United States Department of Labor
Employees' Compensation Appeals Board

CYNTHIA I. EUN, Appellant	)	
and	)	**Docket No. 04-1843**
	)	**Issued: April 4, 2005**
U.S. POSTAL SERVICE, BULK MAIL CENTER, Denver, CO Employer	)	

Appearances:
Gregory A. Hall, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 13, 2004 appellant, through her attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated April 14, 2004, denying her emotional condition claim on the grounds that it was not sustained in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof in establishing that she developed an emotional condition due to factors of her federal employment.

FACTUAL HISTORY

On February 6, 2003 appellant, then a 40-year-old clerk, filed an occupational disease claim alleging that she developed stress due to sexual harassment in the performance of her federal duties. She first became aware of her condition on December 16, 2002 and first related this condition to her employment on January 13, 2003. Appellant stopped work on January 13, 2003.

The Office requested additional factual and medical information by letter dated February 19, 2003.

On January 28, 2003 Dr. Daniel J. Son, a Board-certified family practitioner, completed a form report and diagnosed situational anxiety and stress as well as irritable bowel. He found that appellant's condition began in December 2002 and that she became totally disabled beginning January 17 to February 17, 2003.

Appellant submitted a statement and alleged that in December 2002 she realized that Rhyle Compton, a coworker, who had previously exposed her to pornography against her wishes and commented on sexual issues that made her uncomfortable, was returning to her work unit. Appellant became upset and alleged that her condition was compounded by questions and comments from coworkers. She requested a transfer away from Mr. Compton.

Mr. Compton stated that on February 25, 2000 he and appellant were working together and he mentioned that the mail he was keying consisted of pornography. Appellant asked what that was and he informed her that the mail was adult material and showed her the warning label. Another female employee approached and appellant asked Mr. Compton to inform that employee of the content of the mail. He refused and then informed appellant that she was also keying the same materials and could mention this to her coworker. She became upset.

On February 25, 2000 appellant stated that Mr. Compton called her and told her to look at the mail as it was pornography. In a separate statement of the same date, she noted that in the last year, Mr. Compton had showed her a medical magazine with a picture of a cancerous tongue on the cover. He asked, "Do you know why this tongue has cancer? It is because of too [much] oral sex." Appellant then asked him to stop and became upset. Mr. Compton apologized and promised not to repeat his actions. However, appellant felt that his statement on February 25, 2000 was similar.

Gene Lopez, a coworker, submitted a statement dated March 4, 2000 asserting that Mr. Compton showed appellant a medical magazine with a picture of a cancerous tongue. Appellant became visibly upset and then explained to Mr. Lopez that Mr. Compton had informed her that the cancer arose due to excessive oral sex.

The employing establishment responded to appellant's allegations on March 10, 2003 and stated that she reported on February 25, 2000 that Mr. Compton showed her obscene pictures and that she had asked him to stop. The employing establishment immediately removed Mr. Compton from appellant's area and instructed him to have no further contact with her on penalty of termination. The employing establishment noted that appellant discovered that Mr. Compton was returning to her work unit on January 11, 2003 and attributed her condition in part to this return. The employing establishment stated that the two employees had worked in close proximity for 17 months with no complaints from appellant. The employing establishment noted that Mr. Compton had not spoken to appellant since February 26, 2000.

Appellant filed a grievance on January 11, 2003 regarding Mr. Compton's return to her work unit. She requested a transfer to the General Mail Facility with the same level of seniority, same days off, same tour, same position and same benefits as she was currently receiving.

Dr. Son submitted treatment notes beginning on February 26, 2000 noting appellant's description of harassment at work. On December 16, 2002 he noted that she had previously experienced workplace sexual harassment by a coworker who made lewd comments, showed her pornography and asked for her comments. Appellant slowly recovered until she recently found out that the same person was returning to her facility. He diagnosed situational anxiety. Dr. Son stated that it was unacceptable to reintroduce appellant's harasser back into her workplace. On January 13, 2002 Dr. Son expanded his diagnosis to include irritable bowel syndrome.

In a statement dated March 15, 2003, appellant attributed her condition to Mr. Compton's conduct. She noted the incident with the picture of the tongue. Appellant also described the February 2000 incident as Mr. Compton calling her to look at sexually oriented mail, informing her that the mail was pornography and that it was "hot." Appellant stated that in December 2002, she discovered that Mr. Compton was returning to her work unit and that this brought back bad memories and stress.

By decision dated April 30, 2003, the Office denied appellant's claim, finding that she had not substantiated a compensable factor of employment. She requested an oral hearing on May 28, 2003.

