United States Department of Labor
Employees' Compensation Appeals Board

L.H., Appellant	)	
and	)	**Docket No. 10-2045**
	)	**Issued: July 14, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Glens Falls, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 4, 2010 appellant filed a timely appeal from the March 12, 2010 merit decision of the Office of Workers' Compensation Programs which denied her claim for an emotional condition. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she developed an emotional condition in the performance of duty.

FACTUAL HISTORY

On October 6, 2009 appellant, then a 31-year-old mail handler, filed an occupational disease claim alleging that she developed an emotional condition as a result of being harassed by

[1] 5 U.S.C. § 8101 *et seq.*

her coworkers and by her superiors. She became aware of her condition and realized it was related to her employment on July 14, 2009. Appellant stopped work on July 14, 2009.

In an undated statement, appellant alleged that in October 2007 her supervisor, Matthew Brennan, improperly issued her a letter of warning and a letter of removal due to absenteeism. In March 2008, after she lost time having surgery, her coworker, Larry McGourty, asked her where she had been and stated that she must have used all her sick leave. Appellant indicated that Charlie Boss, a mail hander, laughed at this comment. She alleged that, during the same shift, she retrieved a hamper and Mr. McGourty yelled at her that it was "stupid" for her to retrieve a hamper because he had already done so. Appellant alleged that Steve Salvato, a mail hander, informed her that Mr. McGourty and Mr. Boss told coworkers that she had a tummy tuck. Mr. McGourty commented that he wondered what type of operation she would get next. Appellant asserted that in February 2009 during a party that was held off duty at a local bar, Mr. Boss told other coworkers that she had sex with another coworker on a kitchen counter. She alleged that Mr. Boss wrote "no oozing fluids" on the office bulletin board which upset her. Appellant alleged that Mr. Boss stated that he only attended her wedding for the free beer. She alleged that Mr. Brennan instructed her to pull her hair back so that it would not get stuck in the feeder of the mail processing machine but he did not require other employees to do the same. Appellant alleged that in June 2007 Mr. Brennan informed her that he was able to see her tattoo and she disliked the manner in which he told her. She asserted that in August 2007 she left her postal job at 4:00 a.m. because she was ill but reported to work at her second job at Eddie Bauer at 11:00 a.m. Mr. Brennan subsequently confronted her at the store in front of her coworkers and advised that she was being taken off the schedule for the remainder of the week. Appellant alleged that Jeff Morehouse, a driver, breached her confidentiality when he improperly discussed her harassment claim with her coworkers.

Appellant submitted September 2, 2009 notes from a nurse practitioner regarding her treatment for depression and anxiety. Also submitted were September 9 and December 2, 2009 reports from Mary Ellen Lawlor-Merrigan, Ph.D., a licensed clinical psychologist, who treated appellant for work-related stress, adjustment reaction, anxiety and depression.

The employing establishment submitted a November 4, 2009 administrative investigative report about appellant's allegations. Mr. Boss informed the investigators that appellant engaged in discussions with other employees about her tattoos. He noted writing a statement "no oozing fluids" on the bulletin board but stated that it was meant in jest and appellant did not complain about it. Mr. Boss noted being at a bar after work when Chris Salinski, a mail handler, discussed an encounter he had with appellant on his countertop but never heard the story circulated in the office. He noted that he and Mr. McGourty teased coworkers including appellant but it was in good fun. Mr. Boss believed he had a good relationship with appellant before she filed her complaint. Mr. McGourty indicated that appellant informed everyone that she was having a tummy tuck. He noted that she used profanity with him at work but he did not remember all the circumstances. Mr. McGourty believed he was good friends with appellant and noted socializing with her and her husband and attended her wedding. He was unaware that she felt harassed.

