

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHELLE R. SMARTT and U.S. POSTAL SERVICE,
POST OFFICE, Detroit, MI

*Docket No. 01-932; Submitted on the Record;
Issued November 16, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

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

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

On May 20, 2000 appellant, then a 36-year-old letter carrier, filed a claim for an occupational disease (Form CA-2), alleging that her emotional condition was caused or aggravated by her employment after she was hired on April 10, 1999. She stopped work on May 15, 2000 and has not returned. Appellant's claim was accompanied by factual and medical evidence.

By letter dated June 28, 2000, the Office of Workers' Compensation Programs advised appellant to submit additional factual and medical evidence supportive of her claim. By letter of the same date, the Office advised the employing establishment to submit factual evidence regarding appellant's claim. In response, both the employing establishment and appellant submitted factual and medical evidence.

By decision dated December 19, 2000, the Office found the evidence of record insufficient to establish that appellant sustained an emotional condition while in the performance of duty. The Office addressed all of appellant's allegations and made findings regarding whether the events alleged were factually accepted and, if so, whether they occurred in the performance of duty. The Office found that it was not factually accepted that there was any type of sexual harassment or any other type of harassment by employing establishment personnel or that cursing alleged by a coworker, Mr. Embree, on January 25, 2000, had occurred. The Office found that there was no evidence of error or abuse in the employing establishment's handling of appellant's complaints, in the administration of administrative and/or personnel issues dealing with appellant's evaluations and disciplinary actions and in the employing establishment's reassignments, scheduling and related operational matters. The Office noted that appellant had

established a compensable employment factor in that a coworker had intentionally touched her face on November 26, 1999; however, the medical evidence of record was insufficient to establish appellant's claim.

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.¹

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.² 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.³

Appellant alleged that her emotional condition was caused by stress at the employing establishment. In more detailed statements, appellant alleged that she was sexually harassed by Mr. Rochon, first as a coworker and then as an official. She submitted copies of grievances that she filed regarding this matter. With respect to an allegation of harassment, there is no evidence supporting a finding of harassment in this case.⁴ An employee's allegation that he or she was harassed or discriminated against is not determinative of whether or not harassment occurred.⁵ Mr. Rochon denied appellant's allegations. The employing establishment investigated appellant's allegations concerning sexual harassment against Mr. Rochon. The employing establishment noted that the investigation found no supporting evidence for the sexual harassment charges and no action was taken against Mr. Rochon. In a June 23, 1999 letter, both appellant and her union steward stated they were not going to pursue any complaint against

¹ *Lillian Cutler*, 28 ECAB 125 (1976).

² *Pamela R. Rice*, 38 ECAB 838 (1987).

³ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁴ A claimant must establish a factual basis for a claim of harassment by supporting the allegations with probative and reliable evidence. *Gregory N. Waite*, 46 ECAB 662 (1995); *Barbara J. Nicholson*, 45 ECAB 803 (1994).

⁵ *Helen P. Allen*, 47 ECAB 141 (1995).

anyone in the postal service at that time. Given the totality of evidence presented, the Office properly found that it was not factually accepted that any sexual harassment occurred.

Appellant further alleged that when she reported the harassment by Mr. Rochon, the employing establishment failed to take action and, in fact, transferred her to another work unit. The record reflects that the employing establishment investigated the charges. To the extent that the employing establishment investigated appellant's allegations and arrived at a conclusion, this is an administrative or personnel matter.⁶ The record is devoid of any error or abuse in the administrative actions taken and, any disagreement with such actions is not compensable. Although the record establishes that appellant was transferred from the Seven Oaks office to the Joyfield location, the transfer was not made based on any bias, but resulted strictly on the employing establishment's need for additional personnel at that location. The Board has held that the assignment of a work schedule is an administrative function and, absent evidence of error or abuse, it is not considered a work factor for purposes of compensation.⁷ The very nature of appellant's job that of a part-time flexible clerk, denotes there are no assigned duties or bids and/or hours; but rather the employee serves at the need of the employing establishment. In this case, the evidence supports that appellant was correctly assigned to another unit as one of the junior part-time flexible workers. The Board has held that disability is not covered where it results from such factors as frustration from not being permitted to work in a particular environment or to hold a particular position.⁸

Appellant has submitted witness statements from coworkers and parties outside the employing establishment to support her allegations that the employing establishment undertook a pattern of harassment and abuse. The employing establishment has specifically denied such allegation. As previously noted, to 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. Appellant's witness statements are not probative or reliable evidence.⁹ She submitted a statement from her sister and her boyfriend, both of whom do not work at the employing establishment. They were witnesses to any of the alleged events occurring at the employing establishment. Their statements have little probative value in establishing that any events appellant alleged occurred. The statements submitted from appellant's coworkers are vague and generalized in nature and do not contain descriptions of the specific allegations made on the part of management.¹⁰ As the employing establishment specifically denied such allegations, there is insufficient probative evidence to establish the specific instances of alleged abuse or harassment. The Office properly found that a pattern of abuse or harassment was not established by the employing establishment in this case.

⁶ *Diane C. Bernard*, 45 ECAB 223 (1993).

