

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANET M. WILLIAMS and U.S. POSTAL SERVICE,
POST OFFICE, Atlanta, Ga.

*Docket No. 96-2473; Submitted on the Record;
Issued September 2, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

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

On September 1, 1995 appellant, a 40-year-old letter carrier, filed a CA-1 claim for traumatic injury, claiming that she had sustained an emotional condition resulting from an employment-related incident which occurred on May 8, 1995.

At the time she filed her claim, appellant was no longer employed with the employing establishment as a result of the May 8, 1995 incident at work. In a May 23, 1995 statement, submitted by her supervisor, in which her supervisor proposed her termination from the employing establishment, the supervisor alleged that on May 8, 1995, he and appellant became involved in a disagreement regarding the proper procedure for requesting sick leave, during which appellant became very loud and caused a disturbance on the workroom floor. The supervisor stated that as a result of her behavior, he called a meeting with her and her union steward to explain his position that sick leave should be requested in advance, with proof of a medical appointment. The supervisor alleged that after providing this explanation, appellant stated she would not report to work on May 9, 1995 and that she would simply call in, whereupon the supervisor stated she would be charged with leave without pay if she acted in this manner.

Following this meeting, appellant invited her husband down to the employing establishment. This invitation contradicted the supervisor's explicit instructions to appellant to keep her husband away from the worksite, which were based on workplace disturbances for which he was previously responsible. The husband appeared at the worksite shortly after his wife's telephone call and proceeded to behave in a loud, threatening manner in the presence of employees and customers. The supervisor emerged from his office, called the police and security, returned to the lobby and found appellant standing in the door with her husband when he informed appellant that her husband was not allowed on the employing establishment

premises because of his previous erratic behavior. According to the supervisor, appellant then continued her disruptive behavior by shouting at him from the door of the lobby that he could not deny her husband access to the worksite. The supervisor concluded in his statement that appellant had clearly engaged in improper conduct on May 8, 1995 by violating his earlier instructions about involving her husband in work-related situations and by creating a situation from which violence could have resulted. The supervisor noted that appellant previously had been issued a three day suspension for improper conduct on February 27, 1995 for making threatening statements to a manager and for failing to follow instructions and for insubordination. Appellant has not worked with the employing establishment since May 8, 1995 and was subsequently terminated on August 15, 1995 by the employing establishment.

Accompanying appellant's September 1, 1995 Form CA-1 was a medical clinic intake note dated May 23, 1995, in which she alleged that her supervisor had "declared war on her" and, in which she indicated that her supervisor had engaged in a pattern of harassment, threats of job loss, and humiliation in front of co-employees, which had resulted in symptoms of emotional distress including weight loss, insomnia, fatigue, inability to concentrate, memory impairment and feelings of hopelessness and hopelessness about work.

The employing establishment controverted the claim in a letter dated September 29, 1995.

In a letter to appellant dated December 6, 1995, the Office of Workers' Compensation Programs informed her that based on the evidence she had submitted it was changing her claim to one based on occupational disease. The Office further advised appellant that the evidence she submitted was not sufficient to determine whether she was eligible for compensation benefits and that he needed to submit a detailed description of the specific employment-related conditions or incidents she believed contributed to her illness. The Office also asked appellant to submit a comprehensive medical report from her treating physician describing her symptoms and the medical reasons for her condition and an opinion as to whether factors or incidents, *i.e.*, specific employment factors, at her employing establishment contributed to her condition.

Appellant responded to the Office's request in a letter dated February 2, 1996, wherein she stated that she had attached factual and medical evidence in support of her claim. Accompanying appellant's letter was a January 4, 1996 letter, from appellant's attorney, in which she alleged several episodes of harassment, sexual and otherwise, on the part of her supervisor. The letter indicated that since the time the supervisor had arrived at the worksite, appellant had been sexually harassed, disrespected and publicly maligned on a recurring basis. The letter specifically listed the following allegations of harassment, sexual and otherwise, on the part of her supervisor:

- (1) On or about January 1993 appellant's supervisor, referring to appellant in a disrespectful manner as "Miss Janet," told appellant to come into his office so that they could talk, at which time he told her "you are much too attractive and educated to be carrying mail and getting caught up in a bunch of union crap." Appellant apparently was a union steward at the time.

(2) On one occasion [undated], appellant's supervisor allegedly called her into his office and stated "you and I could have a beautiful work relationship, but first I need for you to give up all that union crap ... you don't need the union, all you need is me. I can look out for you far better than the union can." Appellant stated that although the supervisor was made aware that his conduct was unwelcome, he persisted in conducting himself in an unprofessional manner and allegedly continued to harass appellant.

(3) In May 1993, her supervisor allegedly began making her follow improper mail delivery procedures.