Joe Loiacono, a mail handler and union representative, stated that appellant never reported that others joked or teased her too much or that she was upset. Appellant informed him she was having surgery and learned about her claim from Mr. Morehouse. Mr. Salvato stated

that appellant told him she was having elective surgery and spoke of it on the work room floor. He noted that Mr. Boss told him of a sexual comment made at a bar about appellant and that she was filing a harassment claim.

Tom Sullivan, a mail handler, stated that he never saw Mr. McGourty or Mr. Boss harass appellant but noted that they liked to tease coworkers. John Corbett, a supervisor, was aware that she had surgery but was unaware that she felt harassed until after she stopped work. He indicated that appellant was an excellent worker but was not regular in maintaining attendance.

Mr. Brennan noted terminating appellant due to attendance issues, insubordination and failure to follow instructions. She was reinstated but he found her to be defiant with a spotty attendance record. Mr. Brennan requested that appellant pull her hair back when working on machines for safety purposes and advised that this applied to all employees. He noted on one occasion that she left work due to illness but she reported for work at her second job at Eddie Bauer. Mr. Brennan visited the store and privately informed appellant that she was off the schedule at the employing establishment until further notice. He noted another occasion, he observed her attire at work and found that her tattoo was noticeable. Mr. Brennan informed appellant that this was inappropriate. He advised her not to walk on the work room floor in stockings as she was required to wear appropriate footwear. Tom Williams, a clerk, noted learning about appellant's harassment claim from her husband. He did not discuss her claim with anyone. Bob Kimmerly, postmaster, noted that appellant's husband informed him of the claim and noted investigating the matter as he was a member of the threat assessment team. He did not discuss the claim with anyone else. Mr. Moorehouse noted discussing appellant's claim with Mr. Loiacono.

The employing establishment submitted a February 8, 2010 report from Dr. Richard Stevens, a medical director, who stated that appellant's allegations were not corroborated. Dr. Stevens noted that she failed to report any alleged harassment to management before leaving the workplace on July 14, 2009 and that an extensive management investigation failed to corroborate her claims.

In a decision dated March 12, 2010, the Office denied appellant's claim finding that the claimed emotional condition did not occur in the performance of duty.

LEGAL PRECEDENT

To establish an emotional condition in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.[2]

Workers' compensation law does not apply to each and every illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the concept or coverage

[2] *George H. Clark*, 56 ECAB 162 (2004).

of workers' compensation. Where the disability results from an employee's emotional reaction to her regular or specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.[3] 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.[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 the 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 the matter establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[6]

ANALYSIS

Appellant alleged an emotional condition as a result of being harassed by coworkers and management and for being disciplined. The Board must initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act. Appellant has not attributed her emotional condition to the regular or specially assigned duties of her position as a mail handler. Therefore, she has not alleged a compensable factor under *Cutler*.[7]

Appellant made alleged harassment related to administrative and personnel actions. In *Thomas D. McEuen*,[8] the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing

[3] 5 U.S.C. §§ 8101-8193.

[4] *See Lillian Cutler,* 28 ECAB 126 (1976).

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

[6] *Id.*

[7] *See supra* note 4.

[8] *See Thomas D. McEuen,* 41 ECAB 387 (1990), *reaff'd on recon.,* 42 ECAB 566 (1991).

establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[9]

Appellant alleged that in October 2007 her supervisor Mr. Brennan improperly issued her a letter of warning and a letter of removal due to absenteeism. Her allegations that the employing establishment engaged in improper disciplinary actions, also relate to administrative or personnel matters, unrelated to her regular or specially assigned work duties.[10] Although the handling of disciplinary actions and evaluations are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.[11] The record reveals that appellant was terminated due to attendance issues, insubordination and failure to follow instructions. Mr. Brennan noted that she was reinstated but he found her to be defiant with a spotty attendance record. He noted an occasion in August 2007 when appellant left work sick and but reported for her second job at Eddie Bauer. Mr. Brennan noted that appellant was subsequently taken off the schedule until further notice. Mr. Corbett noted generally that appellant was an excellent worker but was not regular in attendance. The evidence does not support that the employing establishment acted unreasonably in response to appellant's absences. Appellant presented insufficient evidence to establish that the employing establishment erred in these matters. She has not established administrative error or abuse in the performance of these actions and they are not compensable factors under the Act.

