U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VALERIE SPATES-MOORE and U.S. POSTAL SERVICE,
POST OFFICE, Huntington Beach, CA

Docket No. 03-947; Submitted on the Record;
Issued July 29, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS
MICHAEL E. GROOM

The issue is whether appellant sustained an emotional condition in the performance of her federal duties.

On September 15, 2001 appellant, then a 43-year-old letter carrier, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging harassment in her federal employment. She listed the date of injury as July 27, 2001. On July 27, 2001 appellant was called into a meeting with her supervisor, Jesse Vargas, to discuss a July 10, 2001 incident that resulted in appellant's suspension for insubordination. She told Mr. Vargas that he was retaliating against her because she had filed a law suit against the employing establishment. Appellant claimed that Mr. Vargas replied that he did not know what appellant was referring to and then threatened to, and subsequently did, call the police. She stated that she was removed from the premises and prevented from returning until she received psychological counseling.

In a September 17, 2001 report, Dr. John Deirmerijian, Board-certified in psychiatry and neurology, diagnosed appellant as having an adjustment disorder with an anxious mood. In an October 8, 2001 report, he added that appellant's emotional condition was related to her work with the employing establishment.

In a July 27, 2001 letter, Mr. Vargas, the customer service manager, wrote:

> "[Appellant was] placed in an off duty status (without pay) on July 27, 2001 … and will continue in this status … [because] retaining you on duty at this time could result in injury to self and others.
>
> "More specifically today, Friday July 27, 2001, while meeting with your steward and myself, you began yelling at me and calling me names and refused to follow instructions. In addition, you began yelling through a window to customers indicating postal management allowed pedophiles to be employed. Your behavior was disruptive and unprofessional. When verbally informed you were to leave

the premises because of your misconduct, you refused to follow direct orders and I had to elicit the assistance of the local police department…. You are prohibited from being on [the employing establishment's] premises … without advance authorization…."

In an August 28, 2001 letter to appellant, Jeanne Hannahs, the Postmaster, wrote:

"On August 21, 2001 you underwent a psychiatric medical evaluation performed by Dr. Melvin Schwartz (who) reported significant psychiatric findings which preclude you from returning to duty at this time. Dr. Schwartz … has prescribed that you seek … psychiatric treatment for a period of at least six to twelve weeks…. Once you are medically released to return to duty by your treating psychiatrist, it will be necessary for you to be reevaluated by the [employing establishment's] [m]edical [p]hysician prior to your return to duty.… I am rescinding your emergency placement in off duty status effective the date of this letter…."

The record contains a July 26, 2001 notice of suspension of 14 days issued to appellant for failure to follow instructions/insubordination.

In a July 27, 2001 statement, Mr. Vargas wrote that, while attempting to issue corrective action to appellant, with a union steward present, she became argumentative and yelled at him with disregard to all instructions and direct orders to stop. He indicated that appellant called him a liar and began to yell that he does not punish pedophiles and said she was going to tell postal customers in the lobby that the employing establishment hires pedophiles. Mr. Vargas indicated that appellant then pushed the pictures of his children off his desk and asked if he liked someone having sex with them. Appellant then went into the lobby and asked an elderly female customer how she would like it if someone were saying they wished to have sex with her young daughter. The police were subsequently called to assist in removing appellant from employing establishment's property.

The employing establishment submitted several witness statement that support the incident as described by appellant and Mr. Vargas; that there was an exchange of loud voices, that appellant spoke with a customer; and the police were called to the scene after she refused to leave the premises.

In an October 23, 2001 letter, the Office of Workers' Compensation Programs requested more information. In a November 6, 2001 letter, appellant wrote that on July 27, 2001 Mr. Vargas degraded and humiliated her when he called 911 and the police arrived. She said that Mr. Vargas falsely accused her of being a threat to others as well as herself and the police officers observed the incident, but made no arrests.

In a November 1, 2001 note, Dr. Deirmerijian wrote that appellant had suffered from depression and was totally disabled until October 29, 2001. He noted that appellant applied to return to work but the employing establishment refused to accept her medical documentation.

A November 21, 2001 decision by a dispute resolution team rescinded the 14-day suspension arising out of the July 10, 2001 incident. The arbitrator found that the employing establishment failed to establish "just cause" for the adverse employment action.

In a January 2, 2002 report, Dr. Deirmerijian again released appellant to return to work writing that she did not suffer from any psychiatric condition. On January 30, 2002 the employing establishment discharged appellant for failing to provide sufficient medical documentation. She subsequently filed a grievance.

