U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAURA V. KING and DEPARTMENT OF THE NAVY, NAVAL SEA SYSTEMS COMMAND, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

Docket No. 98-156; Submitted on the Record;
Issued September 28, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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 January 11, 1991 appellant, then a 38-year-old security specialist, filed a claim for an emotional condition and gastritis. She related her condition to several incidents at work which she described in detail. In an October 18, 1991 decision, the Office of Workers' Compensation Programs rejected appellant's claim on the grounds that the evidence of record did not establish that her emotional condition was causally related to compensable factors of her employment. Appellant requested a hearing before an Office hearing representative. In an April 6, 1993 decision, the Office found that appellant abandoned her right to a hearing because she had failed to appear for the scheduled hearing and did not submitted sufficient reasons for her failure to appear. Appellant requested reconsideration. In an April 29, 1993 decision, the Office rejected appellant's request for reconsideration on the grounds that the request was untimely and appellant had not shown clear evidence of error in the Office's October 18, 1991 decision. In a January 9, 1995 decision, the Board affirmed the Office's decision denying appellant's request for reconsideration.[1] In a January 26, 1996 decision, the Director of the Office found that a medical report from Dr. Michael R. O'Leary, a psychologist, which the Office, in its October 18, 1991 decision, stated had not been submitted, had actually been received by the Office in a timely fashion before the issuance of the October 18, 1991 decision. The Director, therefore, concluded that the Office had erred in rejecting appellant's claim in its October 18, 1991 decision, without considering Dr. O'Leary's September 26, 1991 report. He vacated the Office's October 18, 1991, April 6 and 29, 1993 decisions and returned the case to the Office for further merit review. In a March 4, 1996 decision, the Office denied appellant's claim on the grounds that she had not met her burden of proof in establishing that her emotional condition was

[1] Docket No. 93-2050 (issued January 9, 1995).

causally related to factors of her employment. In an October 21, 1996 decision, an Office hearing representative affirmed the Office's March 4, 1996 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 with 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.[2] 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.[3] 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.[4]

Appellant made a general allegation that her emotional condition was due to harassment by her supervisors. The actions of a supervisor which an employee characterizes as harassment may constitute factors of employment giving rise to coverage under the Act. However, there must be some evidence that such implicated acts of harassment did, in fact, occur. Mere perception of harassment or discrimination are not compensable under the Act. A claimant must establish a factual basis for allegations that the claimed emotional condition was caused by factors of employment.[5] Appellant has not submitted any specific evidence that would establish that she was subjected to deliberate, systematic sexual harassment or discrimination in her job. The only administrative finding of record in this case was a denial of appellant's claim for discrimination. However, even though appellant has not established that she was subjected to harassment at work, the incidents and other employment conditions must be reviewed to determine whether they constitute compensable factors of employment.[6]

---

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

[3] *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).

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

[5] *Joan Juanita Greene*, 41 ECAB 760 (1990).

[6] *Delores F. Ximinez*, 27 ECAB 929 (1978); *Stanley Smith, O.D.*, 27 ECAB 652 (1978).

The Office accepted that appellant's exposure to pictures of nude and semi-nude women in the employing establishment was a compensable factor of employment, particularly when she escorted a woman through the employing establishment who was to present a seminar on sexual harassment. The record contains a memorandum from an official in the employing establishment's Equal Employment Opportunity (EEO) office, in which the supervisor of the employing establishment was informed that displaying such items in the work place could lead to sexual harassment and could be used to support a sexual harassment discrimination complaint to prove a hostile work environment. The EEO official recommended that the supervisor clarify to all employees that, under the policy of the employing establishment, behavior, pictures or jokes that are not appropriate are specifically excluded from the workplace. The employing establishment indicated that, in response, it reissued memoranda on the issue of sexual harassment and had the offending material removed. This memorandum shows that the display of the pictures of nude and semi-nude women in the workplace was an abuse in the employing establishment and, therefore, constitutes a compensable factor of employment.