Appellant further alleged that Mr. Brennan instructed her to pull her hair back to prevent it from getting caught in the feeder of a mail processing machine but he did not require other employees to do the same. She alleged that in June 2007 Mr. Brennan inappropriately commented on the visibility of her tattoo. The Board has found that an employee's complaints concerning the manner in which a supervisor performs his duties as a supervisor or the manner in which a supervisor exercises his supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act. This principle recognizes: a supervisor or manager in general must be allowed to perform his duties; and that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.[12] Appellant presented no evidence to support that her supervisor erred or acted abusively with regard to these allegations. There is no evidence substantiating that her employer acted unreasonably in these matters. Mr. Brennan advised appellant to pull her hair back when working on machines for safety purposes and advised that this policy was enforced for all employees. With regard to appellant's tattoo, Mr. Brennan noted observing appellant's attire at work and indicated that her tattoo was noticeable and the display was inappropriate for the work environment. Appellant has not established administrative error or abuse by the employer in these actions and therefore they are not compensable under the Act.

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

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

Appellant generally alleged that she was harassed by her supervisors and coworkers. She noted incidents including being questioned by coworkers regarding her use of sick leave after surgery, inquiries as to the nature of her surgery and whether she would undergo further surgery. Appellant further alleged that after retrieving a hamper a coworker stated that she was "stupid" because he had done so, that during a party held off duty in a local bar coworkers commented that she had sex with another coworker on a kitchen counter and another coworker wrote a message on an office bulletin board which stated "no oozing fluids." To the extent that incidents alleged as constituting harassment by a supervisor are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[13] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[14] The factual evidence fails to support appellant's claim for harassment. The record does not support appellant's allegation that she was harassed. Appellant cited no specific instances of harassment occurring at a particular time and place, rather she made general allegations.

The employing establishment refuted appellant's assertions. Mr. Boss noted that he and Mr. McGourty would tease coworkers including appellant but it was in good fun. He noted writing a statement "no oozing fluids" on the bulletin board and noted it was meant in jest and that appellant never mentioned that it upset her. Mr. Boss believed he had a good relationship with appellant and was invited to her wedding. Neither individual noted treating her unfairly. Mr. Loiacono noted being a union representative and stated that appellant never reported that she was harassed or teased too much or that she became upset. Mr. Sullivan noted that he, Mr. McGourty and Mr. Boss got along well and spent time together off the clock. He never witnessed Mr. McGourty and Mr. Boss harass appellant but noted they liked to tease coworkers. Mr. McGourty believed he was good friends with appellant and noted socializing with her and her husband and attended her wedding. The evidence is insufficient to show that appellant was singled out or treated disparately with regard to her assertions of harassment.

To the extent appellant alleged that she was verbally abused by Mr. McGourty when he yelled at her in March 2008 that it was "stupid" for her to retrieve a hamper, the Board has generally held that being spoken to in a raised or harsh voice does not of itself constitute verbal abuse or harassment.[15] In the instances appellant described, the Board notes that there is no evidence to support that Mr. McGourty made the comment, as alleged. Mr. McGourty did not recall the situation and the allegations are not supported by the witness statements of record. Consequently, appellant has not established her claim for an emotional condition as she has not attributed her claimed condition to any compensable employment factors.[16]

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

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

[15] *T.G.*, 58 ECAB 189 (2006).

[16] As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496 (1992).

On appeal appellant generally asserted that she established that she was harassed and improperly disciplined and provided medical evidence on her condition. The Board notes that the Office properly considered the evidence and found that she did not establish an emotional condition to any compensable employment factors.

CONCLUSION

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 14, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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