

**United States Department of Labor  
Employees' Compensation Appeals Board**

---

**JOANN LAPOINTE, Appellant**

**and**

**U.S. POSTAL SERVICE, VEHICLE  
MAINTENANCE FACILITY,  
Hicksville, NY, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 05-1220  
Issued: September 7, 2005**

*Appearances:*  
*Paul Kalker, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On May 11, 2005 appellant filed a timely appeal from a June 17, 2004 merit decision of the Office of Workers' Compensation Programs, finding that she did not sustain an emotional condition while in the performance of duty; and a March 23, 2005 merit decision, denying modification of the June 17, 2004 decision. 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 established that she sustained an emotional condition while in the performance of duty.

**FACTUAL HISTORY**

On May 4, 2004 appellant, then a 45-year-old clerk, filed a traumatic injury claim alleging that on April 29, 2004 she developed an emotional condition as a result of being

videotaped by a coworker while she returned to work from a break. She submitted illegible narrative statements in support of her claim.

By letter dated May 13, 2004, the Office advised appellant that the evidence submitted was illegible. The Office requested that she submit additional information regarding the alleged April 29, 2004 incident and medical evidence supportive of her claim. The Office requested that the employing establishment respond to appellant's allegation.

The Office received a letter from appellant on May 5, 2004 regarding an employee's responsibilities for an on-the-job injury. The Office also received prescriptions dated May 4, 2004 of Dr. Norman P. Haywood, a general practitioner, who referred her to another physician for a psychological evaluation and diagnosed anxiety with panic attacks. He excused appellant from work until further notice and scheduled an appointment for June 4, 2004. A form signed by her on May 7, 2004 advised of her election of Dr. Haywood as her treating physician.

In response to the Office's May 13, 2004 letter, the employing establishment submitted a May 19, 2004 statement of Richard Pokowitz, a manager, regarding his conversation with Kenneth Herbst, an employee, about videotaping appellant on April 29, 2004. The employing establishment indicated that it would try to secure a statement from Mr. Herbst when he returned to the office from Oklahoma. In the May 19, 2004 statement, Mr. Pokowitz indicated that he was unable to obtain a written statement from Mr. Herbst because he was in school for two weeks. He interviewed Mr. Herbst on May 3, 2004 as to the reasons why he took a picture of appellant and Frank Furnari, a coworker. Mr. Herbst responded that his actions had nothing to do with appellant, rather he had an issue with Mr. Furnari. Mr. Herbst advised that he saw an opportunity to catch Mr. Furnari doing something wrong when he saw Mr. Furnari getting out of appellant's automobile and that he took a picture to have proof of the incident.

In a May 21, 2004 letter, appellant stated that on April 29, 2004 both she and Mr. Herbst were on the employing establishment premises between 8:30 a.m. and 9:00 a.m. at the parking area. Appellant noted that, for several months, Mr. Herbst had monitored other employees and followed them in a vehicle as they left the employing establishment. She alleged that he went out of his way to walk close to her and stared at her. This action unnerved appellant and she informed her manager of the situation. She contended that Mrs. Herbst who also worked in the office with her had been harassed by her as well. Appellant received complaints that Mrs. Herbst was rude and disrespectful when people telephoned appellant. She alleged that Mrs. Herbst was crass when she paged appellant through the intercom system and used a nicer tone of voice for other people she paged. Appellant advised her manager about these complaints. She stated that this stressful situation caused a hostile work environment. After reporting the videotaping incident to her manager, no action was taken. Appellant noted that Mr. Herbst was previously banned from the employing establishment's district personnel office in Islandia, New York. Appellant further noted that, at the time of the alleged incident, she was bringing tea to her manager as instructed. She stated that she knew Mr. Herbst from work and did not have a personal association with him away from work. Appellant also stated that she did not notice Mrs. Herbst when she got out of her car on April 29, 2004 but did notice a truck behind her prior to getting out of the car. Appellant noted that she had not received any medical information regarding her claim but would forward it to the Office.

Appellant submitted Dr. Haywood's May 4, 2004 attending physician's report which found that she experienced panic attacks due to the alleged April 29, 2004 incident and listed her physical limitations.

