United States Department of Labor
Employees' Compensation Appeals Board

B.B., Appellant	)	
and	)	**Docket No. 09-1415**
	)	**Issued: August 25, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Boston, MA, Employer	)	

Appearances:
Richard Heavey, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 18, 2009 appellant filed a timely appeal from the May 1, 2009 decision of the Office of Workers' Compensation Programs that denied her emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she developed an emotional condition in the performance of duty.

FACTUAL HISTORY

On June 2, 2008 appellant, then a 59-year-old supervisor of distribution operations, filed an occupational disease claim alleging that she developed anxiety due to work stress. She became aware of her condition and realized it was related to her federal employment on May 2, 2008. Appellant stopped work on May 2, 2008.

In a July 24, 2005 statement, appellant noted that she experienced stress after receiving a downgrade notice on May 2, 2008 and two 14-day suspensions, on August 2, 2006 and

March 22, 2007, respectively. The August 2, 2006 suspension was reduced to a seven-day suspension. Appellant contended that her supervisors placed undue restrictions and requirements upon her and held her to a different standard than her peers which caused her stress.

The employing establishment submitted a June 17, 2008 statement from Patricia Gold, manager of health and resources. Ms. Gold disputed appellant's allegations. She advised that the employing establishment attempted to administratively deal with appellant's negative performance issues but she resisted all efforts to improve and was uncooperative with a performance improvement plan. Throughout the process, appellant was afforded all due process rights and appeals and it was the employing establishment's position that her condition was self-generated.

On June 27, 2008 the Office asked appellant and the employer to provide additional evidence. The employing establishment submitted a July 13, 2008 e-mail from Paul Passariello, appellant's manager, who disagreed with appellant's allegations, noting that she did not file a claim until after she was downgraded for failing to perform her job satisfactorily. Appellant failed to indicate the time period involved in her claim but Mr. Passariello was unable to recall anything out of the ordinary with regard to her workload or extra demands. Mr. Passariello advised that appellant was not performing her required duties and was downgraded.

Appellant submitted a May 25, 2008 certificate of healthcare provider from John P. Hennessy, Ph.D., a clinical psychologist, who noted that she was confronted with a traumatic event while at work and developed acute stress disorder and was totally disabled.

In a September 30, 2008 decision, the Office denied appellant's claim finding that the claimed emotional condition did not arise in the performance of duty.

On November 21, 2008 appellant requested reconsideration. She asserted that the employing establishment rescinded its decision demoting her because its allegations against her were without merit. In a November 4, 2008 letter, John M. Lespasio, Jr., senior plant manager, advised appellant that she was being restored to the position of supervisor of distribution operations and the personnel action and letter of decision effectuating her reduction in grade and pay effective May 10, 2008 would be rescinded.

In a July 13, 2008 statement, Linda Bornstein advised that she worked for appellant and found her to be an excellent supervisor. An August 14, 2008 statement from David Delorie, a retired supervisor, noted attending several meetings with Mr. Passariello and appellant from March to November 2007. Mr. Delorie indicated that Mr. Passariello never requested an extension of appellant's performance improvement plan or granted permission to extend the plan. In an August 20, 2008 statement, Richard Nici, a mail handler, noted that appellant was his supervisor and he observed Mr. Passariello dressing appellant down in front of her subordinates on the workroom floor several times. In an August 7, 2008 statement, William Bennett, a mail handler, noted that he was supervised by appellant. On October 26, 2007 he was instructed by appellant to clear robots and completed the task in the allotted time frame. Other statements from William Stanton, a clerk, and his wife Linda Stanton, dated October 9, 2008, noted that Mr. Stanton had a heart attack and he submitted appropriate documentation and was granted leave for his absence.

In a February 13, 2009 statement, appellant alleged that Mr. Passariello's goal was to terminate or downgrade her. On March 9, 2009 she asserted that the rescission of the adverse action was taken for the purposes of avoiding reimbursement of her legal fees. On March 11, 2009 appellant alleged that she sustained significant emotional trauma and was discriminated against, harassed, demeaned, humiliated and embarrassed. She asserted that her manager humiliated her, swore at and demeaned her in front of employees.

In a February 18, 2009 statement, Mr. Passariello advised that the notice of proposed adverse action and letter of decision were neither rescinded as erroneous nor as part of a settlement; rather, the adverse action was rescinded due to the uncertainties of litigation and to avoid further fees, time and expense devoted to an appeal. He noted that appellant continued to pursue aspects of the matter and that the employer reserved all defenses in the matter.

