

**United States Department of Labor
Employees' Compensation Appeals Board**

L.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Belleville, MI, Employer**

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**Docket No. 07-57
Issued: July 18, 2007**

Appearances:
Steven H. Stilman, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 5, 2006 appellant, through her attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated July 10, 2006 finding that she had not established an emotional condition causally related to her federal employment. 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 has met her burden of proof in establishing that she developed an emotional condition due to factors of her federal employment.

FACTUAL HISTORY

On July 20, 1999 appellant, then a 41-year-old distribution clerk, filed a traumatic injury claim alleging that due to sexual and nonsexual harassment by supervisors and coworkers she sustained stress, anxiety and fear. She stopped work on May 28, 1999. In a note dated May 28, 1999, Dr. Leon McDougle, a Board-certified family practitioner, indicated that appellant was totally disabled until June 16, 1999 due to work-related stress and anxiety. On June 29, 1999 he

indicated that appellant's disability continued through August 20, 1999. The employing establishment controverted appellant's claim on July 30, 1999.

In a letter dated August 5, 1999, the Office requested additional factual and medical information from appellant. The Office noted that appellant submitted disability slips from Dr. McDougle and a July 26, 1999 statement from Raymond Baert, appellant's supervisor. Appellant submitted a letter of warning dated June 16, 1995 asserting that she failed to account for a registered letter. The letter of warning was reduced on August 24, 1995. The employing establishment issued a letter of removal on September 24, 1999 effective November 5, 1999.

Appellant filed an Equal Employment Opportunity (EEO) complaint and alleged that she had a dispute over the mail with her coworker Robin Ely on May 26, 1999. She contended that Postmaster Carol Betchel yelled at her. Appellant alleged that Mr. Baert had humiliated and embarrassed her in front of another employee.

Debra S. Ely, a letter carrier at the employing establishment, denied ever witnessing any inappropriate contact or actions between appellant and Mr. Baert, supervisor of customer services.

By decision dated September 7, 1999, the Office denied appellant's claim for an emotional condition finding that she failed to substantiate a compensable factor of employment.

Dr. Sudhir Lingnurkar, a physician, completed a note on April 25, 2000. It was his opinion that appellant was unable to return to work.

In a statement dated September 6, 2000, Mr. Baert denied ever touching appellant's back or whispering in her ear. He never asked appellant out to dinner and had never stroked her hair. Mr. Baert stated that he generally shook the employees' hands when he came into work, but denied rubbing his fingers in the palm of her hand. He stated, "It may be true that I held the claimant's hand and walked her over to her assignment on the floor." Mr. Baert denied any sexual conversations in the swing room other than appellant's discussion of her honeymoon. On September 26, 2000 he denied touching appellant's back with his chest when standing behind her to observe her sorting letters and working dispatch. Mr. Baert noted that it may have appeared that he was whispering in appellant's ear when he was speaking softly to her while giving her instructions on her next work assignment.

In a letter dated September 13, 2000, the Office requested additional information in support of appellant's September 6, 2000 reconsideration request.

On October 10, 2000 appellant stated that she had filed a complaint with the EEO Commission. She denied any personal relationship with Mr. Baert and she had invited all supervisors to her wedding. She alleged that Mr. Baert's inappropriate behavior began within a few weeks of her arrival at the employing establishment. Appellant stated that he began to talk to her when she returned from carrying mail and informed her that he had been married too long. Appellant stated that Mr. Baert walked up behind her and whispered her next assignment in her ear. She also alleged that he ran his hand down the back of her hair and told her how soft her hair was. Appellant asserted that Mr. Baert shook her hand and rubbed his middle finger in her palm and that this progressed from everyday to several times a day. She alleged that he asked

her to dinner or out for a drink two or three times a week. Appellant stated that she did not experience sexual harassment from other employees or supervisors.