In a May 20, 2004 letter, the employing establishment controverted appellant's claim. The employing establishment described the alleged April 29, 2004 incident and Mr. Pokowitz's interview of Mr. Herbst. The employing establishment contended that appellant's stress was self-generated and caused by her perception that someone was targeting her when, in fact, Mr. Herbst noted that he did not have any interest in her. It was contended that she was not injured in the course of her employment. The employing establishment noted that on April 28, 2004 Thomas Lapointe, appellant's husband, took a picture of Mr. Herbst's automobile which was parked in violation of applicable parking regulations and had complained to Ken Filby, a supervisor, who advised Mr. Pokowitz of the incident and it was requested that Supervisor Richard Rizzo, speak to Mr. Herbst to remind him about the regulation that no craft employee's car was allowed in the parking area.

In a May 27, 2004 form report, Dr. Haywood indicated that appellant's panic attacks were caused by the alleged April 29, 2004 incident with an affirmative check mark. On May 27, 2004 Dr. Haywood reiterated his findings. A June 4, 2004 note indicated that she remained totally disabled until further notice and that she was scheduled for an appointment on June 15, 2004.

In a June 8, 2004 report, Dr. Sukon Kim, a Board-certified psychiatrist, stated that appellant had been under his care for an emotional disorder. He further stated that she should be excused from work until further notice.

By decision dated June 17, 2004, the Office found the evidence of record insufficient to establish that appellant sustained an emotional condition while in the performance of duty. The Office found that she failed to submit evidence to substantiate that she was harassed by Mr. Herbst on the workroom floor by walking close to her and staring at her. The Office found that appellant failed to submit any evidence that Mr. Herbst's videotaping of her constituted harassment.

By letter dated December 12, 2004, appellant, through her attorney, requested reconsideration. Counsel contended that appellant's allegations and the accompanying statements of Mr. Furnari and Stephen J. Shirreffs, an employee, were sufficient to establish that she was harassed by Mr. Herbst. He also contended that the employing establishment's failure to investigate the alleged harassment was compensable. Counsel noted that an accompanying report of Dr. Lilian A. Bernier, a Board-certified psychiatrist, was sufficient to establish that appellant's emotional condition was caused by her employment.

Mr. Furnari stated that on April 29, 2004, at approximately 8:30 a.m., he went with appellant to pick up coffee. He stated that on their way back to the employing establishment, appellant noticed in her mirror that Mr. Herbst was sitting in an employing establishment vehicle with a video camera. Mr. Furnari got out of the car and walked over to Mr. Shirreffs, who was standing by his car. Mr. Furnari stated that Mr. Herbst kept the camera focused on appellant's car the whole time and Mr. Shirreffs replied that Mr. Herbst was following them.

Dr. Bernier described the alleged April 29, 2004 incident and stated that appellant had a post-traumatic stress disorder.

Mr. Shirreffs stated that he was on break at approximately 8:00 a.m. on April 29, 2004 when he walked to his automobile to get his breakfast. He noticed an employing establishment vehicle blocking the entrance to the employing establishment, with Mr. Herbst behind the wheel videotaping appellant and Mr. Furnari getting out of her car. Mr. Shirreffs noted that, as he walked back to the employing establishment, he saw Mr. Herbst parked in the handicapped spot again videotaping appellant and Mr. Furnari as they walked into the building. He noted that two days before this incident, on April 27, 2004 at approximately 5:35 p.m., he was followed by Mr. and Mrs. Herbst after work while giving Jerry O'Brien, a coworker, a ride to pick up his truck.

By decision dated March 23, 2005, the Office denied modification of the June 17, 2004 decision.<sup>1</sup>

### **LEGAL PRECEDENT**

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

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 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 the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position or to 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

---

<sup>1</sup> The Board notes that, although the Office stated in the March 23, 2005 decision, that appellant's request for reconsideration was denied on the grounds that it "neither raised substantive legal questions nor included new and relevant evidence," it noted, in an accompanying memorandum, the basis for conducting a merit review of a claim and found that the evidence of record did not establish that the prior decision should be modified.

<sup>2</sup> *Pamela R. Rice*, 38 ECAB 838 (1987).

