U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JESSICA L. REYNOLDS and U.S. POSTAL SERVICE,
BROOK PARK POST OFFICE, CUSTODIAL SERVICE,
Brook Park, OH

Docket No. 98-1208; Submitted on the Record;
Issued December 3, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has established that she sustained an emotional condition in the performance of duty as alleged.

On December 23, 1996 appellant, then a 30-year-old custodial worker, filed a claim for severe depression and flu-like symptoms brought on by a chemical imbalance resulting from alleged stress at work.[1] Appellant requested a change in craft on October 18, 1996 and a transfer in November 1996 asserting acts of hostility against her by management and coworkers on the basis of her caucasian race and Wiccan or earth religion beliefs.[2]

In support of her claim, appellant submitted an August 26, 1996 form report by Dr. Shila Matthews, an attending psychiatrist.[3] Dr. Matthews diagnosed chronic major depression with an exacerbation beginning August 19, 1996, treated with counseling and prescription medication. She indicated that appellant was able to work.

The record indicates that there were three employing establishment disciplinary proceedings against appellant: a May 19, 1996 notice of a three-day suspension for failing to

[1] The record indicates that appellant filed a previous claim for "stress" on December 1, 1989, under Claim No. A9-354863, denied by the Office of Workers' Compensation Programs in September 1991.

[2] The Board notes that disabling conditions resulting from an employee's feeling of job insecurity, such as fear of a reduction-in-force, or the desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act. *Raymond S. Cordova*, 32 ECAB 1005 (1981).

[3] Appellant also submitted an October 11, 1996 letter from Carolyn Foster, a social worker, who stated that appellant's job was "having a negative effect on her mood disorder" and recommended a transfer. However, as social workers are not considered physicians under the Act, Ms. Foster's opinion is of no probative value. 5 U.S.C. § 8101(2); s*ee James A. Long*, 40 ECAB 538 (1989); *Susan M. Biles*, 40 ECAB 420 (1988) (where the Board held that the statement of a layperson is not competent evidence on the issue of causal relationship).

maintain a regular work schedule, perform duties in a safe manner, timely report an accident, follow instructions and a direct order and October 7, 1996 notice of suspension from October 21 to November 3, 1996 due to unscheduled absences on nine dates between July 16 and September 27, 1996; a November 22, 1996 notice of removal for being continuously absent without leave from October 7 to 18, 1996 and from November 4, 1996 onward and failure to follow instructions. In each case, appellant asserted that her absences were caused by the claimed emotional condition. Also, appellant attributed her emotional condition in part to these disciplinary matters, alleging that they were acts of discrimination or retaliation against her on the basis of caucasian race and Wiccan religion.

In a January 2, 1997 letter, an employing establishment official noted that in July 1996, appellant's father visited the employing establishment, stating that appellant was in the process of a divorce and would lose her home and custody of her children. The employing establishment noted that appellant had mentioned her psychiatric treatment for depression, but did not allege that the condition was related to her federal employment.

By decision dated February 26, 1997, the Office denied appellant's claim on the grounds that she had not established that she had sustained an emotional condition in the performance of duty as alleged, as she had not established any compensable factors of employment. Appellant disagreed with this decision and requested an oral hearing before a representative of the Office's Branch of Hearings and Review held October 28, 1997.

At the hearing, appellant stated that she had worked for the employing establishment from November 5, 1986, to approximately October 5, 1996, when she stopped work due to her emotional condition and returned to work for five hours per day on May 5, 1997.[4] Appellant asserted that work factors aggravated a "chemical imbalance," causing severe depression requiring medication and counseling. Appellant alleged that her work environment was excessively noisy due to coworkers shouting, bickering and making rude comments about her and others, including that appellant was not "saved." Appellant also alleged that each morning, a group of coworkers blocked access to her tool locker by holding a prayer meeting in response to appellant's Wiccan beliefs and status as a practicing witch and urged appellant to join or she would be damned. Appellant noted filing Equal Employment Opportunity (EEO) complaints alleging that the employing establishment did not accommodate her mental illness.[5] Appellant noted nonoccupational stressors of a September 1993 marriage, divorce in March 1997, a miscarriage, losing custody of her two children and losing possessions in a flood in her home.

In a November 18, 1997 letter, Postmaster Betty Ailer responded to the hearing transcript. Ms. Ailer stated that she was unaware of appellant's religion until her February 19,

[4] Appellant stated that she had filed Claim No. A9-432626 for work factors on and after May 5 to November 27, 1997. Appellant thus limited the present claim to work factors prior to her stopping work in October 1996.

