness stated that they had not seen Ms. Cox touch appellant on June 20, 2001 or otherwise make inappropriate sexual remarks to her. In the absence of corroborating witness statements to support her allegations of harassment, appellant has not established her allegations of harassment to be factual.

Although appellant was not pleased with the manner in which her work assignments were made by Mr. Radar and she felt humiliated that he required that her work be checked for errors, the review of an employee's work performance and the assignment of work is an administrative function of the employing establishment and falls outside the scope of the Act in the absence of error or abuse.[5] The Board finds that there is insufficient evidence to support appellant's allegations of abusive behavior by Mr. Radar in the manner in which he supervised appellant.

For these reasons, the Board concludes that appellant failed to establish a compensable factor of employment and did not meet her burden of proof to establish that she sustained an emotional condition in the performance of duty.[6]

[5] *See generally Ernest J. Malagrida*, 51 ECAB 287 (2000).

[6] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krycki*, 43 ECAB 496 (1992).

The decision of the Office of Workers' Compensation Programs dated June 3, 2003 is hereby affirmed.

Dated, Washington, DC
November 19, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member