

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELWYN W. MANEGO and GOVERNMENT PRINTING OFFICE,
SATELLITE PRINTING PROCUREMENT OFFICE, New Orleans, LA

*Docket No. 03-401; Submitted on the Record;
Issued May 19, 2003*

DECISION and ORDER

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

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

On January 26, 1999 appellant, then a 43-year-old procurement technician, filed a claim alleging that she sustained anxiety, depression and an adjustment disorder in the performance of duty. Appellant attributed her condition to harassment and discrimination by her supervisor, Gerard J. Finnegan, beginning in 1998. The record indicates that appellant did not stop.¹

Appellant's position required a variety of clerical tasks; including reviewing print orders for contract compliance, providing information to process print orders, providing information to other branches of the agency, typing forms, compiling procurement information, preparing reports based on or rough drafts and performing financial calculations. The position was described as "somewhat complex due to the detailed nature of the tasks and the accuracy and speed essential for meeting deadlines."

Appellant alleged that she experienced anxiety and depression regarding her ability to perform her assigned duties, as Mr. Finnegan assigned her tasks, for which she was not trained. She noted that she was promoted to procurement technician in July 1994, but was only trained for some of the new skills required. Mr. Finnegan stopped appellant's training in May 1995 when he became assistant manager. In September 1996, Mr. Finnegan rated her "unsuccessful" as she followed previous training in preparing a compliance report. When appellant followed Mr. Finnegan's new instructions, he reprimanded her again. In May 1998, other employees in the office received four hours of one-on-one training with a computer consultant to learn a new office system, but Mr. Finnegan allowed appellant only 1 hour and 15 minutes of instruction.

¹ In March 5 and April 26, 1999 letters, the Office of Workers' Compensation Programs advised appellant of the type of factual and medical evidence needed to establish her claim and requested information from the employing establishment regarding appellant's allegations.

Mr. Finnegan allegedly assigned appellant to perform tasks on the new computer system, for which she was not trained, causing her significant anxiety. Appellant also alleged that Mr. Finnegan did not allow her to order basic office supplies necessary to perform her assigned duties and from May 1995 through May 1998, refused to repair computer problems that hindered preparation of cost estimate letters.

Appellant also attributed her condition to her regular work duties. She alleged that, from May 1995 through May 1998, Mr. Finnegan allotted her only two days to prepare required procurement reports that required several weeks of gathering contract information from different offices. Appellant asserted that Mr. Finnegan assigned her so many tasks that she could not keep track of them and would change instructions without notifying her. She alleged that her requests for assistance, overtime and compensatory time were all refused, although other employees were permitted to work overtime. In August 1998, Mr. Finnegan increased appellant's duties to include answering the office telephone, attend to contract procurement problems and amend contract folders. Mr. Finnegan also imposed additional deadlines on her work.

Appellant alleged harassment and retaliation by Mr. Finnegan based on her gender and race. Appellant alleged that Mr. Finnegan's imposition of additional work and deadlines in August 1998, was in retaliation for her filing an Equal Employment Opportunity grievance against him. She also alleged that on August 6, 1998 Mr. Finnegan issued a memorandum of counseling accusing appellant of unprofessional conduct, although she did not act unprofessionally and no formal counseling had taken place. Appellant stated that, from September 1996 through June 1997, Mr. Finnegan left many demeaning, hostile notes taped to her computer in full view of her coworkers.

Appellant also attributed her condition to being denied sick leave in September 1996 following surgery, being made to take annual leave instead of sick leave on December 14, 1998 and being denied flextime. Appellant alleged that Mr. Finnegan permitted Caucasian employees to use sick or annual leave and to work flextime schedules.²

Appellant submitted copies of notes Mr. Finnegan had left on her computer.

In an August 6, 1998 memorandum of counseling, Mr. Finnegan stated that appellant exhibited an "unprofessional attitude" as she accused him and a coworker of "discriminating against her for being black." Appellant made these accusations in a July 27, 1998 telephone conversation with Ginger Rogers of a regional office and at an August 5, 1998 meeting. Appellant did not initial the form. In an August 10, 1998 note, she stated that, "[u]nder duress," she had never been "unprofessional to anyone. Yes there is discrimination in the New Orleans office and it is directed towards me as I am the only Black female here."

² Appellant also submitted medical evidence in support of her claim. In a May 8, 1997 report, Dr. Jay W. Seastrunk, Jr., an attending psychiatrist, stated that appellant was under medical care and disabled for work due to "extreme depression." In a January 11, 1999 report, Dr. Robert Ancira, an attending psychiatrist, diagnosed an adjustment disorder with mixed anxiety and depressed mood. Dr. Ancira noted that appellant had experienced "stress at work" for 10 years and had "current conflicts" with her supervisor, including not being allowed to complete training. He noted that, although appellant had been promoted, Mr. Finnegan kept appellant from performing her new job duties. Dr. Ancira noted that appellant's office only had four employees.

