U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HONG A. PHAM and U.S. POSTAL SERVICE,
POST OFFICE, Merrifield, VA

Docket No. 99-2351; Submitted on the Record;
Issued August 7, 2001

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant sustained an emotional condition in the performance of duty.

On January 4, 1999 appellant, a 32-year-old clerk, filed a Form CA-2 claim for benefits based on occupational disease, alleging that factors of her employment caused her to experience depression and emotional anxiety. She first became of aware of this condition on March 8, 1996. In a statement dated January 4, 1999, appellant asserted that her condition had resulted from a pattern of harassment on the part of the employing establishment which began in 1988. Appellant alleged the occurrence of the following incidents.

In 1988, after sustaining a work-related back injury, appellant claimed she was sexually harassed by a physician during a medical examination mandated by the employing establishment. Appellant alleged that the physician at the medical unit took pictures of her while she was undressed without her consent. She claimed that she filed a complaint with the postmaster, but withdrew it because she could not cope with the attendant stress.

Appellant alleged that she was verbally harassed in 1996 by a supervisor, who ordered her to sit next to his desk. She claimed that he became aggressive when she hesitated to sit close to him, pointed his finger at her face, touched her shoulder and pushed her to move to his area in an aggressive manner. Appellant filed an Equal Employment Opportunity (EEO) complaint against her supervisor regarding this incident.

In November 1997 appellant filed a racial discrimination claim against her supervisor, Cynthia Mitchell. Appellant alleged that Ms. Mitchell forbid her from drinking bottled water at her station, although she permitted a white male coworker to engage in the same activity. After appellant filed complaint, Ms. Mitchell asked her to go to the division office to make a statement, although she was unaccompanied by her union representative. Appellant claimed that Ms. Mitchell warned her that if she did not go with her immediately, she would have security guards escort her out of the building.

Following the November 1997 incident, management gave appellant a much more demanding work schedule. Appellant claimed that a management official contacted her physician without her permission and she experienced a greater degree of stress due to management's unfair treatment. She alleged that she experienced loss of sleep and emotional anxiety because her schedule changed from the 3:00 p.m. to 11:30 p.m. shift to the 6:00 p.m. to 2:30 a.m. shift.

In October 5, 1998, appellant became deeply depressed and asked to leave work using annual leave. She claimed management had warned her not to use any more sick leave, but her front-line supervisor, Ms. Mitchell, insisted that she use sick leave that day. When she attempted to return to work on November 9, 1998, management did not allow her to work. Appellant claimed that she attempted to work again on November 30, 1998, but management again forbids her from working. Appellant was hospitalized from December 1 to 4, 1998.

Appellant's physician recommended her return to work on December 14, 1998, but she was only able to work four hours per day for two weeks. One of the management officials said he would have to send her home for two days because he needed to talk to another official about her schedule change.

In response to appellant's allegations, the employing establishment submitted four rebuttal statements from each of the supervisors and management officials mentioned by appellant, which refuted her allegations.

In a statement dated March 18, 1999, supervisor Darryl Martin denied that he gave appellant a harder work schedule in retaliation for filing a discrimination complaint against Ms. Mitchell. He stated that appellant accepted a temporary job offer on February 28, 1998 which included the same work duties listed on the permanent job offer. Mr. Martin attached a copy of the job offer, which was signed by appellant, to support his assertion.

In a statement dated March 18, 1999, appellant's supervisor in 1996, Mr. Song Kang, denied that he ever instructed appellant to sit down next to his desk, claiming that he did not even sit at a desk at that time. Mr. Kang stated that, with regard to this incident, appellant was among a group of employees who were having an extended conversation and thereby neglecting their job duties. He instructed the group to separate and ordered them to return to work. Mr. Kang denied engaging in any finger-pointing, touching or pushing.