In a report dated October 29, 2003, Dr. Marita J. Keeling, a Board-certified psychiatrist, noted appellant's history of injury including a head injury in 1993 and the incidents with Mr. Compton in 2000. She reported an incident on January 13, 2003 which involved a meeting between appellant and her supervisors, Dave Sapp and George Jacobs resulting in Mr. Sapp yelling that appellant was "stupid" and trying to get something for nothing. Dr. Keeling noted that appellant was born in Korea and that English was her second language. She noted that appellant frequently needed an interpreter. Dr. Keeling also noted that appellant had a very sheltered upbringing. She stated:

> "In 2000, [appellant] experienced the first of several incidents of sexual harassment directed at her by coworkers. As a result she experienced more severe anxiety and needed a medical leave. It should be understood that head injured individuals have more difficulty coping with any kind of stress and, therefore, although some of her reactions appear to be inappropriately strong, this is, in fact, quite consistent with her head injury. [Appellant] was able to return to full[-]time work after her coworker was transferred to another department.
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> "However, when [appellant] learned that [Mr. Compton] was going to return she became increasingly anxious and depressed again. She attempted to address her concerns by reporting them, but since people had trouble understanding why she would have such a strong reaction to events that had occurred years before, she was again treated inappropriately. [Mr.] Sapp apparently became very frustrated and angry and yelled at her calling her 'Stupid' and berating her publicly, shaking his finger at her in a threatening fashion…."

Dr. Keeling concluded that appellant was totally disabled. She relied on neuropsychological testing by Kevin B. Kells on July 28, 2003. Dr. Keeling diagnosed dementia due to the 1993 head injury as well as major depressive episode, generalized anxiety disorder and panic disorder. She stated that all the conditions stemmed directly from a combination of work-related factors.

Stephen E. Bertels, union president, submitted an affidavit dated December 13, 2003 and reported that appellant told him of the events with Mr. Compton. He stated on January 13, 2003 in a meeting with Mr. Sapp, the manager of distribution operations and Mr. Jacobs, supervisor of distribution operations, appellant provided a written statement outlining her complaint of harassment and requested separation from Mr. Compton. She noted that she had agreed not to pursue an Equal Employment Opportunity complaint in 2000, in return for management's promise to keep Mr. Compton away from her. After they discussed appellant's request, Mr. Bertels alleged that Mr. Sapp started screaming at her stating that she was trying to get something for nothing. He also stuck his finger in appellant's face and yelled that she was stupid, not a good worker and that he would do anything to get rid of her. This incident caused appellant to leave work. Mr. Bertels stated that, when appellant later asked for a transfer, Mr. Sapp told her that "Kaiser Permanente doctors would lie for their patients."

Appellant and her daughter also submitted affidavits noting that her primary language was Korean and that her English was limited. She alleged that Asians, who did not speak English well or with an accent were often treated badly at the employing establishment. Appellant noted that after she made the complaint about Mr. Compton, his friends made fun of her for being a prude. She stated that despite managers yelling at her on a regular basis, she was able to work until she discovered that Mr. Compton was being allowed to return to her work unit. Appellant noted that during the January 13, 2003 meeting, to determine if she and Mr. Compton could be separated, Mr. Sapp yelled at her, saying that she was stupid, not a good worker and trying to get something for nothing. She reported that Mr. Sapp told her that Kaiser Permanente physicians lied for their patients and that he did not believe what her doctor had written.

Appellant testified at the oral hearing on January 21, 2004 through a translator. The employing establishment responded to her testimony on February 17, 2003 alleging that she refused the offer of accommodation and demanded to be moved to the General Mail Facility with the same hours and days off. In a statement dated January 27, 2004, Mr. Sapp stated that he informed appellant on January 13, 2003 that Mr. Compton's assignment would be deferred until the sexual harassment team could investigate the claim. He denied allegations that he refused to accommodate appellant, that he screamed, stuck his finger in her face and called her stupid.

By decision dated April 14, 2004, the hearing representative found that appellant had established a compensable factor of employment in regard to Mr. Compton's comment regarding the photograph of the tongue. However, the hearing representative found that Mr. Compton's reference to pornography did not rise to the level of verbal abuse. He found that these incidents did not establish sexual harassment as there were no repeated actions. The hearing representative found that appellant's reaction to the prospect of Mr. Compton returning to her work unit was not compensable. He found that she had not established additional compensable factors of employment and concluded that the medical evidence was not sufficient to establish

that Mr. Compton's comment regarding the photograph of a tongue was the cause of appellant's diagnosed emotional condition.

LEGAL PRECEDENT

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 worker's compensation. Where the disability results from an employee's emotional reaction to his regular of specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[1] 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 his frustration from not being permitted to work in a particular environment or to hold a particular position.[2]

Generally, actions of the employing establishment in administrative or personnel matters unrelated to the employee's regular or specially assigned work duties, do not fall within the coverage of the Act.[3] While 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, mere perceptions are insufficient. In determining whether the employing establishment erred or acted abusively, the Board determines whether the employing establishment acted reasonably.[4]

The Board defines harassment as a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coemployees or workers.[5] For harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[6] The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.[7]

Verbal altercations and difficult relationships with supervisors, when sufficiently detailed by the claimant and supported by the record, may constitute factors of employment. Although

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[1] 5 U.S.C. §§ 8101-8193.

[2] *See Thomas D. McEuen*, 41 ECAB 387, 390-91 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

[3] *James E. Norris*, 52 ECAB 93, 100 (2000).