In an August 6, 1998 letter, appellant alleged that Mr. Finnegan met with her in his office on August 5, 1998 regarding her remarks at a meeting that day regarding “tension” between Debra Hainsborough and appellant. Although Mr. Finnegan did not state that the meeting was a formal counseling session, he presented her with a memorandum of counseling on August 6, 1998.

In a May 1999 letter, Mr. Finnegan noted that he changed compliance report procedures, but that he fully informed appellant of such changes. Mr. Finnegan noted that when informed of computer problems he would ask the office responsible to be contacted or the individual to contact to repair the computer problems. He noted that office supplies were ordered when needed. Mr. Finnegan explained that playing computer games or openly relaxing at one’s desk was not considered a special privilege. Regarding appellant’s allegation of overwork, he noted that in July and August 1998, he gave appellant additional duties, which she should have been performing previously, but that he had performed them for a period as appellant had a significant workload. Mr. Finnegan stated that he placed notes on appellant’s computer, but that these were placed in envelopes. Mr. Finnegan noted that appellant received less training than other coworkers, but that her duties did not require additional training. He alleged that no one in the office was granted overtime. Regarding the August 5, 1998 counseling, Mr. Finnegan stated that he did not place the letter of counseling in appellant’s personnel file as he wanted to give her a “second chance” to correct the “problem.” He denied appellant’s allegations of discrimination on the basis of race and sex.

On July 28, 1999 the Office asked Mr. Finnegan to elaborate on appellant’s account that Ms. Hainsborough yelled at her. Mr. Finnegan responded that this incident happened when he was out of the office. When he asked appellant and Ms. Hainsborough of their views of the incident, each stated that they did not yell at each other.

By decision dated July 29, 1999, the Office denied appellant’s claim on the grounds that appellant had not established a compensable factor of employment.

On October 27, 1999 letter appellant requested reconsideration. Appellant alleged that Mr. Finnegan did not provide complete information regarding her job duties, which also included timekeeping, answering the telephone, taking bids, processing small purchase requests, preparing reports and letters, filing, photocopying, handling repair requests and various clerical tasks.

The record indicates that appellant’s October 27, 1999 request for reconsideration was not associated with her case record. Appellant again requested reconsideration in an April 12, 2002 letter. She submitted additional evidence.

In an August 20, 1998 certificate, Dr. Mark R. Holdiness, an attending psychiatrist, stated that appellant was under his care from August 17 to 31, 1998 for stress and anxiety. He released appellant to return to work on August 31, 1998.

In a June 21, 2002 letter, the Office advised appellant that her case would be reopened for development of her October 27, 1999 and April 12, 2002 requests for reconsideration.

By decision dated November 4, 2002, the Office denied modification of the July 29, 1999 decision. The Office found that Dr. Holdiness’ August 20, 1998 certificate did not contain a

history of condition, diagnosis, description of any causative incidents, or discuss causal relationship. The Office further found that appellant's April 12, 2002 letter and the March 21, 2002 letter from the employing establishment, also did not establish any compensable factors of employment.

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

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. When an employee experiences an emotional reaction to his or her regular or specially assigned work duties or to a requirement imposed by the employment, or has fear and anxiety regarding his or her ability to carry out his or her duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment and comes within the scope of coverage of the Federal Employees' Compensation Act. On the other hand, where the disability results from an employee's emotional reaction to employment matters but such matters are not related 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.³

Appellant attributed her emotional condition in part due to Mr. Finnegan denying her the office supplies needed to do her job and failing to timely repair her computer and interfering with her assigned duties. Allegations regarding inadequate equipment relate to administrative or personnel matters, unrelated to appellant's assigned duties and does not fall under coverage of the Act.⁴ The Board has found, however, 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.⁵ Mr. Finnegan stated that he did not allow appellant to order office supplies unless the items requested were needed. The Board finds that the evidence does not establish error or abuse. The evidence does not support appellant's allegations that Mr. Finnegan did not timely address computer repairs when required.

Appellant also alleged that her claimed emotional condition was due to her regular and specially assigned duties. The Board has held that performance of one's duties may give rise to a compensable factor of employment.⁶ The Board notes that appellant's position required detailed tasks done with the accuracy and speed to meet deadlines. Appellant alleged that Mr. Finnegan increased her workload in July and August 1998 and did not grant her overtime. Mr. Finnegan corroborated that, in July and August 1998, he gave appellant additional tasks, which he had

³ *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Brian H. Derrick*, 51 ECAB 417 (2000).

⁵ *See Richard Dube*, 42 ECAB 916 (1991).