In a statement received by the Office on April 7, 1999, Ms. Mitchell denied engaging in discriminatory conduct by allowing a white male employee to drink bottled water at his work station while simultaneously denying appellant the same privilege. She stated that she instructed appellant to walk across the hallway to the water fountain to drink her bottled water and that the policy for all employees was that they were not allowed to consume food or beverages while engaged in the manual operation, as appellant was at that time, in order to prevent damage to the mail. Ms. Mitchell noted that when she noticed the white male employee drinking water at his station, she told him to drink it at the water fountain, just as she had instructed other employees. Ms. Mitchell stated that on the day in question, appellant became hostile and started yelling at her on the workroom floor when she instructed her to drink her water at the fountain. Ms. Mitchell asked appellant to accompany her to the management office without her union

representative because she intended an informal conversation/warning and did not believe this was the type of formal reprimand which required union representation. Ms. Mitchell did tell appellant she was going to call the postal police, but intended this is as a warning if appellant continued to disrupt the manual operation.

Ms. Mitchell asserted that everyone in the manual section who was on limited/light duty, including appellant, had their hours changed to 6:00 p.m. to 2:30 a.m. because this was the time when the mail volume was the heaviest in the manual operation.

In a statement dated March 18, 1999, with regard to appellant's charge that she was arbitrarily denied sick leave in October 1998, management official Steven Mayhew stated that one of his administrative duties included monitoring the sick leave usage of all employees and that management was required to discuss attendance with employees who had accumulated numerous unscheduled absences. Mr. Mayhew stated that he advised appellant had accumulated three unscheduled absences in a brief period of time and warned her that disciplinary action would be taken if she continued to be absent from work.

By decision dated June 24, 1999, the Office found that fact of injury was not established, as the evidence of record did not establish that an injury was sustained in the performance of duty. The Office found that several of the allegations appellant cited were factual, but did not constitute compensable factors of employment. The Office found that other allegations made by appellant were not accepted as factual, as appellant failed to provide corroborating evidence in support of them.

By letter dated July 23, 1999, appellant requested reconsideration. In support of her request, appellant submitted copies of grievances, EEO complaints, a December 8, 1997 letter of complaint, a December 8, 1998 letter of complaint from appellant to the postmaster and a December 14, 1998 letter from a management official responding to appellant's December 8, 1998 letter. Appellant also submitted a November 14, 1998 report from Dr. Chan Dang-Vu, a psychiatrist, who noted her history of depression and indicated that she was unable to return to full-time work. In an October 14, 1988 medical report, Dr. Long Nguyen, a general practitioner, stated he was treating appellant for severe low back and upper extremity pain, depression and emotional stress.

By decision dated August 4, 1999, the Office denied modification, of the June 24, 1999 decision.

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

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition and rationalized medical opinion establishing that compensable employment factors are causally related to the claimed emotional condition.[1] There must be

[1] *See Debbie J. Hobbs*, 43 ECAB 135 (1991).

evidence that implicated acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.[2]

The first issue is whether appellant has established factors of employment that contributed to her alleged emotional condition or disability. 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 Federal Employees' Compensation Act.[3] On the other hand, disability is not covered where it results from an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position, or 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 a personal injury sustained while in the performance of duty within the meaning of the Act.[4]

With regard to her allegations of harassment, it is well established that for harassment to give rise to a compensable disability under the Act there must be some evidence that the implicated incidents of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable.[5] The Board finds that appellant has failed to submit sufficient evidence to establish her allegations that the employing establishment engaged in a pattern of harassment. Appellant provided no corroboration for her allegations that she was verbally harassed and threatened in 1996 by supervisor Kang or that supervisor Mitchell engaged in racial discrimination by not allowing her to drink water at her work station.

Appellant has not submitted any factual evidence to support her allegations that she was harassed or treated in a discriminatory manner by her supervisors. The Board finds that the allegations that her superiors engaged in a pattern of harassment did not factually occur as she failed to provide sufficient evidence for her allegations. As such, appellant's allegations constitute mere perceptions or generally stated assertions of dissatisfaction with a certain superior at work which do not support her claim for an emotional disability.[6]

The Board further finds that the administrative and personnel actions taken by management in this case contained no evidence of agency error and are, therefore, not considered factors of employment. An employee's emotional reaction to an administrative or personnel matter is not covered under the Act, unless there is evidence that the employing establishment acted unreasonably.[7]

Appellant alleged that Ms. Mitchell committed administrative error by forcing her to leave her work station, in being informally counseled by management without union

[2] *See Ruth C. Borden*, 43 ECAB 146 (1991).

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

[4] *Id.*

[5] *See Ruth C. Borden*, *supra* note 2.

