U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VIRGINIA A. NICHOLL and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Richmond, VA

Docket No. 02-736; Submitted on the Record;
Issued September 20, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

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

On November 4, 1997 appellant, then a 41-year-old classifications specialist, filed an occupational claim for post-traumatic stress disorder (PTSD) which she became aware was work related on October 9, 1997.

Appellant was diagnosed as having PTSD resulting from an attempt by a coworker she had been dating to kill her and her children at her home and the employing establishment was aware of her condition since 1993. When she applied for an upgrade in her position as assistant return preparer coordinator in 1993, a memorandum dated March 30, 1990 from her manager, Mike Crutchley, who made sexual references to her was found among the documents in her employment record.[1] Appellant alleged that her "life with the [employing establishment] ha[d] been hell ever since." She stated that she was forced to take 240 hours of advanced sick leave due to the pressure of fellow employees alienating her because of the manager getting into trouble. Appellant stated that management initially moved her from her unit to separate her from the manager but in a couple of months she was placed in the same "two by four room" with him.

Appellant contended that when she returned from sick leave, a female manager, Sue Hough, accused her of "blowing a statute," placed her on a leave restriction letter despite the fact that appellant had medical documentation, listened to her [tele]phone conversations and performed more workload reviews on her than on others in the unit. Appellant contended that she always received awards but in 1996 she and another employee did not receive any awards. She contended that she "was constantly being written up for stupid things" and "the final straw"

[1] Appellant filed an emotional claim on January 20, 1995 (No. A03-205070) regarding the discovery of Mr. Crutchley's letter, the attempt to reassign her, anger at what she alleged was a cover-up of Mr. Crutchley's behavior, and her subsequent inability to work. By decision dated November 9, 1995, the Office of Workers' Compensation Programs denied appellant's claim because she did not establish a fact of injury.

was that a coworker and a friend of the managers reported her to inspections for alleged comments she made to someone on the telephone about the Chief of examinations (*i.e.*, threatening to kill the supervisor, John Boehm). Appellant stated that she was being rotated out of her unit even though management was aware she had PTSD.

Appellant stated that her job of assistant return preparer coordinator was taken away from her in August 1997. She stated that she had been working for John Teeple who, according to the union, had "been bad-mouthing" her and the work she was doing for him. Appellant stated that he would not give her "any of that work."

Appellant stated that she had filed a Equal Employment Opportunity (EEO) complaint in 1994 in response to the memorandum she received from Mr. Crutchley and that in 1997 she filed another EEO complaint. Two weeks after she filed the second complaint, she was removed from her job and she filed another complaint in 1998 on the grounds of retaliation.

In an undated statement received by the Office on January 14, 1998, Carolyn M. Webb, the Chief of the Workers' Compensation Center, denied appellant's contentions. She stated that contrary to appellant's assertion, management did not unreasonably refuse to accommodate her emotional condition by reassigning her to the audit section. Ms. Webb stated that appellant was reassigned due to a reorganization the audit office was undergoing. Regarding appellant's EEO complaint in 1994, Ms. Webb stated that the EEO's final decision on December 6, 1995 was that there was insufficient evidence to show discrimination and retaliation. She stated that appellant presented no evidence of discrimination and retaliation subsequent to the EEO decision. Ms. Webb denied that other employees listened in on appellant's conversations. She stated, however, that a coworker overheard appellant threatening physical harm to another employee and that it was proper for the coworker to report the incident to the inspection office. Regarding Mr. Crutchley's memorandum containing the sexual reference, Ms. Webb stated that the employing establishment inadvertently discovered the memorandum in 1994 and that, in a discussion on September 12, 1994, appellant denied that she felt harassed or uncomfortable working for Mr. Crutchley either at the time the memorandum was written or at the time it was discovered and that an EEO counselor noted that appellant stated that it was written four years earlier as a joke, but that appellant subsequently changed her mind and filed an EEO complaint objecting to the letter and the problems it caused.

In an undated statement, Annie Smith, the Chief of the Planning and Special Programs Branch stated that on November 23, 1994 she learned for the first time that appellant declined the detail she offered her and that appellant told her that she had made no effort to relocate Mr. Crutchley. Ms. Smith stated, however, that in a subsequent meeting, appellant stated that she had no problem working with Mr. Crutchley. Ms. Smith stated that Mr. Crutchley was "disciplined," apparently for writing the March 30, 1990 memorandum to appellant. Ms. Smith stated that appellant was moved from the coordination section to another work unit for valid business reasons, *i.e.*, "to enhance the ability of Mr. Teeple and [appellant] to deliver a more focused program to deal with problem return preparers." She stated that Mr. Crutchley and other individuals were also moved to another unit. Ms. Smith stated that appellant would have been reassigned regardless of the discovery of the memorandum from Mr. Crutchley.

