

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

S.M., Appellant)	
)	
and)	Docket No. 11-299
)	Issued: September 29, 2011
U.S. POSTAL SERVICE, POST OFFICE,)	
Memphis, TN, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 17, 2010 appellant filed a timely appeal from the June 24, 2010 Office of Workers' Compensation Programs' (OWCP) decision, which affirmed the denial of her emotional condition claim. Pursuant to the Federal Employee' Compensation Act (FECA)¹ and 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 to establish that she sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On August 1, 2008 appellant, then a 45-year-old automation clerk filed an occupational disease claim alleging that on April 6, 21, 22 and 23, 2008 she sustained an emotional condition due to sexual harassment from her supervisor. She alleged that she first realized the disease or

¹ 5 U.S.C. § 8101 *et seq.*

illness was caused or aggravated by her employment on April 23, 2008. Appellant stopped work on April 24, 2008.

In an August 4, 2008 statement, appellant indicated that, a supervisor, Marvin Pleasant, harassed her in the presence of her supervisor, Donna Johnson, on four separate occasions; April 6, 21, 22 and 23, 2008. She indicated that she tried to report the harassment to his supervisor, Matt Cummins, "but to no avail." Appellant stated that, on April 6, 2008, in the presence of Ms. Johnson, Mr. Pleasant made an inappropriate sexual remark about a red outfit that she was wearing. She noted that it made her "feel very dirty and uncomfortable." Both appellant and Ms. Johnson requested that he leave her alone. On April 21, 2008 Mr. Pleasant "made inappropriate sexual conduct and behavior" by telling her to "pull down the machine by making eye gesture and body gesture at his pants." Appellant asked him to stop and leave her alone. On April 22, 2008 Mr. Pleasant asked, "how are you doing?" When appellant responded that she was "fine," she indicated that Mr. Pleasant responded that he knew that but wanted to know how she was doing and made "flirty eye gestures" to her. Later in the day, she needed labels and, when he gave them to her, he made a "disrespectful gesture" and stated "the big end goes first." Appellant asked him not to make such gestures and remarks. Also later in the day, she was told to change a computer program, of which she was not familiar and Mr. Pleasant assisted her by coming up behind her to put the information in the computer. Appellant indicated that she had to duck under his arms. She stated that she could not believe what he did and that she was traumatized and became nervous. Appellant advised that, "no matter what I would say to him he wouldn't stop his behavior." She indicated that on April 23, 2008 she began her tour but after 10 minutes, she asked to speak to a supervisor to file a complaint, as she was afraid.

On August 7, 2008 OWCP advised appellant of the type of evidence needed to establish her claim. It also requested that the employing establishment submit additional evidence.

In an August 18, 2008 statement, appellant repeated that the sexual advances began on April 6, 2008 and that, despite repeated requests for him to stop, they continued. She also alleged that instances occurred when she was working alone. Appellant stated that, while she was afraid to come to work, she knew that she needed to report Mr. Pleasant's conduct to management. When she reported his conduct, she alleged that management did not appear to be concerned and she thought that management did not care that Mr. Pleasant was "sexually harassing" her. Appellant stated that the employing establishment did not help her, that she filed an Equal Employment Opportunity (EEO) complaint but that the employer did not inform her of the outcome. She denied any outside stressors.

In an August 28, 2008 letter, Zenobia Cox, an employing establishment human resources specialist, provided statements from employing establishment personnel. This included an August 27, 2008 statement from Mr. Pleasant who denied that he had ever made any sexual remarks or innuendos to appellant.

In an August 28, 2008 statement, Ms. Johnson advised that she had never witnessed Mr. Pleasant or any other employee make sexual innuendos or advances towards appellant. She also confirmed that "[a]t no time has [appellant] stated to me that [Mr.] Pleasant had made any sexual advances or statements to her while under [her] supervision." Ms. Johnson also explained

that she had reviewed appellant's allegations and noted that it was she who inquired into where appellant had purchased a red outfit that she had worn to work. Furthermore, she noted that Mr. Pleasant was correct when he instructed appellant "to put the big end of the roll of label stock into the printer to make labels." Ms. Johnson referred to the employer's guidelines and noted that they specified that "each employee must ensure that labels are properly loaded, with the striped side down and the larger (big) white area fed first into the printer. If the label stock is loaded 'backwards,' with the smaller white area fed first, the information for each tray label will be split, with the day of delivery and the bin number of one separation printed on the adjacent label for the following separation." Ms. Johnson included a copy of the instructions for the machine.