In a decision dated May 1, 2009, the Office denied modification of the September 30, 2008 decision.

LEGAL PRECEDENT

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

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[2] the Board explained that there are distinctions to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[3] 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 under the Act.[4] When an employee experiences emotional stress in carrying out her employment duties and the medical evidence establishes that the disability resulted from her emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of her work.[5] 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 under the Act. Where the disability results from an employee's emotional reaction to her regular or specially assigned duties or to a

[1] *Donna Faye Cardwell*, 41 ECAB 730 (1990).

[2] 28 ECAB 125 (1976).

[3] 5 U.S.C. §§ 8101-8193.

[4] *See Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

[5] *Lillian Cutler*, *supra* note 2.

requirement imposed by the employment, the disability comes within the coverage of the Act. 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.[6]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, 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 factors of employment and may not be considered.[7] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[8]

ANALYSIS

The Board notes that appellant has not established any compensable work factor relating to the performance of her regular or specially assigned work duties under *Cutler*.[9] Although appellant asserted that her supervisors placed undue restrictions and requirements upon her, she made general allegations and cited no specific instances relating her emotional condition to her work assignments. Rather, she addressed several administrative matters. The employing establishment controverted the claim. In a July 13, 2008 statement, Mr. Passariello noted that appellant did not file a claim until after she was downgraded for failing to perform her job satisfactorily. He was unable to recall anything out of the ordinary with regard to her workload or extra demands. The factual evidence does not establish a regular or specially assigned duty as a cause of appellant's claimed emotional condition.

Appellant's allegations regarding her supervisors generally relate to administrative or personnel matters. In *Thomas D. McEuen*,[10] the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated.

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[6] *See Michael Thomas Plante,* 44 ECAB 510 (1993); *Cutler, supra* note 2.

[7] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[8] *Id.*

[9] *Supra* note 2.

[10] 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[11]

Appellant alleged error by her employer in discipline and downgrading based on her job performance. These are administrative or personnel matters unrelated to her regular or specially assigned work duties. Although the handling of disciplinary actions and performance evaluations are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[12] Appellant alleged that she improperly received a downgrade notice on May 2, 2008 and 14-day suspensions on August 2, 2006 and March 22, 2007. She contends that the August 2, 2006 suspension was reduced to a seven-day suspension and the employing establishment rescinded the demotion as it was without merit and the employer wanted to avoid paying legal fees. The record does not establish that the employing establishment acted unreasonably in this administrative matter. Appellant's supervisors clearly explained that the basis for disciplinary action was appellant's poor performance. The evidence reveals that the employer attempted to correct her work with a performance improvement plan. Ms. Gold advised that the employing establishment attempted to administratively deal with appellant's negative performance issues but she resisted all efforts to improve and was uncooperative with the performance improvement plan. Mr. Passariello stated that appellant was downgraded for failing to perform her job satisfactorily. He advised that the notice of proposed adverse action and letter of decision was set aside due to the uncertainties of litigation and to avoid further fees, time and expense devoted to the appeal. Mr. Passariello stated that appellant continued pursuing aspects of the personnel action and that the employing establishment reserved its defenses. Although a suspension was reduced and the proposed demotion was rescinded, this does not, by itself, establish error or abuse. The record contains no evidence to establish that the employing establishment acted erroneously or abusively in these administrative matters.[13] The employing establishment did not admit any error in reducing the suspension and rescinding the demotion; instead, it noted doing this for administrative convenience. Absent evidence which would establish that the actions taken by the employer were improper or unreasonable, appellant has not established error or abuse.[14] There is

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

[12] *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).

[13] *See Linda K. Mitchell*, 54 ECAB 748 (2003) (the mere fact that the employing establishment lessened a disciplinary action did not establish that the employing establishment erred or acted in an abusive manner).