The record contains a February 22, 2002 prearbitration decision that rescinded the July 27, 2001 emergency suspension without prejudice to either party because appellant provided medical documentation showing she was medically incapacitated during the suspension.

In a March 6, 2002 decision, the Office denied appellant's claim finding that she did not establish that her emotional condition was causally related to a factor of employment. In a March 18, 2001 letter, she requested a hearing.

In an August 2, 2002 decision, an arbitrator found that the employing establishment had insufficient evidence to terminate appellant for failing to produce the proper medical documentation and reversed the termination. She was then placed on paid administrative leave.

At the October 31, 2002 hearing, appellant reiterated her previous claims; namely, she described several actions of the employing establishment as harassment and retaliation. In a December 2, 2002 memorandum responding to appellant's testimony, Mr. Vargas denied any knowledge of appellant's lawsuit against the employing establishment prior to the July 27, 2001 incident.

In a January 17, 2003 decision, the hearing representative affirmed the March 6, 2002 decision finding that appellant had not established that her emotional condition arose out of a factor of employment. The hearing representative further found that, while the employing establishment erred in disciplining appellant on several occasions, the issue in question at the hearing was only the incident of July 27, 2001, in part because appellant filed a Form CA-1, claim for traumatic injury.

The Board finds this case is not in posture for 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 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.[1] On the other hand, the disability is not covered where it results from such factors as an

[1] 5 U.S.C. §§ 8101-8193.

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.[2]

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 employment factors.[3] This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[4]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[5] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[6]

In the present case, appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. By decisions dated March 6, 2002 and January 17, 2003, the Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that harassment and discrimination on the part of her supervisors contributed to his claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[7] 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 of harassment or discrimination are not compensable under the Act.[8] In the present case, the employing establishment denied that appellant was subjected to

[2] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[3] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[4] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[5] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[6] *Id.*

[7] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

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

harassment or discrimination and appellant has not submitted sufficient evidence to establish that she was harassed or threatened by her supervisor.[9] Appellant alleged that her supervisor, Mr. Vargas, harassed and threatened her when he called the police in response to a verbal confrontation the two were engaged in. But the statements by coworkers, including appellant's union steward, characterize Mr. Vargas' behavior as calm and professional. Appellant provided no corroborating evidence, such as witness statements, to establish that her supervisor threatened or harassed her. The witness statements in the record indicate that appellant reacted to the purposed discipline and became disruptive in the workplace. Appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[10] Although the handling of disciplinary actions is generally related to the employment, they are administrative functions of the employer and not duties of the employee.[11] However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[12]

The Board notes that the evidence of record indicates a possible error on two occasions. In a November 21, 2001 decision, a dispute resolution team rescinded the employing establishment's decision to issue appellant a notice of suspension arising out of the July 10, 2001 incident. Second, in an August 2, 2002 decision, an arbitrator reversed the employing establishment decisions to terminate appellant for failure to produce sufficient medical documentation and for refusing to allow appellant to return to work. These actions may establish error or abuse on behalf of the employing establishment. However, the Office failed to fully develop the record on these two issues. In the January 17, 2003 decision, the hearing representative in fact finds an error but dismisses further development or consideration of these factors because, according to the hearing representative, appellant's allegations only address the incident on July 27, 2002 incident. It is not clear from the record why he made that finding; nor is it clear from the record why the dispute resolution team and the arbitrator changed those decisions. Thus, the case record must be returned to the Office for further factual development with respect to these administrative matters.

[9] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[10] *See Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[11] *Id.*

[12] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

The Board further finds that appellant has not established error or abuse regarding the July 27, 2001 incident. She alleged that Mr. Vargas was retaliating against her for filing a lawsuit against the employing establishment, but Mr. Vargas stated that he did not know about the lawsuit. Appellant has offered no evidence that suggests he knew of the lawsuit. The mere fact that the employing establishment rescinded the emergency suspension does not establish error and abuse. The Board notes that in a prearbitration settlement the parties agreed, without prejudice to either party, to lift the suspension. The Board has long held that the mere fact personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse.[13]

However, the record is insufficiently developed with respect to a possible error in the administration of disciplinary actions of July 29 and November 21, 2001. The case will be remanded to the Office for further factual development as deemed necessary. After such development, the Office should issue an appropriate decision on this matter.

The decisions of the Office of Workers' Compensation Programs dated January 17, 2003 March 6, 2002 are affirmed, in part, and set aside for further development consistent with this decision of the Board.

Dated, Washington, DC
July 29, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[13] *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).