Regarding appellant's statement that she was doing work that was completely different from her usual job, Ms. Smith stated that appellant had been assigned some temporary work to cover for a tax auditor who had broken her leg and the assignment would stop when the auditor returned. Regarding appellant's contention that she worked only three feet from Mr. Crutchley, Ms. Smith stated that Mr. Crutchley worked in the same general office space as two thirds of the branch employees and he could not be moved from that office. She stated that appellant's cubicle was 17 feet from Mr. Crutchley's office and was separated by a partition. Ms. Smith also stated that Mr. Crutchley no longer supervised the coordination section where appellant once worked.

By decision dated November 9, 1998, the Office denied appellant's claim, stating that she failed to establish that she sustained an emotional condition in the performance of duty.

Appellant requested a review of the written record and submitted additional evidence consisting of a copy of complaint she filed in the federal court alleging discrimination due to her disability, a copy of her EEO investigative file and additional treatment notes.

By decision dated October 18, 1999, the Office hearing representative affirmed the Office's November 9, 1998 decision.

On October 25, 1999 appellant requested reconsideration of the Office's decision. She submitted a copy of the union steward's newsletter in which she highlighted the blurb, "[p]roposed removal for unsubstantiated threatening remarks resulted in no action." During the employing establishment's investigation of the alleged threat, appellant was placed on administrative leave and issued an adverse action letter which restricted her from entering the federal building without an escort and removed her credentials. While on leave, she was notified of a transfer of her job in November 1997.

By decision dated November 8, 1999, the Office denied modification of its prior decisions.

By letter dated November 11, 1999, appellant requested reconsideration of the Office's decision.

By decision dated November 23, 1999, the Office denied appellant's request for reconsideration.

By letter dated October 24, 2000, appellant requested reconsideration of the Office's decision. She submitted medical reports from Dr. Sherri Landes, a clinical psychologist, dated January 6, 2000, an undated "[t]reatment [s]ummary" from Linda Slavin, M.S., a letter from appellant to Ms. Webb dated November 23, 1998, an unsigned memorandum from "William Goldstein" to appellant dated November 10, 1999 describing appellant's education and history of employment, a medical report from Dr. Ronald I. Lebman, a Board-certified emergency medicine specialist, dated August 2, 1996, a copy of the supplemental investigative file and miscellaneous documents including approval of her disability application dated August 11, 1998 and copies of her claims.

In his statement, Mr. Goldstein explained that on October 9, 1997 appellant was taken to the inspections department and interrogated about her alleged threat against Mr. Boehm. She became hysterical and had to be taken home. Appellant subsequently received notice of a proposed termination of her employment and became upset. She took sick leave which she had to obtain from the leave bank. Mr. Goldstein stated that appellant was placed on administrative leave in January 1998 pending completion of the investigation. In May 1998, with the help of the union, appellant was cleared of any wrongdoing and the proposed notice of termination was withdrawn. While appellant was on administrative leave, she was transferred to the audit section. Mr. Goldstein stated that appellant felt she could not return to audits because it was too stressful and she applied for disability retirement.

Mr. Goldstein stated that under Ms. Hough appellant took lots of sick leave because of her PTSD and at one point, Ms. Hough restricted the amount of sick leave appellant could take to an amount less than in the union contract. Mr. Goldstein stated that appellant filed a grievance and won and Ms. Hough was compelled to withdraw the leave restriction. He stated that in general appellant felt management had the policy of trying to get rid of employees who had disabilities and she felt management was trying to get rid of her because of her disability.

In a statement dated August 3, 1998, Mr. Hough stated that she challenged appellant's use of sick leave because appellant had not provided her with sufficient documentation to show that appellant had a work-related illness.

By decision dated February 6, 2001, the Office denied modification of the prior decisions.

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

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 an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[2] 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.[3]

Where an employee alleges harassment and cites to specific incidents and the employer denies that harassment occurred, the Office or some other appropriate fact finder must make a determination as to the truth of the allegations.[4] The issue is not whether the claimant has

[2] 5 U.S.C. §§ 8101-8193.