⁶ *Sandra F. Powell*, 45 ECAB 877 (1994); *William P. George*, 43 ECAB 1159 (1992); *Georgia F. Kennedy*, 35 ECAB 1151 (1984).

performed for a period, due to her significant workload. The evidence of record is sufficient to establish a compensable factor of employment pertaining to appellant's regular and specially assigned work duties.

Appellant alleged a lack of adequate training. She alleged that, in May 1995, Mr. Finnegan terminated her training for the procurement technician position, to which she had been promoted in July 1994 and that Mr. Finnegan denied her adequate computer training in May 1998. However, appellant did not specify, which type of training Mr. Finnegan cancelled or denied, such as course or workshop titles and the date they were offered. Mr. Finnegan noted that appellant received less training than her coworkers, but that her position did not require additional training. Appellant did not submit sufficient evidence to establish that she was denied computer training in May 1998, necessary for her to perform her assigned duties. Thus, she has not established a compensable factor of employment in this respect.

Appellant also alleged harassment and discrimination by Mr. Finnegan, from May 1995 onward, based on gender and race. She also alleged that he posted notes on her computer, did not permit her to relax at her desk and denied her needed equipment and training. In order to establish compensability under the Act, however, there must be evidence that harassment did, in fact, occur. The Board notes that unfounded perceptions of harassment do not constitute an employment factor and that mere perceptions are not compensable under the Act.⁷ Appellant has not submitted sufficient evidence to establish her allegations of harassment or discrimination. Appellant alleged that a series of notes from Mr. Finnegan regarding errors appellant made in entering computer data, issuing a letter prematurely, leaving a postage meter on overnight and delaying in delivering a package, also constituted harassment. However, the Board finds that these notes constitute normal supervisory review of work without evidence of error or abuse. Appellant alleged that the notes were posted openly and could be read by her coworkers. However, Mr. Finnegan indicated that he left these notes in closed envelopes. Appellant did not provide evidence regarding the notes being openly posted. Also, the Board has held that supervisory inquiries into employee conduct are actions taken in an administrative capacity and are not considered compensable unless error or abuse is established.⁸ Thus, appellant has not established that these notes constitute harassment.

Appellant also alleged that she experienced anxiety and depression regarding conflicting or incorrect instructions in preparation of compliance reports in September 1996. However, a reaction to instruction itself is not compensable, as the Board has held that work assignments given by supervisors in the exercise of supervisory discretion are actions taken in an administrative capacity.⁹

Regarding appellant's reaction to the August 6, 1998 memorandum of counseling, the Office found that disciplinary actions are not considered to be in the performance of duty.¹⁰ The

⁷ *Kathleen D. Walker*, 42 ECAB 603 (1991).

⁸ *Sherry L. McFall*, 51 ECAB 436 (2000).

⁹ *Robert Knoke*, 51 ECAB 319 (2000).

¹⁰ *See Larry D. Passalacqua*, 32 ECAB 1859 (1981).

Board has held that these disciplinary actions 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.¹¹ In this case, there is sufficient evidence of record to establish that Mr. Finnegan's actions were justified. During the August 5, 1998 meeting with Mr. Finnegan, appellant admitted that there was an ongoing conflict between her and Ms. Hainsborough and that this tension affected the work environment. The Board finds that it was reasonable under these circumstances for Mr. Finnegan to have counseled appellant. Also, appellant has not provided sufficient evidence to establish that Mr. Finnegan tricked her into a counseling session on August 5, 1998. Thus, appellant has not established a compensable employment factor under the Act in this respect.¹²

Regarding appellant's allegations regarding being denied sick leave in September 1996 and December 1998, the Board has held that emotional reactions regarding denials of leave are not compensable work factors where appellant offered no independent evidence that the employing establishment erred or acted abusively in these matters.¹³ In this case, appellant has not offered sufficient evidence to establish error or abuse regarding Mr. Finnegan's actions regarding her use of leave.

Appellant also attributed her emotional condition to receiving a lowered performance rating in September 1996. The Board has held that reactions to assessments of performance are not covered by the Act unless error or abuse is shown.¹⁴ As appellant did not submit evidence clearly demonstrating that the September 1996 rating constituted error or abuse, appellant's reaction to it is not compensable.¹⁵

As appellant has a compensable factor under *Cutler* the case will be remanded to the Office for consideration of the medical evidence. Following this and any other development deemed necessary, the Office shall issue a *de novo* decision in the case.

¹¹ See *Jimmy Gilbreath*, 44 ECAB 555 (1993).

¹² See *Frederick D. Richardson*, 45 ECAB 454 (1994).

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

¹⁴ *Effie O. Morris*, 44 ECAB 470 (1993).

¹⁵ See *Gary M. Carlo*, 47 ECAB 299 (1996).

The decision of the Office of Workers' Compensation Programs dated November 4, 2002 is hereby set aside and the case remanded to the Office for further development consistent with this decision and order.

Dated, Washington, DC
May 19, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member