(4) In approximately January 1994, the supervisor allegedly told appellant that the two should become "closer." The supervisor also allegedly said that appellant could have it made on easy street only if she crossed over and cooperated with him. The supervisor further stated, allegedly, that "I'm really a very likable guy, just consider me to be your big old teddy bear and perhaps we could meet sometime in a more relaxed atmosphere. Again, appellant asserted that she had clearly indicated to her supervisor that she was not interested and that she found him to be "very disgusting." According to appellant, comments such as these continued throughout appellant's employment under the supervisor. One example of these alleged comments was, "I have everybody right where I want them, and you don't see them getting involved with that union crap. I need you to become closer and more relaxed so that we can be like a happy family. So what do you say, come on, cross over." Appellant asserted that, as a union steward, she found these statements to be particularly offensive, felt intimidated and feared for her job.

(5) Appellant's supervisor allegedly continued his sexual harassment of appellant by allegedly going out on her mail route three to four times a week while she performed her job duties. While on these routes, the supervisor would talk to her about the two becoming "closer" and on several occasions, the supervisor stood behind her while she worked.

(6) On an unlisted date, the supervisor allegedly stated to appellant that "the postal inspection service has informed me that you and the guy driving the white city truck appear to be working together and it is believed that you have robbed the post office." Appellant claimed that one morning, as appellant had a casual conversation with her supervisor, she mentioned that one of her customers committed suicide over the weekend. The supervisor allegedly replied, "you are going to commit suicide one day too."

(7) After taking a few days off because of personal reasons, appellant returned to work and allegedly discovered that her supervisor had moved her work cases closer to his desk, and closer to his supervisor's desk than any other employee's cases. When appellant asked the supervisor why her cases were moved from their original spot, he allegedly replied, "I moved you closer so that I can keep an eye on you at all times." Appellant alleged that her supervisor used the close

proximity of his desk as a means to further his sexual harassment. For example, appellant alleged that her supervisor would often stand behind her and stare at her as she bent over to do her work. On one occasion, while watching her mail, the supervisor allegedly stared at appellant's posterior and said, "I tell you, it don't get no better than that." Appellant claimed that this kind of behavior persisted for several months. The supervisor's sexual harassment became so overt that other employees within the post office began to notice, according to appellant, snickering and laughing at her when she had her back turned to appellant.

(8) Appellant stated that, although she is married, several of the employees referred to appellant as the supervisor's girlfriend, and clerks in the post office mentioned to appellant that the supervisor was her "admirer." As a married woman and an employee, appellant thought that it was repugnant to have fellow employees believe that her boss had a crush on her and a desire to be sexually involved with her.

(9) Appellant alleged that in the fall of 1993, one morning, while appellant was casing her mail, she bent down to get a pen that she had dropped. After appellant picked up the pen and began to stand back, her buttocks bumped into the supervisor's pelvic area as a result of her standing very close behind her. Appellant immediately turned around and said, "what are you doing?" The supervisor was smiling, saying, "you are supposed to say excuse me."

(10) Appellant alleged that in April 1994 her supervisor threatened to fire appellant if she didn't sever all ties with the union, and claimed that he made this threat because she approached the union regarding her supervisor's alleged sexual harassment. Appellant stated that she was very upset about having to talk to the union president regarding her supervisor's alleged sexual harassment.

(11) On or about March 9, 1995, appellant requested a half day off from her supervisor. The supervisor replied, in front of several employees, "if you want me to let you take off, get down on her knees and beg for it." Appellant allegedly said to the supervisor, "why should I get on my knees,?" when the supervisor allegedly replied, "because I want to see you beg."

Appellant asserted that, because of this pattern of harassment, threats and belligerent behavior on the part of her supervisor, she began to suffer severe emotional distress.

Appellant also submitted a January 23, 1996 medical report, from Dr. Richard B. Bernstein, Board-certified in psychiatry and neurology, who diagnosed a suspect severe chronic anxiety/depression, but did not relate these symptoms to her employment and a January 30, 1996 medical report, from Dr. Mary N. Chestnut, a psychologist, who stated that she began treating appellant on May 23, 1995 to address issues involving job-related stress. Dr. Chestnut diagnosed a major depressive episode, feelings of helplessness and hopelessness, depressed mood, loss of interest in formerly pleasurable pursuits, significant weight loss, insomnia, fatigue, feelings of worthlessness and continuing thoughts of death to escape her

supervisor and found that these symptoms were causally related to the work history related by appellant.¹

By decision dated May 3, 1996, the Office found that fact of injury was not established, as the evidence of record did not establish that an injury was sustained in the performance of duty. In an accompanying memorandum to the Director, the Office stated that the fact that appellant had cited factors of employment, which, if proven, would have been competent to produce a disabling medical condition that would be covered under the Federal Employees' Compensation Act. The Office, however, found that appellant failed to provide factual support for these factors.

