United States Department of Labor
Employees' Compensation Appeals Board

M.F., Appellant	)	
and	)	**Docket No. 07-233**
	)	**Issued: April 6, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Texarkana, TX, Employer	)	

Appearances:
James L. Cook, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 3, 2006 appellant filed a timely appeal from an August 7, 2006 decision of the Office of Workers' Compensation Programs, denying her claim for an emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant's claimed emotional condition was causally related to a compensable factor of her federal employment.

FACTUAL HISTORY

On September 1, 2004 appellant, then a 53-year-old review clerk, filed an occupational disease claim alleging that she developed an emotional condition beginning August 1, 2003 due to sexual harassment from her immediate supervisor, Norman Jarvis. She alleged that Mr. Jarvis made sexual advances toward her which included serenading her with songs. Appellant alleged that on August 1, 2003 he followed her and asked for her home telephone number several times.

On August 11, 2004 Mr. Jarvis yelled at her in the break room to "stop licking your lips." He sometimes approached her from behind and sang love songs. On one occasion when appellant walked to the restroom, Mr. Jarvis made a sucking sound with his mouth, asked if she needed him to go to the restroom with her and said, "You know what I could do for you." Appellant threatened to report the incidents but he did not stop. Mr. Jarvis became hostile when she did not respond to his advances. Appellant spoke to her second level supervisor, Buddy Giles.

In a September 4, 2004 report, Mr. Giles stated that he had investigated appellant's allegations of sexual harassment by Mr. Jarvis but found no witnesses to verify her allegations.

On October 22, 2004 the Office asked appellant to provide additional evidence to include a detailed description of incidents or conditions that contributed to her emotional condition, with specific information such as relevant dates, locations, employees involved and what occurred.

On November 10, 2004 Dr. Shawn Stussy, an attending family practitioner, stated that appellant had been harassed at work for an extended period of time. Appellant developed anxiety and depression. She was being treated by a psychologist.[1]

By decision dated March 4, 2005, the Office denied appellant's claim on the grounds that the evidence did not establish that she was sexually harassed by her supervisor.

Appellant requested an oral hearing that was held on May 24, 2006. She testified that Mr. Jarvis had asked her to have sex with him. Appellant responded by going into his office, slamming the door and asking what his problem was. She informed Mr. Giles of the problem. On one occasion appellant was walking to the restroom when Mr. Jarvis asked if she wanted him to go with her. Mr. Jarvis made a "slurping" sound. Appellant confronted him several times in private and threatened to call the police. On August 1, 2003 she left work to undergo surgery. Mr. Jarvis asked for her home telephone number five times on the evening before she stopped work and also asked if she wanted his number. Appellant told him that he did not need her telephone number and she did not need his because the employing establishment knew how long she would be on leave. When she returned from her surgery, he went to her office door and stared at her. Once, when appellant was talking to Michael Bursey, Mr. Jarvis screamed at her. Mr. Jarvis sang songs about appellant being his "shoop shoop woman."[2] On August 11, 2004 he told her, in front of another employee, to stop licking her lips.

Appellant submitted additional evidence at the hearing. In an August 12, 2004 statement, Virginia White stated that she told appellant that Mr. Jarvis might be attracted to her but did not know how to express himself. Ms. White thought that appellant might be attracted to Mr. Jarvis and suggested that she invite him to her house for dinner where they might become "intimate." She indicated that appellant and Mr. Jarvis joked with each other on several occasions. In a January 17, 2006 statement, Eloise Neighbors stated that Mr. Jarvis sometimes called appellant's

[1] Appellant also submitted reports from a licensed clinical social worker. However, the Board notes that the reports of a social worker do not constitute competent medical evidence as a social worker is not a "physician" as defined by 5 U.S.C. § 8101(2). *Phillip L. Barnes*, 55 ECAB 426 (2004).

[2] Appellant explained that this term meant a woman used for sexual pleasure.

name and asked why she was looking at him. Mr. Jarvis spoke to her in a "rude" and "rough" manner.[3] He sometimes yelled at her to work faster or move to a different location. On one occasion Ms. Neighbors and appellant were discussing candy they enjoyed as children such as "Sugar Daddy" candy and Mr. Jarvis stated that he had been a "sugar daddy" with a Cadillac at one time.[4] On May 24, 2006 Mr. Bursey stated that he witnessed hostile and abusive treatment of appellant by Mr. Jarvis but provided no specific examples. On one occasion appellant told Mr. Bursey that Mr. Jarvis was verbally harassing her. Mr. Bursey grabbed Mr. Jarvis by the arm and told him to leave her alone. He asked her why Mr. Jarvis harassed her and she just shrugged her shoulders.[5] Mr. Jarvis sometimes yelled at appellant from across the room to give her instructions. Appellant also submitted an additional medical report from Dr. Stussy in which he stated that appellant was harassed at work and developed anxiety.

