

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA BURGARD and U.S. POSTAL SERVICE, MID HUDSON
PLANT & DISTRIBUTION CENTER, Newburgh, N.Y.

*Docket No. 97-1046; Submitted on the Record;
Issued March 4, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

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

On April 7, 1994 appellant, then a 43-year-old training technician, filed a claim for stress which she attributed to an unfounded disciplinary reassignment on that date. In a May 17, 1994 decision, the Office rejected appellant's claim on the grounds that the evidence of record demonstrated that appellant's injury did not occur in the performance of duty. In an October 18, 1996 decision, an Office hearing representative noted that appellant contended that the reassignment was a disciplinary action while her supervisor had stated that the reassignment was an administrative action. The hearing representative noted that the reassignment was the subject of a grievance which resulted in a settlement in which all evidence was expunged from appellant's personnel records and she was restored to her previous position but neither side admitted error. The Office hearing representative concluded, therefore, that there was no clear evidence to support a finding that the employing establishment erred or acted abusively in the administration of a personnel matter. She concluded that appellant had failed to establish that a compensable factor of employment arose out of the performance of her duties. The hearing representative therefore affirmed the Office's May 17, 1994 decision.

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

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are distinctions as to the type of situation giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Act. 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. Disabling

conditions resulting from an employee's feeling of job insecurity 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.¹ When the evidence demonstrates feelings of job insecurity and nothing more, coverage will not be afforded because such feelings are not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of the Act.² In these cases the feelings are considered to be self-generated by the employee as they arise in situations not related to his assigned duties. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse cannot be considered self-generated by the employee but caused by the employing establishment.³

In this case, appellant administered a test on a letter sorting machine scheme on February 16, 1994 in which an employee subsequently admitted that she cheated on the test. A postal inspector reported that appellant indicated that she knew the employee was on notice that her employment would be terminated if she did not pass the test. Appellant commented that she did not see or hear the employee get help from other employees in the room. She noted that she left the room but continued to monitor the test. On April 7, 1994 appellant was notified that she was being relieved from her duties as a training technician based upon an investigation by the employing establishment inspection service. On May 18, 1994 she was formally reassigned and reduced in pay and grade for failure to correctly administer and monitor scheme training. Appellant's supervisor stated that a hidden surveillance video camera showed several incidents of direct cheating on scheme training by several employees while appellant was responsible for administering and monitoring the training. Appellant filed a grievance against the action. In a June 30, 1994 decision, an official at the employing establishment found that the grievance was resolved with the May 18, 1994 reassignment and reduction in grade being modified to be an official discussion and appellant to be paid the difference in pay for the period she was reduced in pay and grade. Appellant was to be restored to her original bid position effective July 9, 1994 and all records and documents pertaining to the reassignment and reduction to be expunged from all records and files. In a July 22, 1994 memorandum, appellant's supervisor placed appellant on a one month detail to a position as a distribution clerk on the grounds that she failed to properly perform her duties as a training technician in that the scheme training was not monitored and cheating occurred while she was the training technician on duty. She was encouraged to bid for any position for which she was qualified but if she was not a successful bidder for any position by the end of the detail period she would be considered an unassigned regular employee and would be assigned to any position in which there was no successful bidder. In an August 18, 1994 settlement agreement appellant was to return to her bid assignment and all records, statements, personal notes and video tapes regarding the May 18, 1994 notice of reassignment and reduction in pay and the July 22, 1994 notice of change of assignment was to be expunged from all files.

¹ *Lillian Cutler*, 28 ECAB 125 (1976).

² *Artice Dotson*, 41 ECAB 754 (1990); *Allen C. Godfrey*, 37 ECAB 334 (1986); *Buck Green*, 37 ECAB 374 (1985); *Peter Sammarco*, 35 ECAB 631 (1984); *Dario G. Gonzalez*, 33 ECAB 119 (1982); *Raymond S. Cordova*, 32 ECAB 1005 (1981); *John Robert Wilson*, 30 ECAB 384 (1979).