The Office found that appellant failed to submit witness statements to support her allegations and, therefore, failed to prove any erroneous or abusive action on the part of the employing establishment. The Office determined that appellant's mere allegations of impropriety were not sufficient to establish them as factual. The Office concluded that, in light of appellant's failure to provide factual support for the employment factors she cited, it was not required to consider the medical evidence she submitted to establish an emotional condition sustained in the performance of duty. The Office, therefore, denied the claim.

The Board finds that appellant has not established that she sustained an emotional condition in the performance of duty.

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition, and rationalized medical opinion establishing that compensable employment factors are causally related to the claimed emotional condition.² There must be evidence that implicated acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.³

The first issue to be addressed is whether appellant has cited factors of employment that contributed to her alleged emotional condition or disability. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Act.⁴ On the other hand, disability is not covered where it results from an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. Disabling conditions resulting from an employee's feeling of job insecurity

¹ Dr. Chestnut also submitted three work capability certificates dated June 20, July 20 and September 20, 1995, in which she diagnosed major depression, single episode, with moderate severity and indicated that her condition could be aggravated by work-related harassment.

² See *Debbie J. Hobbs*, 43 ECAB 135 (1991).

³ See *Ruth C. Borden*, 43 ECAB 146 (1991).

⁴ *Lillian Cutler*, 28 ECAB 125 (1976).

or the desire for a different job do not constitute a personal injury sustained while in the performance of duty within the meaning of the Act.⁵

It is well established that mere perceptions of harassment or discrimination do not constitute a compensable factor of employment. A claimant must establish a basis in fact for the claim by supporting her allegations with probative and reliable evidence.⁶ The Board has underscored that, when working conditions are alleged as factors in causing disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable 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 The Office has the obligation to make specific findings with regard to the allegations raised by a claimant. When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a compensable factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Perceptions and feelings, alone, are not compensable. Only when the matter asserted is a compensable factor of employment and the evidence establishes the truth of the matter asserted may the Office then base its decision to accept or reject the claim on an analysis of the medical evidence.⁸

In the present case, the Office found that the allegations made by appellant concerning the implicated work-related incidents were not established as factual by the weight of evidence of record. The Office reviewed appellant's allegations of harassment and mistreatment, which she contended were motivated by her supervisor's hostility to her involvement with union activities.

The Board finds that the Office's finding that appellant failed to substantiate her claim was proper. Appellant has not submitted any factual evidence to support her allegations that her supervisor engaged in a pattern of harassment, sexual or otherwise, because of her involvement with union activities. Rather, the record merely contains the May 23, 1995 statement recommending her termination from her supervisor, which provides a history that appellant was terminated by the Office for good cause on August 15, 1995 as a result of the May 8, 1995 employment incident; *i.e.*, engaging in improper conduct, violating his earlier instructions about involving her husband in work-related situations and creating a situation, from which violence could have resulted. The supervisor's statement also indicated that appellant had been formally reprimanded on a previous occasion for making threatening statements to a manager, for failing to follow instructions and for insubordination. The Board finds that, based on this history of appellant's employment record, which is uncontroverted by any other evidence of record, appellant was terminated by the employing establishment for good cause on August 15, 1995. The Board further finds that the Office properly found that the episodes of harassment cited by

⁵ *Id.*

⁶ *Curtis Hall*, 45 ECAB 316 (1994); *Margaret S. Krzycki*, 43 ECAB 496 (1992).

⁷ *Norma L. Blank*, 43 ECAB 384 (1992).

⁸ *Id.*

appellant did not factually occur as alleged by appellant, as she failed to provide any corroborating evidence for her allegations.

The employing establishment received no contemporaneous complaint of any such incident and there are no contemporaneous witness statements identifying with specificity the time, place, manner and parties involved.⁹ As such, appellant's allegation constitutes a mere perception or generally stated assertion of dissatisfaction with a certain superior at work, which does not support her claim for an emotional disability.¹⁰ For this reason, the Office properly determined that the matter constituted a perception of appellant and was not factually established.

The decision of the Office of Workers' Compensation Programs dated May 3, 1996 is hereby affirmed.

Dated, Washington, D.C.
September 2, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁹ The record does contain the May 23, 1995 clinic intake note, which listed some of the allegations of harassment allegedly resulting in symptoms of emotional stress; however, this note is not corroborated by any other evidence in the record and was not made contemporaneous with any of the incidents alleged by appellant.

¹⁰ See *Hall*, *supra* note 6.