

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACQUELINE M. JOHNSON and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, PA

*Docket No. 98-2450; Submitted on the Record;
Issued March 9, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has established that she developed an emotional condition in the performance of duty, causally related to compensable factors of her federal employment.

On March 20, 1997 appellant, then a 35-year-old occupational health nurse, filed a claim alleging that she developed emotional instability and headaches due to constant threats, hands pointed in her face and the pushing and grabbing of her arm.¹ In an attached statement, appellant also implicated never receiving an orientation packet when she reported to work on December 23, 1996, never receiving any formal training and never receiving a 30-day evaluation or a performance or orientation checklist. She claimed that she was never made aware of unit policies, that Ms. Koob, her supervisor, told her to get the other nurses to explain them to her and that Ms. Koob became angry, sarcastic and rude when appellant told her that the other nurses were busy. Appellant alleged that when she requested that someone be designated to train her, Ms. Koob stated that that person was her and then chased appellant out of her office. She alleged that Ms. Koob threatened to return her to the clerk craft, put her hands in appellant's face, then sent her home because she was upset and feeling threatened. Appellant alleged that Ms. Koob called her "girl" and told her she should not be in the position without any experience. Ms. Koob allegedly told appellant that no one could work with her. Appellant noted multiple incidents on specific dates of allegedly racially motivated disrespect on the part of Ms. Koob and alleged that her agenda was to see the medical unit staffed completely with caucasian contract nurses instead of African American regular postal employee nurses. She alleged that Ms. Koob gossiped about her, that she tried to make appellant sign an absent without leave slip, in the middle of giving a patient care, for leave appellant had properly taken and that she filed a grievance about this, which caused Ms. Koob to rescind it. Appellant alleged that Ms. Koob called Washington on appellant's day off and tried to have her removed, but that the union stopped this process. She noted that the union gave Ms. Koob a list of procedures for a new

¹ Appellant, a former postal clerk, was selected for the job of occupational health nurse on December 21, 1996.

employee, but that Ms. Koob turned it into a last chance agreement and then tried to terminate appellant with it by claiming that she did not document a patient's death correctly. Appellant alleged that Ms. Koob never trained her but sent her to an inappropriate training class for physicians and physical therapists on performing fitness-for-duty examinations, something a nurse did not do. She also claimed that she had to pay for training and was never reimbursed because Ms. Koob did not know how to do the paperwork. Appellant alleged that there was a problem with money orders she purchased, with the window clerk alleging that appellant got more money orders than what she paid for, but that postal inspectors told her to not leave her assignment. However, Ms. Koob ordered her to leave her assignment and then accused her of disrespect towards her managers when she followed the postal inspector's directive instead. Ms. Koob then sent appellant home, but placed her hands on appellant's left arm and began to push and shove appellant out the door, threatening "leave now before I call the postal police." Appellant did not submit any witness statements supporting or attesting to the specific allegations. A shop steward's statement from Ruth Williams was submitted as part of a grievance, which noted observing Ms. Koob on March 14, 1997 at 11:40 a.m. place her hands on appellant's left shoulder and attempt to shove her out of the medical unit. Other grievance statements submitted by Ms. Williams lacked specifics sufficient to constitute corroborative witness statements.

Appellant filed a number of grievances, Equal Employment Opportunity (EEO) complaints and an assault charge against Ms. Koob. No results or resolutions of these grievances, EEO complaints, or the assault charge was included in the case record.

In a response to appellant's allegations, Ms. Koob denied the assault charge and claimed that appellant was loud and argumentative, used foul language and claimed that she touched appellant's upper left arm in a nursing gesture of comfort. Ms. Koob claimed that appellant had verbally insulted her. She also submitted appellant's medical unit performance history citing many instances of conflicts, inappropriate behavior, poor documentation and poor attention to detail.

By decision dated October 7, 1997, the Office of Workers' Compensation Programs rejected appellant's claim finding that she failed to establish fact of injury. The Office found that none of appellant's allegations were compensable as arising in the performance of duty but acknowledged that appellant was touched by her supervisor. The Office did not accept that appellant was "pushed," "shoved" or "grabbed" by the supervisor.

By letter dated October 9, 1997, appellant requested an oral hearing. A hearing was held on February 26, 1998 at which appellant testified. Medical evidence from a psychiatric social worker and family therapist was received. A newly submitted, illegible "psychiatric evaluation" from a "Dr. Magill" was additionally reviewed.² The grievance statement from Ms. Williams noting Ms. Koob placing her hands on appellant was again submitted. Ms. Williams alleged that Ms. Koob failed to orient appellant and threatened on numerous occasions to send her back to the plant; however, no specific incidents were identified as to time, place and circumstance.

² According to the American Medical Association Directory of Physicians, there is no Dr. Magill practicing in Philadelphia, Pa.

The employing establishment submitted an additional statement by Ms. Koob in which she claimed that appellant received the same orientation as all other nurses, that appellant received almost daily instruction from her, that other nurses were frustrated by appellant's behavior, that appellant's position was not threatened and that appellant exhibited a repeated inability to make sound nursing judgments. Ms. Koob acknowledged that she touched appellant lightly on the arm in an attempt to calm her. She also alleged that appellant's assault claim filed with the Postal Inspection Service had been thoroughly investigated and found to be without merit.³

By decision dated April 28, 1998, the hearing representative found that appellant had failed to establish any compensable factors of employment. The hearing representative found that appellant was touched by her supervisor but that it was an administrative touching and that no evidence of administrative error or abuse was demonstrated. The hearing representative also noted that the medical evidence of record was not probative as it was not provided by a physician but from a licensed social worker.

