

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANA L. LEISHMAN and U.S. POSTAL SERVICE,
POST OFFICE, San Francisco, CA

*Docket No. 03-1947; Submitted on the Record;
Issued December 24, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

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

On May 24, 2002 appellant, then a 42-year-old mail recovery clerk, filed a traumatic injury claim, alleging that on May 22, 2002, while she was working on delayed "3760s," her coworkers sprayed the chemical compound "Professional Lysol" three times towards her resulting in a physical reaction of dizziness, headache, dry mouth, difficulty in breathing and a runny nose and a mental reaction of stress, anxiety and nervousness. Appellant stopped working on May 22, 2002.

In a statement dated May 22, 2002, appellant stated that on that date, while working at her desk, she coughed because her throat was dry and her coworker, Carlotta Balinton, stood up, walked up to appellant's side of the aisle and started to spray Lysol "repeatedly in a side-to-side and up and down motion, toward the air space in front of [her]." Appellant stated that Ms. Balinton's desk and workspace were in front of her desk. Appellant stated that she was surprised at Ms. Balinton's behavior but, she did not want to have a confrontation with her because they did not get along. Appellant stated that the "vast amounts" of Lysol in the air made her cough more and Ms. Balinton started spraying more Lysol toward her with the same motion as the first time. Appellant stated that Ms. Balinton walked away from the area and, when she returned, she sprayed more Lysol at appellant who was still coughing. Appellant stated that Ms. Balinton sprayed up and down and side to side three to four feet from her face. Appellant stated that she felt dizzy, had a headache, a runny nose and had difficulty breathing. She stated that Ms. Balinton was intentionally harming her and stated that her acting supervisor, Lito Nunez, did not respond to her but walked away and she called Ray Fernando who said he would talk to someone at "P and DC."

In a statement dated May 22, 2002, a mail recovery clerk, Nattie Garces, stated that on that morning appellant came to her and smelled of some kind of chemical. She stated that

appellant “appeared to be upset and angry” and was shaking. Ms. Garces stated that Ms. Balinton had sprayed in another instance when someone was coughing.

In a statement dated May 22, 2002, Mr. Nunez stated that, while he was working on the computer by his supervisor’s desk, he started coughing due to a cold. He stated that the employee, Ms. Balinton, started spraying her work area “with something that smelled like ‘Lysol spray.’” Mr. Nunez stated that “[n]ot long after that [he] heard someone else coughing and [he] noticed that [Ms. Balinton] had taken out her can of spray again and started spraying around her work area.” He stated that he heard someone cough again coming from the same area and Ms. Balinton started spraying around her work area again. Mr. Nunez stated that he looked up to see who was coughing and noticed it was appellant and then finished his work. He stated that, when he got up to walk back toward the belt area, appellant called him and started to complain that Ms. Balinton was “spraying too much and that it was a safety hazard.” Appellant asked him to talk to Ms. Balinton about it. Mr. Nunez said that he told appellant that he would and, at the time he noticed Ms. Balinton standing six to seven feet away from appellant and “[r]ight after [he] acknowledged [appellant’s] complaint.” Mr. Nunez stated that appellant became agitated and said that she knew he would not “do anything” and she would call the acting “MRC” manager, Mr. Fernando, and file a complaint. Mr. Nunez stated that he wanted to calm appellant down but, when he asked appellant to walk with him, appellant turned away and headed for the telephone. Mr. Nunez stated that Ms. Balinton had stopped spraying and that, since she and appellant “had a run-in with each other in the past,” it would be better if he talked to Ms. Balinton later in private. Mr. Nunez stated that Mr. Fernando later called her into his office about the incident and he explained what happened. Mr. Nunez stated that he later talked to appellant in the parking lot by the dock area, explaining that he would talk to Ms. Balinton in private but, appellant believed that management was afraid to say anything to Ms. Balinton. Later Mr. Nunez said that Mr. Fernando called him and stated that he discussed the incident with Ms. Balinton and gave her a verbal warning to stop spraying in the work area.

In a statement dated May 22, 2002, Ms. Balinton stated that on that date appellant who worked on the other side of the room was coughing without covering her mouth. Ms. Balinton stated that “[b]ecause of the anthrax, rapid spread of TB [tuberculosis] and the meningitis [she] had as a young adult, [she] was very aware and cautious of [her] environment and surroundings.” Ms. Balinton stated that she sprayed some Lysol “as a barrier as [she] normally [did] to keep from catching other people’s unnecessary germs.” She stated that appellant did not say anything about it and she sprayed again. Ms. Balinton stated that, if appellant had said something or moved away, she would have become aware the spray was bothering appellant. Ms. Balinton stated that she did not point the spray at appellant or into her face or work area. She stated that two minutes later, appellant stood up and starting talking to Mr. Nunez about a safety hazard and stated that, if he did not do anything, she would call Mr. Fernando. Ms. Balinton stated that, without giving Mr. Nunez a chance to respond, appellant picked up the telephone and called Mr. Fernando. Ms. Balinton stated that she felt appellant lacked basic hygiene habits.

