

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VERONIQUE BANKS and U.S. POSTAL SERVICE,
PROCESSING & DISTRIBUTION CENTER, Milwaukee, WI

*Docket No. 03-784; Submitted on the Record;
Issued July 10, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

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

On September 14, 2002 appellant, then a 33-year-old mailhandler, filed a claim for an occupational disease due to sexual harassment. She attributed her emotional stress to being given a letter by a supervisor which contained a sexual proposition on the night of September 10 and 11, 2002.¹

By letter dated October 2, 2002, the Office of Workers' Compensation Programs advised appellant that it needed a specific description of the incidents to which she attributed her condition and a comprehensive medical report including the doctor's explanation how employment incidents contributed to her condition. Also on October 2, 2002 the Office requested that the employing establishment provide comments from a knowledgeable supervisor on the accuracy of appellant's statements.

Appellant submitted a copy of her September 12, 2002 interview with an employing establishment manager about the alleged harassment. Appellant stated that on the nights of September 9 and 10, 2002 she asked the supervisor of distribution operations, Larry Johnson, to change one of her scheduled days off from Tuesday to Thursday because of her daughter's school activities. Mr. Johnson asked her if her daughter's father attended school activities and that she told him "I am my daughter's father and mother" and that "some men are just donors." Appellant stated that at midnight Mr. Johnson placed a folded piece of paper in her hand and told her to read it and not to tell anybody. Appellant placed the paper in her apron and returned to work. At about 12:30 a.m. she read the paper, expecting it to say that she could have the days off. Appellant stated that upon reading the note she was shocked, showed it to a coworker and told an acting supervisor about it on the night of September 10, 2002.

¹ Appellant's regular work shift was from 10:00 p.m. to 6:30 a.m.

Appellant also submitted a copy of a note she wrote on September 10, 2002 stating that on September 9, 2002 she asked Mr. Johnson for Thursday night off and that she received a letter from Mr. Johnson asking her for a date Wednesday or Thursday night. She felt shocked and uncomfortable, and that she had never told Mr. Johnson she liked him or wanted to date him.

Appellant submitted a copy of the note from Mr. Johnson. It stated:

“Are we really serious about this? I am! Can we keep this private and personal and just between us two? No telling Lisa or Candice or anyone!! Do n[o]t forget I have six mouths to feed. [Four] are in college! I can do something besides donate sperm. You [a]re looking at and talking about a very very horny bastard. That [i]s why I [a]m finishing up my situation so I can be totally free. How about coming (get it ‘com’-ing) Thursday night all night!!?? If so let me know 688-1651 late aft’s. All for now!! Or Wednesday night!! (All night long.)” (Emphasis in the original.)

Appellant submitted two medical reports. In a report dated September 13, 2002, Dr. Louis Seno, a Board-certified family practitioner, stated:

“She brings with her a letter, or note, which is quite sexually explicit. As a result of receiving this note, she has been under a lot of stress. She is unable to sleep. She has had headaches, shakes, general fatigue and not feeling well.”

Dr. Seno diagnosed stress reaction secondary to sexual harassment and stated that he prescribed medication and gave her a note to be off work. In a report dated September 23, 2002, Dr. Lynn Telford, a Board-certified family practitioner, stated, “She remains off work and does not believe she can return to work with the person who initiated the sexual harassment. She has continued to have some mental and emotional instability and headache as a result of the incident.”

In an October 15, 2002 letter, Gary Kaiser, appellant’s supervisor, stated that appellant had been allowed to work the day shift for several months but was forced to return to her bid job on September 7, 2002. Mr. Kaiser stated, “The supervisor that [appellant] has alleged sexually harassed her has admitted some responsibility in the incident but he claims that [appellant] had initiated the exchange between them.”

The employing establishment submitted two statements from Mr. Johnson. A September 11, 2002 statement signed by Mr. Johnson states:

“I have not, to my knowledge, either by words or actions knowingly sexually harassed any employee in my area. The comments I make/made to people in general in that if they say I smell good or look sharp I return the compliment in words like you look nice, too or something of that nature. That [i]s the extent of any comments or action to the best of my knowledge.”