⁷ *See Alice M. Washington*, 46 ECAB 382 (1994).

⁸ *Clara T. Norga*, 46 ECAB 473 (1995).

⁹ *Ruthie M. Evans*, 41 ECAB 416 (1990).

¹⁰ *See generally William P. George*, 43 ECAB 1159, 1167 (1992).

Appellant alleged that Mr. Rochon worked at her “new” station from March 16 to March 18, 2000 and she was upset at his presence at the location. There is no evidence of error by the employing establishment of assigning Mr. Rochon to appellant’s station. Moreover, the record reveals that appellant admitted that Mr. Rochon had no contact with her and her request to be excused while Mr. Rochon was temporarily assigned at that location was granted. Appellant’s feelings and objections to Mr. Rochon’s presence does not arise to a compensable work factor under the circumstances.

Several of appellant’s other allegations of employment factors that caused or contributed to her condition fall into the category of administrative or personnel actions. In *Thomas D. McEuen*,¹¹ 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.¹² Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. The incidents and allegations made by appellant, which fall into this category of administrative or personnel actions include: Appellant’s scheduling and work orders, leave usage and denial,¹³ transfer to another assignment¹⁴ and letters of warning being issued to appellant¹⁵ and problems with her pay. The record contains numerous copies of union filings and equal employment opportunity complaints; however, most filings contain no showing of any final decision. On March 29, 2000 appellant and the employing establishment agreed to removal of a December 24, 1999 letter of warning. This agreement does not support any finding of error or abuse by the employing establishment.

However, the Board notes that a November 18, 1999 decision of the Dispute Resolution Team found that management did not honor appellant’s bid on an available hold-down position and that management should have honored appellant’s option for the duration of that duty assignment prior to reassigning her as the junior part-time flexible carrier. As such, the Board finds that appellant has established a compensable work factor.

The Board further notes that the Office found that appellant had established a compensable employment factor in that a coworker touched her face on November 26, 1999. Since appellant has established two compensable factors of employment, the Board will examine

¹¹ 41 ECAB 387 (1990), *reaff’d on recon.*, 42 ECAB 566 (1991).

¹² See *Richard J. Dube*, 42 ECAB 916 (1991).

¹³ *Helen Casillas*, 46 ECAB 1044 (1995).

¹⁴ *Id.*

¹⁵ *Jose L. Gonzalez-Garced*, 46 ECAB 559 (1995).

the medical evidence of record to ascertain whether it supports that she developed an emotional condition causally related to either of these two accepted factors.¹⁶

With respect to the medical evidence, there is no medical opinion on causal relationship between the diagnosed emotional condition and the employment factors accepted herein. Appellant submitted several notes from the Westside Mental Health Services, the majority coming from Susan Spolsky, a licensed social worker. As a licensed social worker is not defined as a “physician” under the Act, her notes cannot be considered as probative medical evidence.¹⁷ In a June 28, 2000 letter, the Office informed appellant that reports from social workers would not be accepted for providing either a diagnosis or a medical opinion to establish her claim. Other disability slips of record either relate to unrelated conditions, such as an upper respiratory condition, or contain no diagnosis.

A May 31, 2000 disability slip from Dr. Dana Lee Wiley, a Board-certified psychiatrist, contains a diagnosis of adjustment disorder with mixed emotional features. However, this disability slip does not contain any opinion as to the causation of the condition found. It is not probative on the issue of whether appellant developed an emotional condition causally related to the physical contact or the employing establishment that honoring a bid on a hold-down assignment.

A July 17, 2000 report signed by Dr. Wiley and Ms. Spolsky was also submitted. Although the report relates appellant’s history of stress on the job, it appears to be authored by Susan Spolsky. The report notes the examination findings and diagnosis of Dr. Wiley’s psychological evaluation and the fact that appellant was to undergo psychotherapy with Ms. Spolsky. The report addresses appellant’s current treatment and need to remain off work. The report closes with the opinion that appellant should not be exposed to any “unnecessary” work stress. The Board finds that this medical report is of diminished probative value as Dr. Wiley merely noted appellant should not be exposed to unnecessary work stress. The report fails to address the issue of the causal relationship of appellant’s emotional condition with regard to the two compensable employment factors found in this case. As appellant failed to submit sufficient rationalized medical evidence addressing the accepted compensable factors as causative in the development of her emotional condition, appellant has failed to establish her claim.

¹⁶ Appellant’s burden of proof is not discharged by the fact that she has established employment factors which may give rise to a compensable disability under the Act. Appellant must also submit rationalized medical evidence establishing that her claimed emotional condition is causally related to an accepted compensable factor of employment. *Brian E. Flescher*, 40 ECAB 532 (1989); *Ronald K. White*, 37 ECAB 176 (1983).

¹⁷ See *Debbie J. Hobbs*, 43 ECAB 135 (1991) (report from social worker with degree in psychology has no probative value as medical evidence in emotional condition claim).

Accordingly, the decision of the Office of Workers' Compensation Programs dated December 19, 2000 is hereby affirmed, as modified.

Dated, Washington, DC
November 16, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member