In a statement dated May 23, 2002, Ms. Balinton stated that in one incident she thought that appellant was about to slam a door on her, that she felt that she could no longer work with appellant because she “fear[ed]” what appellant might do to her and appellant’s hostility towards her “was high.”

In a disability noted dated June 10, 2002, appellant's treating physician, Dr. George D. Karalis, a Board-certified psychiatrist and neurologist, stated that appellant came in for therapy and remained anxious, fearful and depressed. Dr. Karalis stated that appellant could perform her work duties through June 27, 2002.

In a report dated July 10, 2002, Dr. Karalis noted that, in her May 23, 2002 Form CA-1, appellant described "what appears to be a substantive assault upon her by coworker [Ms.] Balinton, who on May 22, 2002 allegedly knowingly sprayed Lysol in the patient's face, of Professional strength, after which the patient experienced serious coughing and had a headache." He stated that appellant said she felt her coworker was "doing this intentionally," and she "was very upset." Dr. Karalis stated that the spraying of the Lysol occurred in the context of the patient's longstanding view that she had been abused and harassed at the jobsite and that unfortunately, has served to more concretize her suspiciousness of the motives of others and her isolationism and social withdrawal. He diagnosed post-traumatic stress disorder, which resulted from 1993 and 1994 stress claim, worsened by the Lysol incident. Dr. Karalis stated that the Lysol incident "has certainly heightened the degree of anxiety, anger, depression and other symptoms in this patient in comparison with her pre-Lysol condition." He stated that the cause of the intensification of the post-traumatic stress syndrome was the Lysol incident and but for the Lysol incident, appellant would not be "this severely upset emotionally." Dr. Karalis stated that appellant should avoid any contact with Ms. Balinton and care should be taken to prevent appellant's exposure to any hostile work environment.

In a report dated July 11, 2002, Dr. Karalis stated that appellant first contacted his office relative to job stresses at the employing establishment in 1989 and he diagnosed work-related post-traumatic stress disorder. He opined that appellant continued to suffer the psychiatric "residua" of the December 6, 1993 job stress wherein she was threatened and harassed by coworkers and supervisors. Dr. Karalis stated that on May 22, 2002 appellant complained that her coworker, Ms. Balinton, "deliberately sprayed Lysol" in her face, which initiated an episode of coughing. Appellant then felt dizzy and had a headache. He noted that appellant was "very upset" and "needed someone to talk to." She then filed a Form CA-1. Dr. Karalis stated that appellant was on leave "because of her inability to effectively perform her postal duties" and that she continued to need insight and/or supportive psychotherapy. He stated that appellant remained traumatized by the threats her supervisor, Sullivan, made against her, once with a knife and with pejorative anti-Lesbian comments made at the jobsite. Dr. Karalis stated that a constant and pervasive theme was her feeling of being overmonitored and overcriticized, which caused her to feel estranged from others at work.

By decision dated July 22, 2002, the Office of Workers' Compensation Programs denied the claim, stating that appellant did not provide any physical evidence to support that she sustained a physical condition as a result of the Lysol spraying and that regarding her emotional condition, appellant did not establish that there were any compensable performance of duty work factors. The Office did not accept as factual that Ms. Balinton sprayed Lysol at her intentionally as a form of assault or hostile behavior.

By letter dated July 31, 2002, appellant requested an oral hearing before an Office hearing representative, which was held on March 25, 2002. At the hearing, appellant's representative, Steve Kwok, stated that the Office placed an unfair burden on appellant to show

that the spraying of the Lysol was intentional and to disprove that Ms. Balinton took normal precautions. Mr. Kwok also stated that Ms. Balinton's use of Lysol violated company rules and Occupational Safety and Health Administration regulations prohibiting certain chemicals to be used in the office. Mr. Kwok stated that, when the Lysol spray hit appellant, the act of spraying became a battery and created a trauma and the evidence establishes that appellant sustained an emotional injury. He stated that appellant and Ms. Balinton were not on the best of terms.

In response to the hearing representative's question why she thought the spraying was intentional and constituted harassment or assault, appellant testified that she coughed when Ms. Balinton first sprayed the Lysol and then Ms. Balinton sprayed the Lysol again. Appellant testified that she did not say anything when Ms. Balinton first sprayed her because she was backed up with her work and had to finish it. She reiterated that Ms. Balinton was facing her and sprayed the Lysol. Appellant stated that she returned to work after the incident "around July" and no longer had to work with Ms. Balinton because the work unit had dissolved. Appellant stated that Mr. Nunez ignored her after the spraying incident and she called Mr. Fernando to complain to him. She stated that she and Ms. Balinton had "conflicts." Appellant stated that, before the third spraying, Ms. Balinton placed a box on appellant's desk to work there and sprayed her from a very short distance. Appellant stated that she subsequently went to the medical unit. She also stated that the Office accepted a prior claim, No. 13-0996306, she had filed for post-traumatic stress.

