

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CANDACE NEFF and U.S. POSTAL SERVICE,
POST OFFICE, Hayward, Calif.

*Docket No. 96-620; Submitted on the Record;
Issued May 8, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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

The Board has duly reviewed the case record in the present case and finds that appellant did not meet her burden of proof to establish that she sustained an emotional condition in the performance of duty.

In the present case, appellant alleged that she sustained an emotional condition due to various incidents and conditions at work. By decision dated July 5, 1994, the Office of Workers' Compensation Programs denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. At appellant's request, an oral hearing was subsequently held before an Office representative. In a decision dated May 11, 1995, the Office hearing representative found that appellant had not established that her emotional condition arose in the performance of duty and denied benefits. Following the decision, appellant submitted new evidence and requested reconsideration. After a merit review, the Office determined that the newly submitted evidence was insufficient to warrant modification of the prior decision.

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 workers' 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.¹ On the other hand, the disability is not covered where it results from such factors as an

¹ 5 U.S.C. §§ 8101-8193.

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.²

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 a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.³ 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 record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.⁴

Appellant alleged that she sustained stress due to harassment and discrimination on the part of her supervisor, Mr. Rick Martinez. In several lengthy and detailed narrative statements appellant cited numerous instances in which she claimed that Mr. Martinez engaged in harassment, discrimination and mistreatment by constantly and inappropriately monitoring her movements in the post office and on her route, failing to respond to her concerns about her work, pacing in front of her work station in a very angry and hostile manner, failing to notify her when she received personal phone calls and not allowing her to make personal calls at work, failing to send her necessary "dog warning" notices, spreading lies and gossip about her, violating an overtime agreement, and generally acting out of control and abusive, speaking in a loud voice only a few inches from her face, interrupting her and walking away from her when she spoke to him. Appellant also asserted that on one occasion Mr. Martinez altered a leave slip she submitted requesting leave without pay to reflect that she was absent without leave. In addition, appellant, a union vice president, asserted that Mr. Martinez interfered with her duties as a union representative worker, docking her pay when she left her work station to perform union work and refusing to let her conduct union business during her work hours. Appellant further stated that on June 14, 1993 Mr. Martinez yelled at her during a meeting and that on September 30, 1993 he accused her of leaving the passenger door of her postal vehicle unlocked when she was certain she had locked it. With respect to this final incident, appellant implied that Mr. Martinez had withheld the passenger door keys to her vehicle and used them to unlock the vehicle himself. Appellant stated that she was often singled out by Mr. Martinez and that he did not hold the other employees to the same standards, allowing them, for example, to make and receive personal calls or to leave their work stations without permission.

Appellant alleged, in her pre-hearing brief, that Mr. Martinez additionally caused emotional distress by referring to her as "that bitch," and by deliberately delaying the completion and filing of her claim for compensation.

² See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

³ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁴ *Id.*

In support of her allegations appellant submitted affidavits from her coworkers. Lynette Torres stated that on October 4, 1993 she heard Mr. Martinez make a loud comment about how little appellant had accomplished during the morning. Milton Quintalmilla stated that he saw Mr. Martinez take a phone call for appellant which he did not relay to her, that Mr. Martinez watched appellant more than he watched the other employees, and that he himself had been refused the opportunity to discuss union business by Mr. Martinez. Mr. Rodney Davis stated that from September 27 through September 30, 1993, he saw Mr. Martinez watching appellant. Lisa Telly stated that on September 16, 1993 she saw Mr. Martinez watch appellant. Barbara Candalaria stated that she saw Mr. Martinez constantly passing by appellant's work area and saying something to her, and added that she did not observe him act similarly towards other union stewards. Susan Fleming stated that she saw Mr. Martinez become furious towards another worker, speaking loudly and behaving rudely. Marianita Nonan stated that she believed appellant was treated unfairly by Mr. Martinez because she took her position as union vice president very seriously, and added that Mr. Martinez did not treat the other union stewards in a similar manner. Margarita Abbott stated that she personally knew that Mr. Martinez was capable of lying. Rose Cruz stated that Mr. Martinez had spoken very loudly and abusively to her. Roland Frieberg stated that he knew that the postal "k car," which appellant was driving when reprimanded for leaving the door unlocked, had more than the three keys which had been given to appellant. John Trizuto stated that Mr. Martinez required that appellant follow regulations about filling out a "7020" form documenting her travel throughout the office, but did not require others to do the same. Lynette Torres stated that on July 20, 1993 she heard Mr. Martinez refer to appellant as "that bitch," out of appellant's earshot.