[14] *See Mary L. Brooks*, 46 ECAB 266 (1994) (there was no persuasive evidence that the employer erred in processing the claimant's performance appraisal when a proposed grade reduction was reduced to a letter of warning and her performance rating was changed from unsatisfactory to good under an EEO settlement that contained no admission of error); *Sherry L. McFall*, 51 ECAB 436, 440 (reduction of a proposed 14-day suspension to a 7-day suspension did not, in and of itself, establish that the employing establishment's actions were in error or unreasonable absent evidence showing that the actions taken by the employing establishment were improper). *See also Mario Mauriello*, Docket No. 04-309 (issued June 28, 2004) (where a grievance resolution determined that the employer did not perform a predisciplinary interview prior to suspending the claimant, rendering a suspension null and void; the Board found that there was no error or abuse absent a showing that the actual reason for the suspension was invalid); *Pamela J. Wells*, Docket No. 94-19 (issued November 6, 1995) (where several disciplinary actions were reduced in severity, the Board found no error or abuse where the claimant did not submit sufficient evidence to show that the employer did not have adequate cause to investigate or take action regarding the underlying matter).

no evidence supporting that the underlying reason for the actions, which were later rescinded, was invalid. Appellant has not established error or abuse with regard to these matters to support a compensable work factor.

As noted, appellant alleged that her supervisors placed undue restrictions and requirements on her. To the extent that appellant is asserting that the employer erred in assigning work, the Board notes that this is an administrative function and the manner in which a supervisor exercises his or her discretion falls outside the ambit of the Act.[15] The Board finds that appellant has not provided sufficient evidence in support of her allegations to establish error or abuse regarding her work assignments. The evidence does not establish that the employing establishment acted unreasonably. Mr. Passariello indicated that there was nothing improper regarding appellant's assignments.

To the extent that appellant alleged a verbal abuse and threats by Mr. Passariello, the Board has recognized the compensability of physical threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[16] The Board finds that the evidence does not reveal that Mr. Passariello verbally abused her or acted unreasonably. Appellant provided insufficient evidence or witness statements to establish her allegations. Mr. Nici noted observing Mr. Passariello "dressing down" appellant in front of her subordinates, but he failed to identify exactly what "dressing down" meant or provide detailed instances of verbal abuse or threatening comments by Mr. Passariello at particular times and places. Appellant has not established that Mr. Passariello engaged in verbal abuse.[17]

Appellant alleged that she was harassed and discriminated against. She asserted that her manager humiliated her, swore, demeaned and embarrassed her in front of employees she supervised. Actions of a claimant's supervisor or coworker which the claimant characterizes as harassment may constitute a compensable factor of employment. However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.[18] An employee's charges that he or she was harassed or discriminated against is not determinative of whether or not harassment or discrimination occurred.[19] To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[20]

[15] *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

[16] *Charles D. Edwards*, 55 ECAB 258 (2004).

[17] *See Judy L. Kahn*, 53 ECAB 321 (2002) (the fact that a supervisor was angry and raised her voice does not, by itself, support a finding of verbal abuse).

[18] *See Lorraine E. Schroeder*, 44 ECAB 323 (1992).

[19] *See William P. George*, 43 ECAB 1159 (1992).

[20] *See Frank A. McDowell*, 44 ECAB 522 (1993); *Ruthie M. Evans*, 41 ECAB 416 (1990).

Appellant cited no specific instances of harassment or discrimination occurring at a particular time and place, rather she made general allegations. As noted Mr. Nici, a mail handler, noted observing Mr. Passariello dressing down appellant in front of her subordinates on the workroom floor. He failed to provide specific instances with regard to time, place and circumstance. In a July 13, 2008 statement, Mr. Passariello advised that appellant did not file a claim until after she was downgraded for failing to perform her job satisfactorily. He noted that she was not performing her required duties and was downgraded for failing to perform to expectation. Similarly, Ms. Gold indicated that the employer attempted to administratively deal with appellant's negative performance and she resisted all efforts to improve and was uncooperative with the performance improvement plan. The evidence is insufficient to show that appellant was singled out or treated disparately with regard to her claims of discrimination or harassment. The Board finds that appellant has not supported her allegations of harassment and discrimination with sufficient probative evidence.

Consequently, appellant has not established her claim for an emotional condition as she has not attributed her claimed condition to any compensable employment factors.[21]

On appeal, appellant alleged that the decision of the Office denying her claim was contrary to law and fact. She asserted that she was downgraded for failure to perform her job satisfactorily and the employing establishment unilaterally rescinded the demotion prior to trial preventing appellant from going to trial and recovering legal fees and that this constituted error and abuse. The Board finds this argument to be without merit. As discussed, the fact that discipline was reduced or rescinded, by itself, does not establish error or abuse by the employer.[22] Appellant did not submit sufficient evidence to show that the employer's reason for initiating the action was invalid or unreasonable.

CONCLUSION

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

[21] As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496 (1992).

[22] *See supra* note 13-14.

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2009 and September 30, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 25, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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