[3] *Clara T. Norga*, 46 ECAB 473, 480 (1995); *see Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[4] *Michael Ewanichak*, 48 ECAB 364, 366 (1997); *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

established harassment or discrimination under standards applied the Equal Employment Opportunity Commission. Rather the issue is whether the claimant, under the Act, has submitted evidence sufficient to establish an injury arising in the performance of duty.[5] To establish entitlement to benefits, the claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.[6]

To the extent that disputes and incidents alleged as constituting harassment by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[7] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[8]

In this case, appellant has not established a compensable factor of employment. Her contentions that the discovery of Mr. Crutchley's March 30, 1990 memorandum in her employment record made her life "hell" resulting in her taking 240 hours of advanced leave is not corroborated by evidence of record. Ms. Webb stated that when Mr. Crutchley's memorandum was discovered, in a discussion on September 14, 1994 with appellant, appellant denied that she felt harassed or uncomfortable working with Mr. Crutchley in the past or in the present. Ms. Smith also stated that appellant stated in a meeting that she had no problem working with Mr. Crutchley. Regarding appellant's contention she was placed near or in the same office area as Mr. Crutchley, Ms. Smith stated that Mr. Crutchley could not be moved because he worked with two-thirds of the branch employees in that office area. It also appears this part of appellant's claim was included in a prior claim, No. A03-205070, which the Office denied on November 9, 1995. Appellant has not shown that management harassed her as a result of discovering Mr. Crutchley's March 30, 1990 letter.[9]

Appellant's other contentions, that when she returned from "forced" sick leave, Ms. Hough accused her of "blowing a statute," listened to her [tele]phone conversation and performed more workload reviews on her than on others in the unit are not corroborated by evidence of record. Appellant's contention that she was discriminated against because she did not receive an award in 1996 was also not corroborated by evidence of record.[10]

Mr. Goldstein's November 10, 1999 memorandum notes that appellant was placed on restricted sick leave use by her supervisor, Ms. Hough. The probative value of Mr. Goldstein's memorandum is questionable as it is not clear who Mr. Goldstein is and the memorandum is unsigned. His assertion that appellant won her grievance against Ms. Hough for placing her on

[5] *See Martha L. Cook*, 47 ECAB 47 ECAB 226, 231 (1995).

[6] *Barbara E. Hamm*, 45 ECAB 843, 851 (1994).

[7] *Clara T. Noga*, 46 ECAB 473, 481 (1995); *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

[8] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[9] *See Barbara J. Latham*, 53 ECAB _____ (Docket No. 99-517, issued January 31, 2002); *Bonnie Goodman*, 50 ECAB 139, 144 (1998).

[10] *Id*.

unrestricted sick leave is not corroborated by any evidence of record. Further, Ms. Hough claimed the medical evidence appellant presented to her at the time, did not document that appellant had a work-related illness. Assuming that Ms. Hough restricted appellant's sick leave, that constitutes an administrative action and appellant has not presented sufficient evidence that Ms. Hough's action was abusive or erroneous.[11]

The record establishes that the employing establishment conducted an investigation into appellant's alleged threat to kill Mr. Boehm. An investigation of this kind is not part of appellant's regularly assigned duties but is an administrative action. Thus, the investigation only constitutes a compensable factor if management acted unreasonably or abusively. Appellant did not make this showing.[12]

The record also establishes that the employing establishment reassigned appellant to the audit section while she was on administrative leave. She contended management was not accommodating her PSTD since reassignment to audit would be stressful. Management, however, stated that the reassignment was not retaliatory or discriminatory but was part of a reorganization to enhance the work effort and in fact, other employees were reassigned to other areas due to the reorganization. Appellant did not show that management had reason to believe that reassigning her to the audit section would aggravate her PSTD. A reassignment constitutes an administrative action and appellant has not shown that management acted unreasonably or abusively in this instance.[13]

Appellant also generally stated that she was not given the kind of work she wanted to do under Mr. Teeple. It is not clear exactly what kind of work appellant is referring to, but even so, management stated that appellant had been assigned different work temporarily to cover for a person who was absent due to an injury. The assignment of work by a manager constitutes an administrative action and appellant has not shown management acted erroneously or abusively in this regard.[14]

Further, although appellant references several EEO complaints she filed and the record refers to grievances appellant filed and won and contains a complaint of discrimination appellant filed with a federal court, the results of the EEO and federal court complaints and documentation of the grievances are not in the record. The absence of such documentation diminishes the validity of appellant's contentions in this case where there is no evidence to document that she was discriminated or retaliated against.

[11] *See John Polito*, 50 ECAB 347, 349 (1999).

[12] *See Barbara J. Latham*, 53 ECAB _____ (Docket No. 99-517, issued January 31, 2002); *Constance I. Galbraith*, 49 ECAB 401, 407-09 (1998).

[13] *See Janet D. Yates*, 49 ECAB 240, 244 (1997).

[14] *See Elizabeth W. Esnil*, 46 ECAB 606, 618 (1995); *Jose L. Gonzalez-Garceo*, 46 ECAB 565, 559 (1995).

Since appellant has failed to establish a compensable factor of employment, she has failed to establish her claim and the medical evidence need not be addressed.[15]

The February 6, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 20, 2002

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[15] *See Diance C. Bernard*, 45 ECAB 223, 228 (1993).