

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARMEN DU-BOUCHET and DEPARTMENT OF COMMERCE,
NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION,
Boulder, CO

*Docket No. 97-1781; Submitted on the Record;
Issued December 3, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

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

On September 21, 1994 appellant, then a 49-year-old secretary, filed a notice alleging that she sustained post-traumatic stress disorder in the performance of duty beginning on September 21, 1992. She attributed her condition in part to pain from work-related carpal tunnel syndrome, alleging that Maurice Blackmon would make her type for one hour twice a day whether there was anything to type or not, because her physician opined that she could type for that duration.¹ In an accompanying factual statement, appellant also alleged a general pattern harassment by supervisors Mr. Blackmon and Henry Diaz, from 1985 through December 30, 1993, when she stopped work and did not return.² As part of this harassment, appellant alleged that Mr. Blackmon required that whenever she left her office, she “had to write with a marker on a large white erasable board to be placed in the center of [her] desk top, [her] destination including visits to the restroom. On a number of occasions, as [appellant] exited the restroom, [she] found M[r]. Blackmon standing in front of the women’s restroom door.”

In a March 25, 1994 report, Dr. Carol Spar, an attending clinical psychologist, diagnosed post-traumatic stress disorder due to harassment at work, depression and a paranoid personality disorder. In a September 7, 1994 letter, Dr. Spar opined that appellant’s “physical pain” due to cumulative trauma disorder contributed to her emotional condition. In a September 19, 1994 letter, she asserted that appellant’s account of “work problems ... from October 1985 through December 30, 1993” was a “truthful accounting of events as experienced by [appellant].”

¹ The record indicates that appellant filed Claim No. A12-134926, accepted for carpal tunnel syndrome, left rotator cuff syndrome and synovitis. This claim is not before the Board on the present appeal.

² Appellant identifies herself as Cuban-American.

In March 17 and May 11, 1995 statements, Mr. Blackmon denied appellant's allegations of harassment, noting that he did not follow appellant or monitor her as alleged.

In an April 13, 1995 statement, Patricia Hoffman, a former coworker of appellant's, recalled that appellant often seemed distressed at work and that when appellant returned to work following an absence related to her carpal tunnel syndrome, appellant's supervisor instructed Ms. Hoffman not to speak to appellant.

In an April 17, 1995 statement, Sandra J. Lubker, a former coworker of appellant's, stated that whenever appellant left her office, "she had to write where she was going on a whiteboard centered on her desk. If she had to use the ladies room she had to write 'bathroom' on the whiteboard ([Appellant] was the only secretary and visitors to the Director's office stopped first at her desk.)"

In an April 28, 1995 report, Dr. John Clarke, a licensed clinical psychologist and Dr. Shauna L. Casement, a candidate for licensure in psychology, diagnosed major depressive disorder with psychotic features, post-traumatic stress disorder by history and paranoid personality disorder by history.

The Office prepared a statement of accepted facts which noted that appellant "identified the following events as causative," then quoted appellant's account of events from her factual statement without indicating if any of the incidents were accepted as factual. Appellant's allegations regarding use of the whiteboard when going to the bathroom appear in the statement of accepted facts as paragraph 62.

In an August 7, 1995 report, Dr. George E. Kalousek, a Board-certified psychiatrist and second opinion physician, noted that the statement of accepted facts "was essentially written by [appellant] herself which is most unusual in terms of these evaluations. I do not have a listing of her compensable and noncompensable facts." Dr. Kalousek obtained a history, conducted a psychiatric examination, and diagnosed major depressive disorder, recurrent, with psychotic features, schizotypal personality disorder, post-traumatic stress disorder and a pain disorder. In response to the Office's query regarding whether appellant sustained an emotional condition as "a result of employment factors," Dr. Kalousek stated that "work probably did precipitate [appellant's] downhill course. Any type of stressor at work could wreck havoc with [appellant] who is extremely fragile."

By decision dated October 19, 1995, the Office denied appellant's claim on the grounds that she had not established that the claimed condition was sustained in the performance of duty. The Office found appellant failed to establish any compensable employment factors. Appellant disagreed with this decision and requested an oral hearing, held on November 11, 1996.

At the hearing, appellant reiterated her claims of harassment and discrimination by Mr. Blackmon and Mr. Diaz. Ms. Lubker also appeared, and testified that she had witnessed Mr. Blackmon following appellant to the restroom, and that he had required appellant to write that she was going to the bathroom on a whiteboard to be kept on her desk. Ms. Lubker stated that she was "embarrassed about the sign ... [a]nyone coming into the director's office, the first thing they see is this big [white]board that says bathroom on it."

By decision dated and finalized January 31, 1997, the Office hearing representative affirmed the Office's October 19, 1995 decision, finding that appellant failed to establish any compensable factor of employment, and that appellant had not established that she was harassed or otherwise mistreated. The hearing representative noted that although Dr. Kalousek generally supported a causal relationship between the downhill course of appellant's condition and her account of employment incidents, this opinion was irrelevant as no compensable employment factors had been established.

The Board finds that the case is not in posture for a decision.

When an employee experiences an emotional reaction to his or her regular or specially assigned work duties or to a requirement imposed by the employment, or has fear and anxiety regarding his or her ability to carry out his or her duties, and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment and comes within the scope of coverage of the Act.³

In this case, the Office found that appellant failed to allege any compensable factors of employment. However, the Board finds that appellant has implicated harassment in that before she was allowed to go to the restroom, she was required by her supervisor, Mr. Blackmon, to place a notice in the middle of her desk, that she would be in the bathroom. The Board notes that although monitoring of an employee's whereabouts is within the customary functions of a supervisor, the bathroom notice requirement appears unique among Mr. Blackmon's employees, indicating harassment of appellant.⁴ The record contains a general statement from Mr. Blackmon denying allegations that he followed or monitored appellant.

The facts of this case are analogous to the circumstances in *Yvonne C. Leatherwood*,⁵ in which the employee, a secretary, alleged a pattern of harassment in that she had to report to her supervisor every time she left her desk and returned. The Board remanded the case to the Office for further development of the factual evidence. In the present case, appellant has implicated a factor of employment requiring further development of the factual evidence by the Office.

In this case, as the Office found no compensable factor of employment case will be remanded to the Office for further development. On return of the case, the Office shall develop the evidence as appropriate to ascertain whether, before going to the bathroom, appellant was required to write on a white board on her desk that she was going to the bathroom, and that this sign was visible to persons entering appellant's office. Following this and such other

³ *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Cf. Herman W. Thornton*, 39 ECAB 875 (1988) (where appellant alleged harassment in part because his supervisor would follow him to the restroom. Although appellant submitted sufficient witness statements to corroborate that his supervisor did follow him to the restroom, the Board found that this constituted a customary supervisory function and was not a compensable factor of employment).

⁵ Docket No. 95-124 (issued June 6, 1996).

development as the Office deems necessary, the Office shall issue an appropriate decision in the case.

The decision of the Office of Workers' Compensation Programs dated and finalized January 31, 1997 is hereby set aside, and the case remanded for further development consistent with this decision and order.

Dated, Washington, D.C.
December 3, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member