In a September 19, 2002 statement, Mr. Johnson stated:

“To set the record straight, I did not, I repeat, did not ‘deliberately’ commit an act of sexual harassment upon the person of [appellant]. I was, I thought, jokingly propositioned, proposed or persuaded by the initial actions of [appellant]. I do admit writing a ‘playful’ note to again thinking she was joking the whole time. Of that fact, I admit guilt and responsibility. But let me give you the entire background before I go too far. I greet and speak to all the employees in the same manner. Usually Hi, how’s it going? Men and women alike, black/white, whomever. I spoke to her this particular Monday evening, (approx[imately] 11:00 p.m.) and she had a half snarl/frown-smile look on her face. I asked her if everything’s okay and she said and I quote ‘My sperm donor’s gone.’ I said what did you say. She repeated the phrase ‘My sperm donor’s gone.’ I said quizzically What do you mean? ‘You know what I mean. All you men are good for is donating sperm inside us.’ (Word for word) Well, mine’s gone and I [a]m looking for another one or one to take his place (I [a]m not quite sure of the exact end phrase here). He did n[o]t want to pay any more so he had to go. Standing near the both of us were James Young, Wilbur Grimes, Billy Sneed and I believe Calvin Mallory. We all just looked at her and shook our heads half smiling half in disbelief. Since she and a few other people in the unit joked and talked that way, I, as supervisor, cautioned them about the tone and texture of that type of conversation. I also gave service talks on the topic of sexual harassment in the past so I was somewhat aware of their playfulness. But on to the main crux of the situation. About 10 minutes (or shortly less later), [appellant] came to the desk I was working at and asked me to change her off days from Tue[sday] [and] Wed[nesday] nights to Wed[nesday] [and] Thur[sday] nights. I told her that it would not be feasible since Mr. Sneed and Ms. Love had those off days already.

“I asked her to talk to them about a body for body switch. She said that she had spoken to them but they wouldn’t want to switch with her. I said I’ll see what I can do but no promises. Then I asked her wasn’t she kidding about the sperm donor thing. She said no and asked if I wanted to step in or fill in question of that nature. I, taking a cue from what I thought was a joke on me, said I don’t mind but I’m a poor man with four kids in college but I see let me think about it. I started to write down what I had just said and she was leaning on my left shoulder this whole time. Seriously if I had turned hard with my head I would have been within an eyelash of kissing her right breast. I backed off and as I was nearing the end of the note she picked it up from the desk (note I said picked it up from the desk!), and said ‘let me see it.’ I did not again I repeat did not give her the note! She took it from the desk and walked off with it. I figured she would bring it back with some kind of comment on it and laugh about and go on as usual. When she didn’t bring it back later I never gave it another thought. I thought it was all a joke. I still do! But obviously she took it a different way. Honestly if she had approached me in a serious tone and told me of the sexual harassment aspect I would have immediately apologized and told her I didn’t mean to imply any such notion. Like that incident and others similar, I gathered the impression that it was all in fun. Realizing now that it wasn’t and I should not have done such a thing I feel very terrible and I still am apologetic for it. I did not, (and I’ll say it for the last time), did not have the intention of intentionally committing an act of sexual

harassment on [appellant]. On that end of it I accept my total responsibility but I was asked, approached and propositioned first and I have witnesses to back me up. After talking to several people, many told me this lady had done this type of behavior many times before, (not that it's an excuse for what I did now). She also bragged after showing the note to several people, told them of her plan. I found/find that very odd and coincidental."

By decision dated January 10, 2003, the Office denied appellant's claim, finding inconsistencies in her allegations that Mr. Johnson had sexually harassed her.

The Board finds that the case is not in posture for decision.

The Board has held that actions of an employee's supervisor which the employee characterizes as harassment or discrimination may constitute a factor of employment giving rise to coverage under the Federal Employees' Compensation Act. However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions alone of harassment or discrimination are not compensable under the Act.²

The accounts of appellant and Mr. Johnson differ substantially as to what occurred on the night shift of September 9 and 10, 2002. Appellant noted having a conversation at work with Mr. Johnson in which she stated "some men are just donors" and thereafter was dispatching mail when she was approached by Mr. Johnson and given the note. Mr. Johnson, however, indicated that he was "jokingly propositioned" by appellant that evening and described the incident as one of sexual banter in the workplace. He acknowledged writing the note under circumstances in which appellant was present in his office and she then took the note away from him, apparently showing it to others. Although both appellant and Mr. Johnson listed witnesses, none of the persons identified as present on the shift were requested to provide information concerning their knowledge of the interaction of appellant and Mr. Johnson.

The evidence of record is one of conflicting accounts as to the events on the night shift of September 9 and 10, 2002. For this reason, the Board will remand the case for further development of the factual evidence by the Office. After such development as is appropriate, the Office should issue a *de novo* decision on appellant's allegation of harassment.

² Donna Faye Cardwell, 41 ECAB 730 (1990).

The decision of the Office of Workers' Compensation Programs dated January 10, 2003 is set aside and the case remanded for further development consistent with this decision.

Dated, Washington, DC
July 10, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member