[5] Appellant filed an EEO complaint on November 18, 1996 for discrimination due to race (caucasian), religion (Wiccan), and disability (mental disorder). In a May 16, 1997 EEO settlement agreement, a proposed removal was reduced to a time served suspension, with a May 19, 1997 return to duty A July 28, 1997 final agency decision found "no discrimination based on mental disability, race and/or religion."

1997, EEO complaint on February 19, 1997. Ms. Ailer noted hearing about appellant's Wiccan beliefs "through employees at the office because they reported she was burning candles and they had a fear of the occult." In May or June 1996, 7 of appellant's coworkers asked if they could hold a daily 5 to 10 minute prayer meeting. Ms. Ailer granted permission for prayer meetings to be held in the utility room after the letter carriers left at 9:30 a.m., until 9:40 a.m. as long as "the majority of the station did not object." The utility room housed the heating system, janitorial supplies and "some lockers that the ladies use" including appellant. "The prayer group would ask the women if they had to go to their lockers before they began their prayer." Ms. Ailer stated that during the prayer meetings, appellant "could not do any custodial duties inside. She worked outside at this time on the grounds. The prayer group did not disrupt or interfere with her duties," as her tools were in a cabinet on the workroom floor. "There is an alternate door to the locker room … no one objected except [appellant] and she could not give me a reason as to say why she objected…. She at no time mentioned her religious beliefs." Ms. Ailer recalled that the prayer meetings "ended around September 1996." Ms. Ailer acknowledged that the workroom floor was noisy, but denied there was any shouting or negative comments made against appellant.[6]

By decision dated and finalized January 8, 1998, the Office affirmed the February 26, 1997 decision, finding that appellant had not established that she sustained an emotional condition in the performance of duty. The hearing representative found that appellant had established as factual that she worked in a noisy environment, but not that coworkers made comments about her or bickered. The hearing representative also found that appellant had established that a prayer group met from 9:30 to 9:40 a.m. from May to September 1996 in the ladies' locker and utility room and that appellant's "coworkers had concerns regarding her beliefs to the extent that they reported them" to Ms. Ailer, thus straining appellant's relationship with her coworkers. However, as this "tension resulted from factors outside the scope of the performance of [appellant's] duties or her assigned duties," appellant's reaction to the prayer group was found to be outside the performance of duty. The hearing representative also found that the notices of suspension and removal were administrative, disciplinary actions not within the performance of duty and that appellant did not demonstrate any error or abuse by the employing establishment that would bring such matters within the performance of duty. The hearing representative noted that appellant's emotional reaction to the flood, divorce, custody dispute and miscarriage, was not in the performance of duty.

The Board finds that appellant has not established that she sustained an emotional condition in the performance of duty as alleged.

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 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 Federal Employees' Compensation Act. On the other hand, where the disability results from an employee's emotional reaction to employment matters

[6] In a November 17, 1997 letter, employing establishment manager Patrick Hanlon stated that appellant had not complained to him regarding "people praying for her."

but such matters are not related to the employee's regular or specially assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the scope of coverage of the Act.[7]

When working conditions are alleged as factors in causing 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.[8] When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.[9]

In the present case, the Office made specific findings on each of the factors appellant implicated.

The Office accepted as factual that appellant worked in a noisy environment. Thus, to establish her claim, appellant would then have to submit medical evidence explaining how and why that established work factor would cause the claimed condition. The only medical evidence of record is the August 26, 1996 form report by Dr. Matthews, an attending psychiatrist. However, she did not mention any work factors in this report, or otherwise offer medical rationale explaining how and why the established job factor of a noisy work environment would cause the claimed emotional condition.[10] Dr. Matthews' report is, therefore, of insufficient probative value to establish causal relationship in this case.[11]

Regarding the May 19 and October 7, 1996 notices of suspension and the November 22, 1996 notice of removal. The Office found that disciplinary actions are not considered to be in the performance of duty.[12] The Board has held that these disciplinary actions 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.[13] Although the handling of

[7] *Lillian Cutler*, 28 ECAB 125 (1976).

[8] *See Barbara Bush*, 38 ECAB 710 (1987).

[9] *Ruthie M. Evans*, 41 ECAB 416 (1990).

[10] The Board notes that the Office advised appellant in a January 16, 1997 letter, of the type of additional factual and medical evidence needed to establish her claim, including a detailed account of any incidents alleged to have caused the claimed condition, and a rationalized medical report from a qualified physician explaining how and why those work factors would cause the claimed condition. The Office also noted several deficiencies in the evidence of record. However, despite these advisements, appellant did not submit the requested evidence.

