U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOAN DAVIS and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Milwaukee, Wis.

Docket No. 97-976; Submitted on the Record;
Issued April 27, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has met her burden of proof to establish that she sustained an emotional condition while in the performance of duty; and (2) whether the Office of Workers' Compensation Programs hearing representative properly denied appellant's request for subpoenas.

The Board has duly reviewed the case record in this appeal and finds that appellant has failed to meet her burden of proof to establish that she sustained an emotional condition while in the performance of duty.

On August 26, 1994 appellant, then a mail processor, filed a traumatic injury claim (Form CA-1) alleging that on August 2, 1993 she sustained an employment-related emotional condition. Specifically, appellant alleged that she was subjected to intentional infliction of severe emotional distress and attempted entrapment. Appellant further alleged that she was threatened by employees and harassed over the telephone by the employing establishment after her termination.[1]

By letter dated November 21, 1994, the Office advised appellant to provide additional factual and medical evidence supportive of her claim.

By decision dated May 26, 1995, the Office found the evidence of record insufficient to establish that appellant sustained an injury as alleged on August 2, 1993. In an accompanying memorandum, the Office found that appellant failed to establish a compensable employment factor. The Office also found that appellant failed to submit any medical evidence supportive of the alleged injury.

[1] The record reveals that appellant was terminated during a probationary period by the employing establishment on August 15, 1993 for threatening a coworker. Previously, appellant was terminated in 1991 for allegedly threatening an employee and was subsequently rehired as a part-time flexible clerk in 1993 on a probationary basis.

In a June 10, 1995 letter, appellant requested an oral hearing before an Office representative. By decision dated September 3, 1996, the hearing representative affirmed the Office's May 26, 1995 decision.

In a November 7, 1996 letter, appellant requested reconsideration of the hearing representative's decision. By decision dated February 14, 1997, the Office denied appellant's request for reconsideration without a merit review on the grounds that the evidence submitted was repetitious and cumulative in nature and thus, insufficient to warrant review of its prior decision.

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 the Federal Employees' Compensation Act. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned work duties or requirements of the employment, the disability comes within the coverage of the Act. On the other hand, where disability results from such factors as an employee's emotional reaction to employment matters unrelated to the employee's regular or specially assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the scope of coverage of the Act.[2]

Perceptions and feelings alone are not compensable. 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.[3] 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.[4]

In this case, appellant's primary allegation is that harassment by her coworkers, Ms. Cecelia Brown, Mr. Andy Ford, Ms. Barbara Johnson and Ms. Joan Jones and her supervisors, Mrs. Barbara Briddle and Mr. Mark Taylor caused her emotional condition. The Board has held that actions of an employee's supervisor which the employee characterizes as harassment may constitute factors of employment giving rise to coverage under the Act.[5] Mere perceptions alone of harassment and discrimination are not compensable under the Act.[6] To

[2] *Lillian Cutler*, 28 ECAB 125 (1976).

[3] *Pamela R. Rice*, 38 ECAB 838 (1987).

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

[5] *Donna Faye Cardwell*, *supra* note 4; *Pamela R. Rice*, *supra* note 3.

[6] *Wanda G. Bailey*, 45 ECAB 835 (1994); *William P. George*, 43 ECAB 1159 (1992); *Joel Parker, Sr.*, 43 ECAB 220 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990).

discharge her burden of proof, a claimant must establish a factual basis for her claim by supporting her allegations of harassment with probative and reliable evidence.[7] Appellant failed to provide any such probative and reliable evidence in this case.

Specifically, appellant has alleged that she was followed part of the way home by Ms. Brown and Mr. Ford. Appellant stated that they rode side by side with her in their car for miles, that they made remarks and that Ms. Brown was laughing at her. Appellant also stated that she felt threatened because she did not know why they were doing this. Appellant then stated that when she went to work that night, she asked Mr. Ford why he was following her. Appellant stated Mr. Ford responded that they were just playing with her. Appellant also alleged that after she was fired, she received harassing telephone calls from Mr. Taylor and after that did not work, her car was sabotaged. Appellant further alleged that Ms. Johnson, Mrs. Briddle and Ms. Grace Ashcroft, an employing establishment supervisor, yelled and cursed at her after she was escorted to an office by Ms. Emma Hughes, an employing establishment supervisor, regarding an accusation that she bumped into Ms. Johnson with a hamper. Appellant stated that Ms. Briddle threatened to terminate her employment. In addition, appellant alleged that she was threatened by Mr. Jones and that one of her coworkers had to stop work to physically restrain him. Appellant stated that several witnesses saw Ms. Brown have a conversation with her after being told repeatedly by management to avoid her. Appellant also stated that her aunt's murder was a direct result of being continuously harassed by telephone and that she had witnesses to this event.

Appellant has failed to submit any corroborating evidence that she was being harassed by Ms. Brown, Mr. Ford, Ms. Johnson, Ms. Jones, Mrs. Briddle and Mr. Taylor. Rather, appellant has merely presented her perception that she was being harassed by these individuals and has not established that harassment did, in fact, occur. Consequently, the truth or validity of the allegations of harassment are not established by the record and they are not, therefore, found to be compensable factors of employment.

Several of appellant's allegations fall into the category of administrative or personnel actions. The Board has 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.[8] The Board has held, 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.[9] Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated.

The allegations made by appellant that fall into this category of administrative or personnel actions include the employing establishment's termination of her employment due to

[7] *Ruthie M. Evans, supra* note 6.

[8] *Thomas D. McEuen*, 41 ECAB 389 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

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

threats that she made against Ms. Brown in 1993, Mr. Taylor's denial of appellant's request to have witnesses present or union representation during an investigation involving the accusation that she made threats against coworkers and an investigation regarding Ms. Johnson's accusation that appellant bumped into her with a hamper.