Appellant served for a time at the chair of the employing establishment's EEO committee. Such service as a chair on an employing establishment committee would be a specially assigned duty and actions arising from that duty could be considered a compensable factor of employment. Appellant indicated that, at an October 19, 1989 meeting of the EEO committee, she maintained that the employing establishment should actively recruit a woman or a black into one section of the employing establishment. A male employee at that meeting stated that women could not do the work in that section and claimed that a black male assigned to another section was fired because he was not capable of learning the work. Such an encounter in the employing establishment would be considered a compensable factor of appellant's employment because it arose from appellant's specially assigned duty as the chair of the employing establishment's EEO committee. Appellant was also requested to investigate a complaint that a male employee made unwanted advances to a woman working in the employing establishment as a contract employee. Appellant talked to the female employee and relayed her account of the incident to her supervisors who in turn reprimanded the male employee. These matters would constitute compensable factors of employment because it arose out of appellant's specially assigned duties.

On June 26, 1990 appellant, in her duties as the security specialist, was going through the employing establishment after close of business to make sure that all security rules had been implemented. She indicated that she found a yellow squeeze toy on a bookcase which, when squeezed, caused a male phallus to pop out of the toy's mouth. Appellant confiscated the toy and gave it to her supervisor. The owner of the toy was informed that the toy was inappropriate and should not be in the employing establishment. As the toy was found while appellant was performing her duties and its presence was contrary to employing establishment policy, the action in finding and turning in the toy would be a compensable factor of employment.

Appellant cited other factors which are not considered compensable factors of employment. Appellant complained that she was not promoted, contended that she was not given the training to which she was entitled, had difficulty in receiving timely reimbursement for training expenses and received a performance evaluation that was not as high as it should have been. These matters are administrative in nature, involving actions unrelated to the performance

of appellant's assigned duties. There is no evidence that the employing establishment erred or was abusive to appellant on these issues. These items, therefore, cannot be considered compensable factors of employment. Appellant claimed that she had stress when her superior removed her from the chairmanship of the employing establishment EEO committee in a January 12, 1990 meeting. The superior indicated that since appellant had by that time filed an EEO complaint, it would be a conflict of interest to have her chair the EEO committee. As this removal was an administrative action and was not shown to be abusive or error, it cannot be considered a compensable factor of employment. Appellant stated that the removal of her security clearance caused her stress. This also was an administrative action, for which there is no evidence that the action taken was in error or abusive. The removal of appellant's security clearance, therefore, cannot be considered a compensable factor of employment. Appellant stated that she had stress when the man who made the biased comments in the EEO committee meeting and the man who made advances to the contract employee subsequently received promotions. The employing establishment indicated that the former person received his promotion one month prior to the committee meeting and the other held the position temporarily for a one month assignment that was being rotated among employees until it was filled permanently. Even if appellant's allegation of the promotions had been accurate, the promotion of the men under these circumstances would not be considered compensable factors of appellant's employment because the promotions were unrelated to the performance of appellant's assigned duties.

Appellant stated that on June 27, 1990, the day after she found the squeeze toy, she was summoned into a meeting with her supervisor, his superior and the head of the employing establishment. She indicated that, in the meeting which lasted 2½ hours, she was reprimanded for the action she took in regard to the squeeze toy in that she informed her attorney and the employing establishment EEO official about finding the squeeze toy before turning it over to her superiors. Appellant stated that she was told repeatedly that she lacked team spirit, showed poor judgment and appeared unwilling to use the chain of command. She claimed that the head of the employing establishment stated that he was going to have appellant reassigned to another part of the employing establishment and insisted that she submit an SF-171, government job application form, to him. The employing establishment stated that the head of the employing establishment was concerned that appellant had not reported the incident of the squeeze toy to management immediately for investigation and correction. He indicated in the meeting with appellant that since the employing establishment was a small operation each individual needed to be a team player and support each other. He stated that he supported EEO requirements and would take appropriate actions to enforce them but noted that it was hard to make prevention 100 percent effective. The employing establishment indicated that the head of the employing establishment offered to find appellant another position outside the employing establishment. Verbal abuse of an employee by a supervisor, particularly in front of witnesses, is a compensable factor of employment.[7] There exists a factual dispute on whether the head of the employing establishment verbally abused appellant in the June 27, 1990 meeting on the way she performed her assigned duties and turned over the squeeze toy. The record, therefore, must be developed further on this issue.