[11] *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

[12] *See Larry D. Passalacqua*, 32 ECAB 1859 (1981).

[13] *See Jimmy Gilbreath*, 44 ECAB 555 (1993).

disciplinary actions, evaluations and other similar actions are generally related to the employment, they are administrative functions of the employer and not the duties of the employee.[14] 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.[15] Appellant has not submitted sufficient evidence in corroboration of her claim to establish that the employing establishment erred or acted abusively with regard to the notices of suspension and removal. Thus, appellant has not established a compensable employment factor under the Act in this respect.[16]

Regarding the prayer meetings, the Board notes that the gatherings occurred while appellant was in the course of her employment, at a time when she was engaged in her master's business, at a place where she was expected to be in connection with her employment and while she was fulfilling the duties of her employment or engaged in doing something incidental thereto, such as attempting to access her locker or other janitorial equipment in the utility room.[17] In a November 18, 1997 letter, Ms. Ailer acknowledged that the prayer meetings were held in response to appellant allegedly burning candles as an occult practice, which disturbed her coworkers. Ms. Ailer stated that these meetings were held on an almost daily basis from May to September 1996, at a set time and location, with the permission of the employing establishment. Ms. Ailer also stated that these meetings, in addition to being held directly in response to employee concerns about appellant's religious beliefs, caused appellant to alter her work activities as she was not allowed to perform her custodial duties in the utility room during the prayer meetings. This official sanction of the prayer meetings, including the disruption of appellant's assigned custodial duties as described by Ms. Ailer, gives rise to the issue of whether the prayer meetings came within the course of employment.

Larson's treatise of workers' compensation law states that recreational or social activities are within the course of employment when:

> "(1) They occur on the premises during a lunch or recreational period as a regular incident of the employment; or (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life."[18]

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[14] *Id.*

[15] *See Richard Dube*, 42 ECAB 916 (1991).

[16] *See Frederick D. Richardson*, 45 ECAB 454 (1994).

[17] *Josie P. Waters*, 45 ECAB 513 (1994); *Monica M. Lenart*, 44 ECAB 772 (1993).

[18] 1A Larson, *The Law of Workers' Compensation* § 22.00 (1993); *see Lindsay A.C. Moulton*, 39 ECAB 434 (1988).

These are three independent links by which recreation can be tied to the employment and, if one is found, the absence of the others is not fatal.[19] Accordingly, when an employee is injured in a recreational activity, he or she must meet one of these three tests to establish performance of duty.

The evidence of record in the present case shows that criteria of the first test have been met. The prayer meetings occurred on the premises during a break period as a daily incident of the employment from May or June to September 1996, a period of four to five months. However, when the degree of employer involvement descends from compulsion to mere sponsorship or encouragement, as in this case, the question becomes closer and it is necessary to conduct a further series of tests. These tests include whether the employing establishment sponsored the event, whether attendance was voluntary and whether the employing establishment provided financial support.[20] There is no evidence of record indicating that any employees were compelled or required to attend the prayer meetings, or that the employing establishment provided any financial sponsorship. Thus, it appears that the prayer meetings were not within the scope of employment and thus constitute a matter unassociated with work activities. Appellant's reaction to the meetings would thus not have occurred within the performance of duty.

Although appellant alleged that she suffered an emotional condition due to stress at work, she failed to provide reliable, probative and substantial evidence that the accepted work factor of a noisy environment caused or contributed to her claimed condition. Thus, she failed to meet her burden of proof to establish that she sustained an emotional condition in the performance of duty.

[19] *Robert E. Daniel*, 46 ECAB 203 (1994); *Archie L. Ransey*, 40 ECAB 1251 (1989); *Clifford G. Smith*, 32 ECAB 1702 (1981); *Stephen H. Greenleigh*, 22 ECAB 53 (1971); Larson, *supra* note, 22.11. These three tests are not coterminous, individually, with the time, place and activity elements of work connection. The first test is related to time, place and activity, while the second and third tests are related solely to activity, respectively, to employer sponsorship of the activity or employer benefit therefrom; *see* Larson, *supra* note 18 at §§ 22.10, 20, 24(f) and 30.

[20] Larson at § 22.23 at 120-21.

The decision of the Office of Workers' Compensation Programs dated and finalized January 8, 1998 is hereby affirmed.

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

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member