An EEO counselor addressed appellant's allegations against Mr. Baert, including that the handshakes he gave her implied that he wanted to have sex with her. The counselor noted that Mr. Baert forced appellant to perform assignments that were below her seniority level. She stated that appellant felt that Mr. Baert's wife and Patti Gurdzinskas, another supervisor's wife, received better assignments and assignments that appellant had requested despite appellant's greater seniority. Appellant alleged that Mr. Baert prevented her from conversing with her union representative on two occasions. She alleged that Postmaster Carol Bechtel yelled at her when she declined to perform a function presented her by Robin Ely. Appellant stated that, in the lunch room her coworkers frequently discussed sexual acts and the sexual activities of others. She alleged that Mr. Baert was aware of these discussions and did not prevent such discussions. Appellant stated that Supervisor Ken Holeski tried to fire her for repeatedly failing to report for fitness-for-duty examinations.

Appellant submitted a statement on October 30, 2000 and repeated her allegations concerning sexual harassment by Mr. Baert. She became afraid of Supervisor Holeski when he became angry after she requested his help in moving two all purpose containers (APC's). Appellant stated that during the beginning of the week of May 15 to 21, 1999 Mr. Baert gave her a direct order to relieve Rose Rodriquious as she had the lowest seniority. Later in the week he again directed appellant to perform "post" when a lower seniority employee was present. Appellant stated that during the following week Mr. Baert interrupted her conversation with her union representative to order her to move APC's. She stated that her work was monitored, that Postmaster Bechtel yelled at her regarding the location of a stamp

Mr. Baert completed a statement on November 6, 2000 and denied appellant's allegations of sexual harassment and disparate treatment.

The Office denied appellant's claim by decision dated November 15, 2000. The Office found that appellant had failed to provide any documentation or witness' statements to support that Mr. Baert's actions occurred as alleged.

Appellant, through her attorney, requested reconsideration on April 11, 2001. Dr. Lary R. Berkower, a Board-certified psychiatrist, completed a report dated March 27, 2001 and noted appellant's allegations that there was "a great deal of sexual acting out at her place of employment." He reported that Mr. Baert repeatedly touched appellant including rubbing her hair, placing his chest on her back, whisper in her ear and hold her hand as well as rubbing his finger in her palm. Dr. Berkower reported that as a result of appellant's refusal to have sex with Mr. Baert she was given unfavorable jobs. He diagnosed major depressive disorder and opined that the circumstances of appellant's employment, including the atmosphere of persistent gossiping and sexual acting out, touching by Mr. Baert, yelling and assignment of low seniority work "played a crucial and direct role in disrupting this individuals psychic equilibrium."

The Office denied appellant's claim by decision dated April 27, 2001. In an order dated January 10, 2003,¹ the Board remanded the claim for reassemblage of the record, including appellant's April 11, 2001 request for reconsideration and an appropriate decision.

In a letter dated April 17, 2006, the Office informed appellant and her attorney that medical evidence referenced in his April 11, 2001 request for reconsideration was not currently present in the case record due to the implementation of a new computer system. The Office noted that it did not have a complete file and requested any available documentation.

In a report dated October 6, 1999, Dr. Kenneth Kron, MD., performed a fitness-for-duty examination and related appellant's allegations of Mr. Baert's touching, her refusal of his advances and the subsequent inappropriate work assignments. He diagnosed a history of depression and recommended that appellant transfer away from Mr. Baert.

Appellant resubmitted a report dated October 12, 2000 from Dr. McDougle diagnosing major depression and recommending a transfer to a different employing establishment. Dr. McDougle stated that appellant's symptoms began following "alleged sexual harassment" at the employing establishment.

By decision dated July 10, 2006, the Office denied modification of its prior decisions. The Office found that appellant had not substantiated a compensable factor of employment and that the additional medical evidence was not, therefore, relevant to her claim.