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 employment factors.⁵ However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.⁶

In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that she was harassed or discriminated against as alleged.⁷ Mr. Martinez submitted a narrative statement in which he refuted appellant's allegations. He stated that he felt appellant was generally a good worker, with the exception of wanting to conduct union business on the clock, and that she was displeased when he brought the regulations governing union business to her attention. Mr. Martinez further stated that his supervisor had instructed him to follow appellant on her mail route because appellant had earlier expressed anxiety about her safety. Postmaster Clarice Golden confirmed that she had personally instructed Mr. Martinez to observe appellant on her route because appellant had expressed concerns about her safety and added that Mr.

⁵ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

⁶ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

⁷ *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).

Martinez was correct in stopping appellant from conducting union duties during her work hours. Ms. Golden explained that because appellant was an officer of the union, a vice president, unless specifically designated to replace a steward during a given time period, she did not have the same privilege as the union stewards to perform union duties during work hours. Ms. Golden concluded that she had never observed Mr. Martinez behave in an abusive or disrespectful manner towards appellant.

Sandra Barton, Supervisor of Customer Services, also stated that she had never observed Mr. Martinez act inappropriately towards appellant, and added that the regulations regarding employee union activity were very strict and specific.

Dave Costello, Manager of Customer Service Support, confirmed that as an officer of the union, appellant was not afforded “on-the-clock” time for union work unless she was specifically acting in lieu of the steward, and that therefore Mr. Martinez had acted appropriately in his disapproval of appellant’s union activities. He further stated that Mr. Martinez had acted properly in observing appellant during her route and provided documentary evidence that Mr. Martinez had not singled out appellant but had observed numerous other employees during their routes and had recorded their various infractions.

Desi D. Cusi, Acting Manager of Customer Service, stated that he was personally present at an unspecified incident appellant cited in her narrative statement, and that her allegations, that Mr. Martinez had spoken loudly and abusively to her during this meeting, were completely unfounded as no argument or loud conversation had taken place between them on this occasion.

Appellant claimed that supervisors made statements and committed acts which she believed constituted harassment and discrimination, but the statements provided by both appellant and the employing establishment establish only that Mr. Martinez was properly performing his regular administrative duties with respect to appellant. There is insufficient evidence in the file pertaining to the namecalling incident on July 20, 1993. Appellant submitted a statement from her treating psychologist, Hyman Silver, Ph.D., who stated that he had discussed the incident with appellant during their regular session and that appellant had been extremely distressed when she was told by a coworker that Mr. Martinez had uttered a degrading remark about her. A review of Dr. Silver’s earlier comprehensive report, however, reveals that while Dr. Silver specifically discussed the behavior of Mr. Martinez toward appellant on July 20, 1993, as well as on many other dates, he did not mention this incident. Similarly, in appellant’s own detailed narrative statements she did not mention this incident, either on or after July 20, 1993. Therefore, there is no competent evidence in the record that the alleged July 20, 1993 incident formed a basis for appellant’s claimed emotional condition.⁸

The Board notes that, in the absence of a showing of harassment or discrimination, appellant’s reaction to such claimed conditions and incidents at work must be considered self-generated in that it appears to have resulted from her frustration in not being permitted to perform her union duties during working hours and perform her regular duties with less attention

⁸ See *Mary A. Sisneros*, 36 ECAB 155 (1994).

from her supervisor.⁹ Thus, appellant has not established a compensable employment factor under the Act with respect to this alleged harassment and discrimination.

Regarding appellant's assertions that Mr. Martinez unreasonably monitored her activities at work, issued unfair disciplinary citations, and delayed completing and filing her claim for compensation, the Board finds that these allegations 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.¹⁰ Although the monitoring of activities at work and the handling of disciplinary actions are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.¹¹ However, the Board has also found 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.¹² Appellant did not submit sufficient evidence to corroborate her claim that the employing establishment committed error or abuse in its disciplinary actions towards her. Nor did she submit any evidence to support her claim that the employing establishment committed error or abuse in connection with its monitoring of her activities at work, either in the office or on her route. Thus, appellant has not established a compensable employment factor under the Act with respect to these administrative matters.

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.¹³

⁹ *Tanya A. Gaines*, 44 ECAB 923, 934-35 (1993).

¹⁰ See *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988). The Board has already considered and rejected appellant's claim that the employing establishment committed harassment and discrimination in connection with these matters.

¹¹ *Id.*

¹² See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹³ 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). It should be noted, however, that the record contains detailed reports from appellant's psychologist, Dr. Silver, dated November 24, 1993 and September 5, 1994, in which he discussed the negative psychological effect of Mr. Martinez's behavior on appellant.

The decisions of the Office of Workers' Compensation Programs dated October 10 and May 11, 1995 are affirmed.¹⁴

Dated, Washington, D.C.
May 8, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹⁴ The Board notes that the record also contains a September 5, 1995 decision of the Office granting attorney's fees to appellant's representative. Appellant did not indicate, however, that she wished to appeal this decision.