Appellant submitted a copy of an April 26, 2006 Equal Employment Opportunity (EEO) decision.[6] In that decision, the administrative law judge found that she failed to establish a *prima facie* case of discrimination[7] or sexual harassment against Mr. Jarvis.[8]

By decision dated August 7, 2006, an Office hearing representative affirmed the March 4, 2005 denial of appellant's claim but modified the decision to reflect that appellant failed to establish any compensable work factors.

LEGAL PRECEDENT

To establish a claim that she sustained an emotional condition in the performance of duty, an employee must submit the following: (1) medical evidence establishing that she has an

[3] Ms. Neighbors did not provide specific examples of what Mr. Jarvis said to appellant.

[4] Ms. Neighbors testified at the EEO hearing that she and appellant laughed about Mr. Jarvis's sugar daddy comment and went back to their conversation. She never heard him yell at anyone else but acknowledged that he had a habit of speaking loudly. Ms. Neighbors testified that she heard Mr. Jarvis sing but she did not remember him singing to appellant.

[5] Mr. Bursey testified at the EEO hearing that Mr. Jarvis sometimes yelled at appellant to get back to work. However, he never witnessed Mr. Jarvis say or do anything of a sexual nature concerning appellant.

[6] Appellant's allegations in her EEO complaint were the same as in her compensation claim.

[7] In her EEO claim, appellant alleged discrimination on the basis of race, religion, gender and age.

[8] At the EEO hearing, Mr. Jarvis testified that appellant often walked around and talked to other employees instead of working. He frequently had to tell her to get back to work. Mr. Jarvis stated that he followed all employees, not just appellant, to ensure that work was done. He denied appellant's allegations of harassment. Specifically, Mr. Jarvis denied singing to her, asking for her telephone number or asking to go to the restroom with her. He denied that appellant ever went to his office, slammed the door and asked what his problem was. Mr. Jarvis sometimes sang songs at work but no songs were directed at appellant. He denied ever telling appellant to "stop licking her lips." Mr. Jarvis was reassigned for three weeks while the employing establishment investigated appellant's allegations. He returned after the investigation was concluded with no finding that he had sexually harassed appellant. Mr. Giles testified that an investigation into appellant's allegations of sexual harassment by Mr. Jarvis was performed. The conclusion was that no sexual harassment occurred. Witnesses stated that Mr. Jarvis sang songs but not to anyone in particular. No employee heard Mr. Jarvis ask for appellant's telephone number. If Mr. Jarvis saw any employee talking, not just appellant, he asked the employee to get back to work.

emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.[9]

The Board has held that 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 employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the medical evidence establishes that the disability results from an employee's emotional reaction to her regular or specially assigned employment duties or to a requirement imposed by the employing establishment, the disability comes within coverage of the Federal Employees' Compensation Act. The same result is reached when the emotional disability resulted from the employee's emotional reaction to the nature of her work or her fear and anxiety regarding her ability to carry out her work duties.[10]

By contrast, there are disabilities having some kind of causal connection with the employment that are not covered under workers' compensation law because they are not found to have arisen out of the employment, such as when disability results from an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.[11]

The Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable work factors of employment, which may be considered by a physician when providing an opinion on causal relationship and which are not deemed compensable factors of employment and may not be considered.[12] As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim; the claim must be supported by probative evidence.[13]

ANALYSIS

Appellant alleged that Mr. Jarvis sexually harassed her. 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 a compensable employment factor.[14] However, for harassment and discrimination to give rise to a compensable disability under the Act, there must be evidence that

[9] *Pamela D. Casey*, 57 ECAB ___ (Docket No. 05-1768, issued December 13, 2005); *George C. Clark,* 56 ECAB ___ (Docket No. 04-1573, issued November 30, 2004).

[10] *Id.; see also Lillian Cutler,* 28 ECAB 125 (1976).

[11] *Id*.

[12] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[13] *See Charles E. McAndrews*, 55 ECAB 711 (2004).

[14] *See Cyndia R. Harrill*, 55 ECAB 522 (2004).

harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Appellant's burden of proof cannot be discharged with allegations alone. She must support her charges with probative and reliable evidence.[15]

The Board finds that only one of the incidents described by appellant is factual. On one occasion Mr. Jarvis told her and Ms. Neighbors that he was once a "sugar daddy" and drove a Cadillac. Mr. Jarvis did not explain what he meant by the term "sugar daddy." His comment was in response to hearing appellant and Ms. Neighbors mention Sugar Daddy candy. Ms. Neighbors testified at the EEO hearing that she and appellant laughed about Mr. Jarvis's sugar daddy comment and went back to their conversation. In view of the context, the comment made by Mr. Jarvis does not constitute sexual harassment. This allegation is not deemed a compensable factor of employment.