LEGAL PRECEDENT

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 worker's compensation. Where the disability results from an employee's emotional reaction to his 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 his frustration from not being permitted to work in a particular environment or to hold a particular position.³ Generally, actions of the employing establishment in administrative or personnel matters unrelated to the employee's regular or specially assigned work duties, do not fall within the coverage of the Act.⁴ While an administrative or personnel matter will be considered an employment factor where the evidence discloses error or abuse on the part of the employing establishment, mere perceptions are insufficient. In determining whether the employing establishment erred or acted abusively, the

¹ Docket No. 01-1741 (issued January 10, 2003).

² 5 U.S.C. §§ 8101-8193.

³ See *Thomas D. McEuen*, 41 ECAB 387, 390-91 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

⁴ *James E. Norris*, 52 ECAB 93, 100 (2000).

Board determines whether the employing establishment acted reasonably.⁵ Reactions to disciplinary matters such as letters of warning and inquiries regarding conduct pertain to actions taken in an administrative capacity and are not compensable until it is established that the employing establishment erred or acted abusively in such capacity.⁶ For harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act.⁷

ANALYSIS

Appellant attributed her emotional condition to actions by her supervisor, Mr. Baert, constituting sexual harassment and retaliation. She alleged that Mr. Baert touched her inappropriately and that, when she spurned his sexual advances, he began to assign her tasks below her seniority level and treated other employee's more favorably. Mr. Baert denied appellant's allegations regarding his actions. Appellant solicited a witness statement from a coworker, Ms. Ely, who denied witnessing any inappropriate actions by Mr. Baert. She has not submitted any factual support for her allegations of sexual harassment or retaliation. Appellant has failed to meet her burden of proof. As noted, she must present evidence that the alleged events did occur. Appellant has presented only her perceptions of harassment and the Office properly found that she failed to substantiate this compensable factor of employment.

Appellant also submitted a letter of warning which was later reduced. The fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse. Furthermore, the fact that a claimant filed complaints and grievances does not substantiate the allegations contained therein and the settlement of such complaints and grievances does not establish error or abuse by the employing establishment.⁸ Therefore, appellant has not established a compensable factor of employment in regard to her letter of warning.

In support of her claim for an emotional condition, appellant alleged that Postmaster Betchel yelled at her. Verbal altercations and difficult relationships with supervisors, when sufficiently detailed by the claimant and supported by the record, may constitute factors of employment. Although the Board has recognized the compensability of verbal abuse in certain circumstances this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.⁹ Appellant did not submit any corroborating evidence regarding the dispute with Ms. Betchel. As there is no support for this allegation, appellant failed to substantiate this compensable factor of employment.

⁵ *Bonnie Goodman*, 50 ECAB 139, 143-44 (1998).

⁶ *Sherry L. McFall*, 51 ECAB 436, 440 (2000).

⁷ *Reco Roncoglione*, 52 ECAB 454, 456 (2001).

⁸ *Michael A. Salvato*, 53 ECAB 666, 668 (2002).

⁹ *Marguerite J. Toland*, 52 ECAB 294 (2001).

Appellant also alleged that Mr. Baert directed her to perform work below her seniority level even when employees with lower seniority were present. The Board has held that the manner in which a supervisor exercises his or her discretion falls outside the coverage of the Act. This principal recognizes that a supervisor or manager must be allowed to perform their duties and that employees will at times disagree with actions taken. Mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse.¹⁰ Appellant has not submitted any evidence establishing that Mr. Baert's actions constituted error or abuse in assigning her work duties. As she has not substantiated this factor of employment, the Office properly denied her claim.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.¹¹

CONCLUSION

The Board finds that appellant has not submitted supportive evidence substantiating that the alleged improper actions by her supervisors occurred as alleged. Therefore, appellant has not established a compensable factor of employment and the Office properly denied her claim as she has not met her burden of proof to establish a factual basis for her claim.

¹⁰ *Linda J. Edwards-Delgado*, 55 ECAB 401 (2004).

¹¹ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. See *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

ORDER

IT IS HEREBY ORDERED THAT the July 10, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 18, 2007
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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