<sup>3</sup> *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.<sup>4</sup>

In emotional condition cases, the Office must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed to be factors of employment and may not be considered.<sup>5</sup> Therefore, the initial question is whether appellant has alleged compensable factors of employment that are substantiated by the record.<sup>6</sup>

### ANALYSIS

Appellant attributed her emotional condition to being harassed by Mr. and Mrs. Herbst. She contends that Mr. Herbst went out of his way to walk close to her and stare at her. Appellant further contends that he videotaped her from an employing establishment vehicle while she was returning from a coffee break with Mr. Furnari on April 29, 2004. She alleges that she received complaints from people who called her that Mrs. Herbst was being rude and disrespectful to them. Appellant also alleges that Mrs. Herbst was crass when she had to page her over the intercom system while she was nice to other people she paged.

If harassment and discrimination were to be shown to have occurred, it would be considered a compensable factor of employment. However, there must be some evidence that such implicated acts of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. A claimant must establish a factual basis for allegations that the claimed emotional condition was caused by factors of employment.<sup>7</sup>

Mr. Furnari stated that he saw Mr. Herbst videotaping him and appellant on April 29, 2004 as they returned to the employing establishment from picking up coffee on break. Mr. Shirreffs stated that he witnessed Mr. Herbst videotaping appellant on April 29, 2004. The Board finds that Mr. Furnari's and Mr. Shirreffs's statements do not establish that Mr. Herbst was harassing appellant. Mr. Herbst explained during his interview by Mr. Pokowitz that his actions had nothing to do with appellant. Rather, he had an issue with Mr. Furnari because he had a double standard and Mr. Herbst saw an opportunity to catch him doing something that he thought was wrong. When Mr. Herbst saw Mr. Furnari getting out of appellant's private vehicle he took a picture to have proof of the incident. Mr. Herbst complained to Mr. Filby, a supervisor, who advised Mr. Pokowitz of the incident, who then asked another supervisor, Mr. Rizzo, to speak to Mr. Herbst about the parking violation and to remind him about the

---

<sup>4</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>5</sup> *Margaret Kryzcki*, 43 ECAB 496, 502 (1992).

<sup>6</sup> *Donald E. Ewals*, 45 ECAB 111, 122 (1993).

<sup>7</sup> *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, *supra* note 3 (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, *supra* note 2 (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

parking regulations. Therefore, the Board finds that appellant has failed to establish that she was harassed by Mr. Herbst and, thus, she has failed to establish a compensable factor of her employment.

The Board further finds that appellant did not submit any evidence such as witness statements to corroborate her allegation that she was harassed by Mrs. Herbst when she was rude and disrespectful to people who telephoned appellant and she was crass towards appellant when she had to page her over the intercom system. Appellant has failed to establish that she was harassed by Mrs. Herbst and, thus, the Board finds that she has failed to establish a compensable factor of her employment.

Appellant's allegation that the employing establishment failed to investigate Mr. Herbst for watching her involves an administrative or personnel matter.<sup>8</sup> However, the Board has found that an administrative or personnel matter may be considered an employment factor where the evidence discloses error or abuse on the part of the employing establishment.<sup>9</sup> Contrary to appellant's contention, Mr. Pokowitz investigated the April 29, 2004 incident by interviewing Mr. Herbst on May 3, 2004. As noted above, he explained why he was videotaping and appellant has submitted no evidence such as a decision, finding that the employing establishment violated its policies or was otherwise unreasonable in handling the investigation. Without substantiated evidence of error or abuse on the part of the employing establishment in handling the above administrative matter, appellant has failed to establish a compensable factor of employment under the Act.<sup>10</sup> As she has failed to establish that she sustained an emotional condition causally related to compensable factors of her employment, it is not necessary to address the medical evidence in this case.<sup>11</sup>

### CONCLUSION

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

---

<sup>8</sup> *Ernest St. Pierre*, 51 ECAB 623, 624 (2000).

<sup>9</sup> *Robert W. Johns*, 51 ECAB 137 (1999).

<sup>10</sup> As no compensable work factors have been identified, it is not necessary to address the medical evidence. *Roger Williams*, 52 ECAB 468, 474 (2001).

<sup>11</sup> *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 29 and January 8, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 7, 2005  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board