³ *Thomas D. McEuen*, 41 ECAB 387 (1990) *reaff'd on recon.*, 42 ECAB 566 (1991).

At the February 13, 1996 hearing, the president of the American Postal Workers' Union local at the employing establishment testified that the April 7, 1994 action taken in regard to appellant violated the contract between the union and the employing establishment. He stated that an employee could not be removed on the grounds of misconduct from a position which they had obtained by bidding. He indicated that the person could be removed only if the position was abolished. He testified that proper way to address misconduct at the employing establishment was by the disciplinary procedure which required a progressive discipline process, beginning with a discussion, and then continuing with a letter of warning, suspensions for increasing periods and then removal from employment at the employing establishment. Appellant's supervisor, in a March 7, 1996 statement, contended that the action taken against appellant was administrative and not disciplinary. She stated that an administrative action did not have to be progressive in nature. She contended that appellant was never disciplined but had demonstrated her inability to perform her job and was therefore removed from her position due to her incompetence.

The Board has held that administrative actions, including investigations and disciplinary actions, are not within a claimant's performance of duty unless the employing establishment acted erroneously or abusively.⁴ The evidence in this case is insufficient to determine whether the action taken against appellant was done in error by violation of a union contract or not following established administrative procedures. Appellant did not submit sufficient evidence in the form of a copy of the contract or in any written description of the administrative procedures at issue to allow a determination of whether there was an error in the employing establishment's administrative actions in this case. This part of appellant's claim therefore cannot be accepted as demonstrating an error or abuse of administrative actions by the employing establishment.

Appellant also submitted a detailed description of other incidents at the employing establishment, which she described as harassment. She stated that her radio on her desk was missing every day and her award plaque was removed from the wall and placed face down on her desk. Appellant indicated that the locked drawers of her desk were entered, several garbage cans were placed around her desk, dead insects were placed in her desk, candy wrappers were stuffed into her time card slot, nasty notes were left under personal items taped to her desk and papers left in her IN basket disappeared. She indicated that she complained about the incidents to her supervisor and other employing establishment officials but no action was taken. Appellant stated that beginning in September 1993 the computers used in training were tampered with. On October 20, 1993 two technicians working to correct a problem in one computer found that the power plug had been removed from the motherboard. Appellant indicated that on November 17, 1993 a computer was tampered with but when she complained to her supervisor, the supervisor responded that appellant probably tampered with it herself. She indicated that her start time was changed on the grounds that she was getting excessive overtime even though she accumulated less than 20 hours of overtime a year when other employees accumulated that much in a pay period. Appellant stated that in December 1993 errors began appearing on the scheme computer disks which were maintained by a coworker. She stated that the errors kept appearing even though her supervisor denied that changes were made to the disks. Appellant stated that the errors on the disks caused problems because tests were given in a strict time limit and errors

⁴ *Michael Thomas Plante*, 44 ECAB 510 (1993).

wasted time. She indicated that on January 25, 1994 the phone cord was stolen from her telephone. Appellant found it but it was stolen again the next day. She then bought a new phone cord and took it home every night with her. She reported that her supervisor accused her of misfiling paperwork that she had never even seen before. Appellant stated that the supervisor also told coworkers that appellant was unreliable in attendance even though appellant had almost perfect attendance.

The Office hearing representative did not review appellant's statement. Many of the incidents cited by appellant, such as theft of equipment, tampering with computers or errors in computer disks, alleged lies told by her supervisor about appellant to other employees, false accusations of tampering or misfiling by the supervisor, could be considered compensable factors of employment if established to have occurred as alleged. Appellant's statement must therefore be sent to the employing establishment. The employing establishment should address the events described by appellant and include statements of any employees who may have witnessed the incidents. Therefore, the Office should make an independent determination of whether the incidents occurred as alleged and, if so, whether any constitute a compensable factor of employment. After further development as set forth in this decision, as well as any development as it may find necessary, the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs, dated October 18, 1996, is hereby set aside and the case remanded for further action in accordance with this decision.

Dated, Washington, D.C.
March 4, 1999

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member