In an August 28, 2008 statement, Matthew K. Cummins, manager of distribution operations, confirmed that he had never witnessed Mr. Pleasant make sexual innuendos or advances towards appellant. He also indicated that appellant had never spoken with him regarding Mr. Pleasant or stated that he made any sexual advances or statements to her. Mr. Cummins noted conducting a "meticulous" investigation and determined that there was no merit to her allegations.

Appellant also submitted medical evidence. This included a July 23, 2008 form report from Dr. Tejinder Saini, a Board-certified psychiatrist, who diagnosed post-traumatic disorder and checked a box "yes" indicating that he believed appellant's condition was caused or aggravated by her work. Dr. Saini advised that appellant "perceives sexual harassment." He indicated that appellant was totally disabled since June 13, 2008. In a July 24, 2008 report, Dr. Saini noted her history of working for the employing establishment for more than 20 years. He related that appellant indicated that she had transferred from a previous location "where the supervisor there too had been harassing her 'coming on' to her according to the patient." Dr. Saini noted that, if her allegations were verified then, the allegations were work related.

By decision dated September 12, 2008, OWCP denied the claim finding that appellant did not attribute her condition to employment incidents that occurred in the performance of duty.

On August 7, 2009 appellant requested reconsideration. She repeated her allegations and alleged that the claimed incidents occurred in the performance of her duties. Appellant questioned Mr. Cummins' statement and noted that Mr. Pleasant was his friend. She also questioned the statement of Ms. Johnson. Appellant provided portions of two pages of a 36-page "investigative summary" which noted that Mr. Cummins did not provide a written report of his investigative findings but instead provided a synopsis of Mr. Pleasant's statement.²

By decision dated October 8, 2009, OWCP denied modification of its prior decision.

On May 21 and 22, 2010 appellant requested reconsideration and submitted additional evidence. The evidence included a February 2, 2009 statement from Maria Johnson, a union local president. Appellant indicated that she had expressed concern about Mr. Pleasant's behavior as his "conduct was unprofessional and was considered sexual harassment." Ms. Johnson alleged that she informed Mr. Pleasant that "touching on females and lewd remarks

² The record does not contain a complete copy of the investigative summary.

were considered sexual harassment and if he did not stop his actions that he would end up with sexual harassment charges.” In an undated statement, Angela Braddock, a coworker, noted that a sexual harassment training class was held “a while back” and, after the class, Mr. Pleasant stated something “inappropriate” to her as they were leaving. She noted that she informed him that they had just watched a “film on sexual harassment” and asked him if she needed to report his behavior. Ms. Braddock responded “no” and “that was the end of that.”

Appellant also provided an April 24, 2008 investigative interview of Mr. Pleasant by Mr. Cummins with regard to sexual harassment alleged against Mr. Pleasant who indicated that he had never sexually harassed an employee, that he never knowingly made sexual advances toward appellant and always treated her with respect, and that he never engaged in sexual innuendo with appellant. Also provided were affidavit questions and a June 21, 2008 EEO affidavit from Mr. Cummins, responding to the questions, who advised that he reviewed all of the facts regarding appellant’s allegations and was unable to find merit in them. Mr. Cummins advised that Mr. Pleasant was provided literature on sexual harassment and received training on how to identify potential gray areas.

By decision dated June 24, 2010, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

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 of workers’ compensation. Where the disability results from an employee’s emotional reaction to his regular or specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA. 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

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition, for which he claims compensation was caused or adversely affected by employment factors.⁴ 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.⁵

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, OWCP 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

³ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff’d on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 126 (1976).

⁴ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁵ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

factors of employment and may not be considered.⁶ If a claimant does implicate a factor of employment, OWCP 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, OWCP must base its decision on an analysis of the medical evidence.⁷

ANALYSIS

Appellant did not attribute her emotional condition to stress or an emotional reaction to performing her regular or specially assigned duties as an automation clerk. Thus, she has not alleged a compensable factor under *Cutler*.⁸ Rather, appellant attributed her emotional condition to being sexually harassed by her supervisor. The Board must thus, initially, review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA.

Appellant alleged that she was sexually harassed by a supervisor, Mr. Pleasant, on April 6, 21, 22, and 23, 2008. The Board has held that actions of an employee's supervisor, which the employee characterizes as harassment, may constitute factors of employment giving rise to coverage under FECA.⁹ However, in order for harassment to give rise to a compensable disability under FECA, there must be some evidence that such harassment did in fact occur. Mere perceptions of harassment alone are not compensable under FECA.¹⁰

Appellant listed four separate occasions, April 6, 21, 22 and 23, 2008, as the dates she was harassed by Mr. Pleasant. They included that, on April 6, 2008, in the presence of Donna Johnson, Mr. Pleasant made an inappropriate sexual remark about a red outfit that she was wearing. Appellant indicated that it made her "feel very dirty and uncomfortable." She noted that both she and Ms. Johnson requested that he leave her alone. However, Ms. Johnson in an August 28, 2008 statement denied that she had ever observed Mr. Pleasant make any inappropriate remarks towards appellant. Furthermore, she noted that appellant had not informed her of any sexual advances or statements made to her while "under [her] supervision." Ms. Johnson also explained that it was she who inquired into where appellant had purchased a red outfit that she had worn to work. Likewise, Mr. Pleasant denied sexually harassing appellant, and Mr. Cummins, a manager, investigated the matter and determined that there was no merit to her allegations. Mr. Cummins denied any knowledge of Mr. Pleasant harassing appellant.