The Board finds that appellant has not established that she sustained an emotional condition causally related to her federal employment.

To establish appellant's claim that she has sustained an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to her condition; (2) rationalized medical evidence establishing that she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.⁴ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.⁵

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the concept of workers' compensation. These injuries occur in the course of employment and have some kind of causal connection with it but are not covered because they do not arise out of the employment. Distinctions exist as to the type of situations 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 to a requirement imposed by the employment, the disability comes within the coverage of the Act. On the other hand, the

³ The record contains no report from the Postal Inspection Service on this issue to confirm Ms. Koob's statement.

⁴ See *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁵ See *Martha L. Watson*, 46 ECAB 407 (1995); *Donna Faye Cardwell supra* note 5.

disability is not compensable where it results from such factors as an employee's fear of a reduction-in-force, her frustration from not being permitted to work in a particular environment or to hold a particular position, or his failure to secure a promotion. 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.⁶ 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.⁷ 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.⁸

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 When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence of record.¹⁰

In the instant case, appellant alleged several incidents which, if substantiated by substantial evidence, could be considered as compensable factors of her employment. These include alleged racial slurs, disparate treatment and being threatened. However, appellant submitted no witness statements to establish any of these incidents occurred as alleged. Consequently, they are not established as having occurred and therefore do not constitute compensable factors of employment.

The only incident alleged by appellant which is established as having occurred is the touching incident during which Ms. Koob put her hands on appellant's left arm. This incident was acknowledged by Ms. Koob. The Office incorrectly found that to be a compensable factor, the touching had to be violent in the form of being "pushed," "shoved" or "grabbed" by the supervisor. The Board notes that this interpretation is not supported by the case law, as it has explained that any unwanted physical contact by a coworker or a supervisor, if established, may

⁶ *Lillian Cutler*, 28 ECAB 125 (1976).

⁷ *Artice Dotson*, 41 ECAB 754 (1990); *Buck Green*, 37 ECAB 374 (1985); *Peter Sammarco*, 35 ECAB 631 (1984).

⁸ *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

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

¹⁰ *See Gregory J. Meisenberg*, 44 ECAB 527 (1993).

be compensable.¹¹ The hearing representative incorrectly found that the touching incident “occurred as a result of an administrative function” for which there was no evidence of error or abuse. This is inconsistent with the Board’s case law. Appellant’s witness, Ms. Williams, stated that Ms. Koob was attempting to physically “shove [appellant] out of the medical unit in a loud manner.”¹² With respect to physical contact, the Board has held that touching arising in the course of employment may give rise to a compensable factor of employment.¹³

The Board therefore finds that appellant has established a compensable factor of her employment, such that the medical evidence of record must be evaluated.

The medical evidence in this case, however, was for the most part provided by Christine Cordero, a licensed social worker, Millicent Jones, a licensed social worker, and Helene Halpern, Ph.D., a family therapist.¹⁴ These individuals are not considered to be physicians as defined under the Act.¹⁵ Even if Dr. Halpern is a clinical psychologist, which is not evident anywhere in her reports, nowhere does she attribute appellant’s diagnosed conditions of “anxiety, depression” to the specific compensable employment factor of physical contact by Ms. Koob. Therefore, Dr. Halpern’s reports are not probative on the issue of causal relation. The March 27, 1998 report of Dr. Magill is largely illegible but from what can be discerned Dr. Magill seems to state only that appellant was in good medical health prior to the job at the employing establishment but then developed anhedonia and increased irritability and anger. He diagnosed major anxiety episode -- single, with symptomatic dysthymia. Dr. Magill, however, does not discuss causal relationship with regard to specific factors of appellant’s employment. Therefore, his report is insufficient to establish causal relation with the compensable factor found in this case. As no other probative medical evidence was submitted that attributed the development of appellant’s anxiety or depression to the physical contact with Ms. Koob, she has failed to establish that she developed an emotional condition in the performance of duty, causally related to compensable factors of her employment.

Accordingly, the decisions of the Office of Workers’ Compensation Programs dated April 28, 1998 and October 7, 1997 are hereby affirmed as modified.

¹¹ See *Karen E. Humphrey*, 44 ECAB 908 (1993) (physical contact and touching of a sexual nature by a coworker may give rise to a compensable incident).

¹² The hearing representative apparently relied on Ms. Koob’s unsupported claim that the Postal Inspection Service found no merit in appellant’s assault claim, in determining that no administrative error or abuse occurred.

¹³ *Helen Casillas*, 46 ECAB 1044 (1995); *Ruth C. Borden*, 43 ECAB 146 (1991); *Alton L. White*, 42 ECAB 666 (1991); Cf. *Constance G. Patterson*, 41 ECAB 206 (1989).

¹⁴ The record contains no evidence that Dr. Halpern is a clinical psychologist.

¹⁵ Title 5 U.S.C. § 8101(2) defines physician as including: “surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.” Therefore reports from counselors, social workers or family therapists do not constitute competent medical evidence; see *Bonnie M. Schreiber*, 46 ECAB 989 (1995) (patient liaison); *Sheila A. Johnson*, 46 ECAB 323 (1994) (acupuncturist); *Sheila Arbour (Victor E. Arbour)*, 43 ECAB 779 (1992) (physician assistants or social workers); *Debbie J. Hobbs*, 43 ECAB 135 (1991) (social worker with degree in psychology); *Joseph N. Fassi*, 42 ECAB 677 (1991) (nurse); *Barbara J. Williams*, 40 ECAB 649 (1988) (physical therapist not a “physician”).

Dated, Washington, D.C.
March 9, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member