The Board finds that the evidence of record does not establish that the remaining allegations by appellant are factual. Appellant alleged that Mr. Jarvis serenaded her with songs; asked for her telephone number several times on August 1, 2003 and asked if she wanted his number; on August 11, 2004 Mr. Jarvis yelled at her and told her to stop licking her lips; that Mr. Jarvis once made a sucking sound with his mouth and asked what he could do for her when she was going to the restroom.

Ms. White stated that she told appellant that Mr. Jarvis might be attracted to her but did not know how to express himself. She thought that appellant might be attracted to Mr. Jarvis and suggested that appellant invite him to her house for dinner where they might become intimate. Ms. White indicated that appellant and Mr. Jarvis joked with each other on several occasions. She has not described any incidents that support appellant's allegations that Mr. Jarvis sexually harassed her. Ms. Neighbors stated that Mr. Jarvis sometimes called appellant's name and asked why she was looking at him. Mr. Jarvis spoke to her in a rude manner but she provided no specific examples of what Mr. Jarvis said to appellant. He sometimes yelled at her to work faster or move to a different location. Ms. Neighbors testified that Mr. Jarvis spoke loudly all the time. She testified that she heard Mr. Jarvis sing but she did not remember him singing to appellant. Ms. Neighbors indicated that Mr. Jarvis was rude to appellant but provided no specific examples. She did not provide any statements establishing that Mr. Jarvis sexually harassed or discriminated against appellant. Mr. Bursey stated that he witnessed hostile and abusive treatment of appellant by Mr. Jarvis but he did not provide specific details of incidents that he personally witnessed. On one occasion appellant told him that she was upset because Mr. Jarvis was verbally harassing her. Mr. Bursey grabbed Mr. Jarvis by the arm and told him to leave her alone. He asked her why Mr. Jarvis harassed her and she just shrugged her shoulders and did not explain. Mr. Jarvis sometimes yelled at appellant from across the room to give her instructions or tell her to get back to work. However, Mr. Bursey stated that he never witnessed Mr. Jarvis say or do anything of a sexual nature concerning appellant. The witness statements of these employees are too general to establish harassment. Therefore, these statements do not establish a compensable employment factor in this regard.

[15] *Id.*

At the EEO hearing, Mr. Jarvis testified that appellant often walked around and talked to other employees instead of working. He frequently had to tell her to get back to work. Mr. Jarvis stated that he followed all employees, not just appellant, to ensure that work was done. He denied appellant's allegations of harassment. Specifically, Mr. Jarvis denied singing to her, asking for her telephone number or asking to go to the restroom with her. He sometimes sang songs at work but no songs were directed at appellant. Mr. Jarvis denied ever telling appellant to "stop licking her lips." He stated that he was reassigned for three weeks while the employing establishment investigated appellant's allegations. Mr. Jarvis returned after the investigation was concluded with no finding that he had sexually harassed her.

Mr. Giles stated that he had investigated appellant's allegations of sexual harassment by Mr. Jarvis but found no witnesses to verify her allegations. Witnesses stated that Mr. Jarvis sang songs but not to anyone in particular. No employee heard Mr. Jarvis ask for appellant's telephone number. If Mr. Jarvis saw any employee talking, not just appellant, he asked the employee to get back to work. The conclusion of the investigation was that no sexual harassment occurred.

Appellant submitted a copy of an EEO decision concerning her allegations of discrimination and sexual harassment. The Board has held that grievances and EEO complaints, by themselves, do not establish wrongdoing by an employing establishment.[16] In the EEO decision in this case, the administrative law judge found that appellant failed to establish that Mr. Jarvis sexually harassed or discriminated against appellant. There is no EEO decision or settlement agreement of record containing findings of error or abuse by employing establishment personnel. Consequently, appellant's EEO materials are not sufficient to establish a compensable factor of her employment.

Unsubstantiated allegations concerning the employer are not accepted as factual.[17] Appellant has failed to establish a factual basis for these allegations. Her allegations are not supported by specific, substantive, reliable or probative factual evidence of record. As there is insufficient evidence to establish these allegations as factual, they cannot be considered as possible compensable employment factors. The Board finds that there is insufficient evidence to establish harassment or discrimination by Mr. Jarvis in his treatment of appellant. Therefore, appellant has failed to establish a compensable employment factor in this regard. Appellant failed to establish that her emotional condition was causally related to a compensable factor of employment. Therefore, the Office properly denied her claim.

CONCLUSION

The Board finds that appellant failed to establish that her emotional condition was causally related to a compensable factor of employment.[18]

[16] *Charles D. Edwards*, 55 ECAB 258 (2004).

[17] *Cyndia R. Harrill*, *supra* note 14.

[18] Unless appellant alleges a compensable factor of employment substantiated by the record, it is unnecessary to address the medical evidence. *See Barbara J. Latham*, 53 ECAB 316 (2002); *Garry M. Carlo*, 47 ECAB 299 (1996).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 7, 2006 is affirmed.

Issued: April 6, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board