[4] *Bonnie Goodman*, 50 ECAB 139, 143-44 (1998).

[5] *Beverly R. Jones*, 55 ECAB ___ (Docket No. 03-1210, issued March 26, 2004).

[6] *Reco Roncoglione*, 52 ECAB 454, 456 (2001).

[7] *Paul Trotman-Hall*, 45 ECAB 229, 236 (1993) (Groom, M.E., concurring).

the Board has recognized the compensability of verbal abuse in certain circumstances this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.[8] The Board has held that the mere fact that a supervisor raised his voice during the course of a conversation does not warrant a finding of verbal abuse.[9]

The Board has recognized that an Office hearing representative has discretion to weigh the evidence of record and render credibility determinations based on the witness testimony.[10] The Office's Federal (FECA) Procedure Manual states:

> "The [claims examiner] is responsible for determining the facts in a case by weighing the evidence which has been developed and drawing conclusions based on that evidence. When the relevant evidence has been received and the parties to the claim have had a chance to refute any disputed evidence, the [claims examiner] is ready to evaluate the evidence for credibility and validity."[11]

ANALYSIS

Appellant has attributed her emotional condition to the employing establishment's decision to allow Mr. Compton to return to her work unit in January 2003. The Board has held that such a decision is of an administrative nature and will not be compensable until the claimant can establish error or abuse in the action. Mr. Compton and appellant have worked in close proximity for 17 months. Appellant's objection is to Mr. Compton's return to her work unit, not her work location or tour of duty, both of which he had been a part of for almost a year and a half. Due to Mr. Compton's demonstrated compliance with the requirement that he did not speak to appellant, it was not unreasonable for the employing establishment to believe that he could work in her unit without making further remarks which appellant viewed as inappropriate.[12] The Board finds that the employing establishment's decision to return Mr. Compton to appellant's work unit was reasonable and did not constitute error or abuse. Furthermore, the Board notes that appellant's reaction to the proposal to return Mr. Compton to her work area would be self-generated.[13]

Appellant also attributed her current emotional condition to Mr. Sapp's alleged verbal assault on January 13, 2003. She and Mr. Bertels, her union representative, asserted that Mr. Sapp, yelled at her, shook his finger in her face, called her stupid and stated that she was a bad employee and that he would do anything to get rid of her. Mr. Sapp denied the allegations

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[8] *Marguerite J. Toland*, 52 ECAB 294, 179 (2001).

[9] *Carolyn S. Philpott*, 51 ECAB 175 (1999).

[10] *Sharon J. McIntosh*, 47 ECAB 754, 757 (1996); *Karen R. Gallagher-Phillips*, (03-1392, issued October 17, 2003).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts, Weighing Factual Evidence and Drawing Conclusions*, Chapter 2.809.10(a) (June 1995).

[12] *Myrna Parayno*, 53 ECAB 593 (2002); *Kimber A. Stokke*, 48 ECAB 510, 512-13 (1997).

[13] *Mary Margaret Grant*, 48 ECAB 696, 702 (1997).

on January 27, 2004. The Board finds that the hearing representative reviewed appellant's testimony, the written statement of Mr. Bertels and the written statement of Mr. Sapp and concluded that appellant's allegations were not credible. The Board will give deference to the credibility findings of the hearing representative as a finder of fact and concludes that appellant has not established verbal abuse on the part of Mr. Sapp.

Appellant attributed her emotional condition to Mr. Compton's statements made in 2000, regarding the mail that he and appellant were processing, describing it as pornography. She alleged that he asserted that this material was "hot." Mr. Compton has admitted to pointing out the fact that he and appellant were processing adult oriented mail, but not to making any further comments. She also asserted that Mr. Compton's previous statement regarding the photograph of a tongue with cancer contributed to her emotional condition. This statement was confirmed by a coworker, Mr. Lopez. The Board finds that neither of these statements rises to the level of sexual harassment, harassment or verbal abuse such as to constitute a compensable factor as required by Board law. Regarding Mr. Compton's description of the mail he and appellant were processing, the Board notes that appellant has not substantiated that Mr. Compton made any lewd, vulgar or sexually explicit remarks about the content of the magazines and she has not explained how Mr. Compton's simple comment that there was pornography on the mail belt would rise to the level of verbal abuse or otherwise fall within the coverage of the Act. Furthermore, the Board notes that although Mr. Compton made a vulgar and inappropriate remark regarding the picture of the tongue, appellant has not shown how such an isolated remark would rise to the level of verbal abuse,[14] or how this statement would demonstrate a persistent disturbance, torment or persecution such that it would fall within the Board's definition of harassment.

CONCLUSION

The Board finds that appellant has failed to establish compensable factors of employment in regard to sexual harassment, verbal abuse and harassment. As appellant has failed to establish a compensable factor of employment she has failed to meet her burden of proof and the Office properly denied her claim.[15]

[14] *Kim Nguyen*, 53 ECAB 127, 129 (2001).

[15] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. *See Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

ORDER

IT IS HEREBY ORDERED THAT the April 14, 2004 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: April 4, 2005
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member