[7] *Georgia F. Kennedy*, 35 ECAB 1151 (1984).

Appellant also contended that her job assignments were reduced and she was not given enough work to do. She cited a report from an EEO counselor who stated that appellant's job duties were reassigned after she filed an informal EEO complaint, that supervisors admitted they were reluctant to give her assignments outside of her security area because she had filed an EEO complaint and that the head of the employing establishment admitted that he had advised managers of the employing establishment to be cautious around appellant, meaning that he did not want them to talk to appellant. These allegations of appellant, if proven to be accurate, would present a compensable factor of employment because it would show that appellant was not being permitted to perform her assigned duties and was being subjected to abusive treatment by the employing establishment. The counselor's report referred to by appellant is not part of the record submitted on appeal. The employing establishment did not provide any direct response to appellant's allegation. The Office did not develop the record further to determine whether appellant's allegation on this point was accurate.

In a June 25, 1991 report, Dr. O'Leary related appellant's complaints from her job, including sexual harassment in her job in promotion, job assignments, parking spaces designated on the basis of gender, training opportunities made available to men but not women and displays of sexual material in the employing establishment. He also noted appellant's June 27, 1990 meeting, in which she stated that she was humiliated, berated and insulted. Dr. O'Leary reported that the incident was reexperienced as nightmares. He indicated that appellant had symptoms of nausea and alternating constipation and diarrhea related to gastritis, which Dr. O'Leary stated were commonly experienced psychophyiological responses to severe stress. He commented that substance of the stress in appellant's case was the unremitting harassment and derogation in front of fellow employees. Dr. O'Leary concluded that the consistency with which appellant felt she was socially and professionally humiliated and resulting helplessness were the proximate causes of her symptoms. He indicated that a further demonstration of the causal relationship was that appellant's symptoms would subside on Friday evenings but would begin to recur on Sunday evenings before she would return to work. Dr. O'Leary diagnosed psychological factors affecting physical condition and adjustment disorder with anxious mood. In a September 26, 1991 report, he added to appellant's history the finding of the squeeze toy, which he commented symbolized to appellant the lack of progress and the continuing sexual harassment despite appellant's complaints. Dr. O'Leary amended his diagnosis of adjustment disorder to anxiety disorder with mixed features of post-traumatic stress disorder, specific phobia and generalized anxiety. Dr. O'Leary again attributed appellant's condition to the stress factors of her employment.

Dr. O'Leary attributed appellant's emotional condition to several factors of her employment, some of which are compensable factors, such as the exposure to sexual displays at work and the finding of the squeeze toy, some of which are not compensable factors, such as the lack of promotion and problems with training, some of which have not been shown to have occurred, such as sexual harassment and some of which need to be developed further, such as the June 27, 1990 meeting. His report, therefore, gives some support to appellant's claim that her emotional condition is related in part to compensable factors of employment. Dr. O'Leary's reports are not contradicted by any other medical evidence of record. While his reports are

insufficient to establish appellant's claim, they are sufficient to require further development of the medical evidence.[8] The case must, therefore, be remanded for further development.

On remand, the Office should develop the record further to determine whether June 27, 1990 meeting and the reduction in appellant's work load occurred as appellant alleged. To that end, the Office should request statements from witnesses and any documentary evidence relating to these factors, including the counselor's report cited by appellant. Upon receipt of such evidence, the Office should make a determination of whether the incidents or factors occurred as appellant alleged. The Office should then prepare a new statement of accepted facts and refer appellant, together with the statement of accepted facts and the case record, to an appropriate specialist for an examination. The specialist should be requested to give a diagnosis of appellant's condition and give his opinion on whether appellant had an emotional condition causally related, in whole or in part, to compensable factors of employment as set forth in the statement of accepted facts. After such further development as it may find necessary the Office should issue a *de novo*.

The decision of the Office of Workers' Compensation Programs, dated October 21, 1996, is hereby set aside and the case remanded for further action in accordance with this decision.

Dated, Washington, D.C.
September 28, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[8] *John. J. Carlone*, 41 ECAB 354 (1989).