On April 21 and 22, 2008 appellant alleged that Mr. Pleasant engaged in inappropriate sexual conduct by asking her how she was doing, advising her to "pull down the machine by

⁶ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁷ *Id.*

⁸ See *supra* note 3.

⁹ *Sylvester Blaze*, 42 ECAB 654 (1991).

¹⁰ *Ruthie M. Evans*, 41 ECAB 416 (1990).

making eye gesture and body gesture at his pants” and later telling her to put the “big end” of labels first into a machine. The Board notes that she has not explained why Mr. Pleasant’s asking her how she was doing constituted inappropriate conduct and there is no evidence to support her allegations of “flirty eye gestures” towards her. Appellant also alleged that Mr. Pleasant assisted her by coming up behind her to put the information in a computer, and she had to duck under his arms. As noted above, any sexual harassment or innuendo was denied by Mr. Pleasant while Ms. Johnson and Mr. Cummins denied any knowledge of Mr. Pleasant harassing appellant. The employing establishment explained that the machine appellant was using had instructions for loading the machine and that Mr. Pleasant was correct in instructing appellant in how to load a roll of label stock. Although appellant alleged that Mr. Pleasant came up behind and she had to duck under his arms, the record does not support that this occurred or that any such interaction with Mr. Pleasant rose to the level of harassment. Therefore, there is insufficient evidence to corroborate appellant’s allegations that Mr. Pleasant sexually harassed appellant on these days.¹¹

Regarding the date of April 23, 2008, appellant did not identify any actions that occurred on that date, other than to indicate that 10 minutes after her tour began, she asked to speak to a supervisor to file a complaint, and she was afraid. She has not identified any compensable factors in this regard.

Appellant submitted a February 2, 2009 statement from Maria Johnson, who indicated that she had expressed concern about Mr. Pleasant’s behavior. Ms. Johnson alleged that she informed Mr. Pleasant that “touching on females and lewd remarks were considered sexual harassment and if he did not stop his actions that he would end up with sexual harassment charges.” The Board notes that Ms. Johnson’s statement does not provide any corroborating evidence in support of appellant’s specific allegations. Ms. Johnson did not provide any indication that she had witnessed the behavior of Mr. Pleasant towards appellant on any of the aforementioned occasions. She did not provide any information to support the allegations of appellant. Likewise, the undated statement from Ms. Braddock, referred to a training class on an unspecified date. Ms. Johnson only indicated that Mr. Pleasant “said something that was inappropriate.” The Board notes that Ms. Braddock did not indicate that this matter involved appellant and she did not state that the matter pertained to any of appellant’s allegations. Thus, Ms. Braddock’s assertions provide no support for appellant’s allegations that Mr. Pleasant acted inappropriately toward appellant on the dates in question.

Appellant also indicated that there was an ongoing EEO process and provided some documents from the EEO proceeding. The Board notes that there are no findings from the EEO process supporting appellant’s allegations. The filing of complaints alone, are not sufficient to establish discrimination or harassment.¹² The employer and Mr. Pleasant denied the allegations.

¹¹ 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).

¹² See *C.T.*, Docket No. 08-2160 (issued May 7, 2009).

Consequently, the Board finds that appellant has not established a compensable employment factor with respect to these allegations of harassment.¹³

As appellant has not established a compensable employment factor, it is not necessary to address the medical evidence.¹⁴

CONCLUSION

Appellant did not meet her burden of proof in establishing that she sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the June 24, 2010 Office of Workers' Compensation Programs' decision is affirmed.

Issued: September 29, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹³ Appellant also questioned Mr. Cummins' investigation into her allegations. To the extent that she attributes her condition to this investigation, the Board notes that investigations are an administrative function of the employer and not a duty of the employee. Such matters are not covered under FECA unless it is shown that the employer either erred or acted abusively in its administrative capacity. *See K.W.*, 59 ECAB 271 (2007). Appellant has not presented evidence that the employing establishment erred or acted abusively in investigating her allegations.

¹⁴ *Garry M. Carlo*, 47 ECAB 299 (1996). *See Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).