Appellant also submitted a physician's "[f]irst [r]eport of [o]ccupational [i]njury or [i]llness" dated May 22, 2002, in which her treating physician, Dr. Ruben Strekloff, stated that appellant was sprayed at with Lysol three times in a row by a coworker at work and felt dizziness and nausea. Dr. Strekloff checked the "yes" box to the question, "If occupational illness, specify etiologic agent and duration of exposure. Chemical or toxic compounds involved?" and diagnosed respiratory tract-irritation due to exposure.

By decision dated June 24, 2003, the Office hearing representative affirmed the Office's July 22, 2002 decision in part, stating that appellant failed to establish that she sustained an emotional condition in the performance of duty, as alleged. The Office hearing representative modified the Office's decision in part, stating that appellant established that she sustained a physical condition consisting of respiratory irritation due to chemical fumes and vapors.

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

To establish that he or she has sustained an emotional condition causally related to factors of her federal employment, appellant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to her condition; (2) rationalized medical evidence establishing that she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that her emotional condition is causally related to the identified compensable employment factors.¹

¹ See *Robert W. Johns*, 51 ECAB 137, 141 (1999).

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

To establish that she has sustained an emotional condition causally related to factors of her federal employment, appellant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to her condition; (2) rationalized medical evidence establishing that she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that her emotional condition was causally related to the identified compensable employment factors.⁴

In this case, appellant claimed that her coworker, Ms. Balinton, upset her intentionally spraying Lysol at her in their same workspace three times when appellant was coughing on May 22, 2002. Appellant stated that her immediate acting supervisor, Mr. Nunez, ignored her when she told him and when she called Mr. Fernando, he stated that he would talk to someone.

In her May 22, 2002 statement, Ms. Balinton stated that she merely sprayed the Lysol because appellant was coughing without covering her mouth and she, Ms. Balinton, was worried about germs. She denied pointing the spray at appellant or in her face or area.

In his statement, appellant's acting supervisor, Mr. Nunez, stated that he talked to appellant about the matter and stated that he would talk to Ms. Balinton in private. He did not do so, however, because after discussing the matter with Mr. Fernando, Mr. Fernando notified him that he had discussed the problem with Ms. Balinton and had given her a verbal warning not to spray any more Lysol in the work area.

Appellant has not established that Ms. Balinton sprayed appellant or appellant's workspace on May 22, 2002 in a hostile or malicious manner or as a form of assault. Ms. Balinton stated that she sprayed the area to protect herself from germs and she did not do it in an aggressive or offensive manner. Ms. Garces stated that Ms. Balinton had sprayed in some other instance when someone had coughed. It is well established that verbal altercations or abuse among coworkers may constitute a factor of employment.⁵ This does not imply, however,

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 *Robert W. Johns*, *supra* note 1.

⁵ *Mary A. Sisneros*, 46 ECAB 155, 163-64 (1994).

that every statement uttered or action in the workplace will give rise to coverage under the Act.⁶ Since there was no corroborating evidence that Ms. Balinton sprayed the Lysol at appellant or appellant's work space in a malicious or hostile manner or as a form of assault, appellant has not established a compensable factor of employment in this regard.⁷ Moreover, Mr. Nunez's statement that, he spoke with appellant and Mr. Fernando, contradicts appellant's assertion that Mr. Nunez ignored her. Appellant has not shown that Mr. Nunez acted unreasonably or abusively in addressing appellant's complaint about the spraying.⁸

As noted above, however, the Office hearing representative accepted as an employment factor that Ms. Balinton sprayed Lysol in appellant's work space. The question then becomes whether the medical evidence of record establishes that the spraying, even if unintentional or done without malice or hostility, caused or contributed to appellant's emotional condition.

Dr. Karalis' July 10 and 11, 2002 reports, do not establish that the spraying of the Lysol in itself contributed to appellant's emotional condition. In both his reports, Dr. Karalis described the Lysol incident as a "deliberate spraying" by Ms. Balinton or a "substantive assault" whereby Ms. Balinton "knowingly" sprayed Lysol into appellant's face. In his July 10, 2002 report, he described the Lysol incident as occurring in the context of appellant's being abused and harassed at the job site. Dr. Karalis' history of the Lysol incident is not accurate because the Office found that the Lysol spraying by Ms. Balinton was not a form of assault or a hostile act. Therefore, although Dr. Karalis concluded that appellant's emotional condition was aggravated by the Lysol incident, his opinion is of diminished probative value because his conclusion was not based on an accurate history of the incident.⁹ No other medical evidence establishes the requisite causal connection between the Lysol incident and appellant's emotional condition. Appellant has, therefore, failed to establish her claim.

⁶ See *Brian H. Derrick*, 51 ECAB 417, 421 (2000).

⁷ See *Curtis Hall*, 45 ECAB 316, 325 (1994).

⁸ See *Mary A. Sisneros*, *supra* note 5 at 163.

⁹ See *Vaheh Mokhtarians*, 51 ECAB 190, 195 (1999); *Joseph M. Popp*, 48 ECAB 624, 626 (1997).

The June 24, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 24, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member