Regarding the employing establishment's termination of appellant due to threats she made against Ms. Brown, Mr. Joseph Jones, appellant's coworker, indicated in an undated narrative statement that on Sunday, August 1, 1993 he and appellant had been working together and that appellant believed Ms. Brown was responsible for an earlier incident that morning where appellant was being picked on. Mr. Jones also indicated that appellant had asked Mr. Ford about the incident. Mr. Jones further indicated that appellant felt that Ms. Brown had been "fucking talking too much and that as soon as her 10 days were up she would fuck her up." Mr. Jones then stated that appellant became belligerent and stated such things as "go and get the bitch" and "[t]hat she was fucking with her money and that she would eventually fuck her up." Mr. Jones reiterated appellant's statements regarding Ms. Brown's interference with her ability to earn money at a September 20, 1994 hearing before an administrative law judge involving the investigation of threats made by appellant and the employing establishment's compliance with appellant's subpoenas. At the hearing, Mr. Taylor testified that Ms. Brown did not say that appellant threatened her personally. Mr. Taylor further testified that the basis for appellant's discharge was her statements to Mr. Jones. Mr. Taylor also testified that appellant was aware of the employing establishment's policy about threats to other workers and the consequences of such action because a memorandum regarding this policy was given to all employees. Mr. Taylor explained the procedure he followed in investigating the allegations against appellant. In an August 2, 1993 narrative statement, appellant admitted that she made threatening comments about Ms. Brown, although she did not make them directly to her. The record reveals that appellant's grievance regarding her termination was denied by the employing establishment. In an August 12, 1993 probationary period evaluation report, a supervisor whose signature is illegible indicated that several employees gave statements concerning appellant's threatening statements she made towards another employee. An undated and unsigned narrative statement revealed that after appellant was rehired in June 1993, several employees who were involved in a 1991 incident were concerned for their safety and were told by Mr. Ronnie Payne, a plant manager, to avoid appellant. The statement further revealed that appellant made it a point to put fear into the minds of these individuals until she was terminated for constant harassment and threats.

Regarding appellant's allegation that she was denied the presence of witnesses or union representation during a meeting about the threats she made against Ms. Brown, she has failed to show that she was entitled to the presence of witnesses or union representation in this situation. The Board finds that appellant has presented no evidence of administrative supervisory error or abuse in terminating her employment in 1993, in denying the presence of witnesses or union representation during a meeting and in conducting investigations of appellant. Therefore, they do not constitute compensable employment factors under the Act.

Since appellant has not established a compensable employment factor under the Act, the Board will not address the medical evidence.[10]

The Board further finds that the Office hearing representative properly denied appellant's request for subpoenas.

Section 8126 of the Act provides, in relevant part, "The Secretary of Labor, on any matter within his jurisdiction under this subchapter, may (1) issue subpoenas for and compel attendance of witnesses within a radius of 100 miles...."[11]

To establish that the Office abused its discretion, appellant must show manifest error, prejudice, partiality, intentional wrong, an unreasonable exercise of judgment, illogical action, or action that would not be taken by a conscientious person acting intelligently. The mere showing that the evidence should support a contrary conclusion is insufficient to prove an abuse of discretion.[12]

In a May 26, 1996 letter, appellant requested that the Office issue subpoenas for employing establishment supervisors, Mr. Payne and Ruddy Ruiz, and for the home telephone records of Mr. Taylor to prove a conspiracy, perjury and telephone harassment that she had to endure. Specifically, appellant requested all documents from Mr. Payne including but not limited to a statement from the supervisor that Mr. Payne spoke to about her in May 1993. Appellant also requested documents from a person who scheduled Ms. Brown to the third shift in her area. Further, appellant requested Mr. Jones' and Mr. Ruiz's schedules from July 31 through August 1, 1993. In addition, appellant requested the remaining 14 pages of a 30-day evaluation and the remaining pages from Ms. Brown's statement. Finally, appellant requested the date that Mr. Ruiz started work as a supervisor in automation, the results of both investigations from Mr. Taylor including statements as to where she was looking and a statement from the postal inspector who was on duty the night of August 1 and 2, 1993.

By letter dated June 7, 1996, the Office denied appellant's request on the grounds that it did not have the authority to subpoena an employee's home telephone records and that she failed to provide a specific explanation as the pertinent facts which she expected to establish by obtaining the other requested documents and the appearance of the identified witnesses. The Office also denied appellant's request on the grounds that she failed to establish whether such facts could be established by other evidence without the use of a subpoena.

Appellant failed to demonstrate that the testimony of Mr. Payne and Mr. Ruiz, documents concerning the results of both investigations and a statement from the postal inspector which would be relevant to the issue of whether her emotional condition was caused by factors of her employment, could not be obtained by means other than the issuance of a subpoena.[13] Further,

[10] *Margaret S. Krzycki*, 43 ECBA 496 (1992).

[11] 5 U.S.C. § 8126(1).

[12] *See Darlene Menke (James G. Menke, Sr.)*, 43 ECAB 173 (1992).

[13] *See* 20 C.F.R. § 10.134(a).

appellant failed to provide a specific explanation as to the pertinent facts which she expected to establish in obtaining information concerning Ms. Brown's shift change and Mr. Jones' and Mr. Ruiz's work schedules, Mr. Ruiz's starting date as a supervisor in automation, a 30-day evaluation and the remaining pages of Ms. Brown's statement. Therefore, the Office properly denied appellant's request for a subpoena.

The February 14, 1997 and September 3, 1996 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
April 27, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member