[6] *See Curtis Hall*, 45 ECAB 316 (1994); *Kathleen D. Walker*, 42 ECAB 603 (1991).

[7] *Alfred Arts*, 45 ECAB 530 (1994).

representation and by arbitrarily warning her against using excessive sick leave. Appellant has failed to demonstrate any error or abuse on the part of the employing establishment. Disciplinary matters consisting of counseling sessions, discussions or letters of warning for conduct pertain to actions taken in an administrative capacity and are not compensable as factors of employment.[8] In addition, monitoring the number of unscheduled absences accumulated by an employee will not give rise to a compensable disability absent error or abuse in these administrative matters.[9] Ms. Mitchell acknowledged that she checked on appellant's conduct relating to these activities, but this is an administrative function of the employer.[10] Thus, neither of these incidents constituted a factor of employment.

Appellant noted that she experienced disruption of her sleep patterns because she was reassigned from the 3:00 p.m. to 11:30 p.m. shift to the 6:00 p.m. to 2:30 a.m. shift. Appellant's supervisor acknowledged that appellant's shift, in addition to other limited-duty employees, was changed due to the volumes of mail in manual operations. The Board finds that the evidence of record is sufficient to establish a compensable work factor with regard to appellant's shift change.[11] Supervisor Darryl Martin denied that he gave appellant a harder work schedule in retaliation for her filing a discrimination complaint against Ms. Mitchell. Mr. Martin submitted a copy of a February 28, 1998 temporary job offer, signed by appellant, which included the same work duties listed on the permanent job offer. The Board finds that this allegation amounts to frustration at not being permitted to work in a particular environment and are not compensable factors under the circumstances of this case.

The occurrence of other incidents cited by appellant was denied by the employing establishment and appellant has not substantiated that such incidents actually occurred.[12]

The Board notes that matters pertaining to use of leave are generally not covered under the Act as they pertain to administrative actions of the employing establishment and not to the regular or specially assigned duties the employee was hired to perform.[13] However, error or abuse by the employing establishment in an administrative or personnel matter, or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage.[14] In the present case, there is no evidence of record to substantiate appellant's allegations of error or irregularity when she was denied permission to use annual leave to cover absences caused by her alleged emotional condition.[15] Appellant has submitted no evidence

[8] *Barbara J. Nicholson*, 45 ECAB 803 (1994); *Barbara E. Hamm*, 45 ECAB 843 (1994).

[9] *See Helen Casillas*, 46 ECAB 1044 (1995).

[10] *Id.*

[11] *See Donna J. DiBernardo*, 47 ECAB 700 (1996); *Peggy R. Lee*, 46 ECAB 527 (1995).

[12] To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his allegations with probative reliable evidence. *Ruthie M. Evans*, 41 ECAB 416 (1990).

[13] *Elizabeth Pinero*, 46 ECAB 123 (1994).

[14] *Margreate Lublin*, 44 ECAB 945 (1993).

[15] *Drew A. Weismuller*, 43 ECAB 745 (1992); *Kathi A. Scarnato*, 43 ECAB 220 (1991).

indicating that the employing establishment committed error or abuse or that its actions in this instance were unreasonable.[16]

Accordingly, a reaction to such factors did not constitute an injury arising within the performance of duty. The Office properly concluded that in the absence of agency error such personnel matters were not compensable factors of employment.

Although appellant has establish a compensable factor of employment pertaining to her work shift change, the Board finds that the medical evidence of record is not sufficient to establish that this caused or contributed to her emotional condition. Dr. Nguyen, a general practitioner submitted brief notations, in which he indicated that appellant was off work for treatment of low back and upper extremity pain and depression. Dr. Nguyen did not provide any rationalized medical opinion, based on a proper factual and medical background, explaining his opinion on causal relationship or otherwise relating his diagnosis to the factor found compensable in this case. Dr. Dang-Vu, a psychiatrist, submitted brief notations noting appellant was under his care for anxiety, depression "reactive to stressors at work where she feels she has been harassed." He also noted that appellant was "particularly sensitive to any perceived adverse attitudes from supervisors." As noted above, the Board has found that appellant's allegations of harassment were not established as factual. Therefore, the history relied upon by Dr. Dang-Vu is not an accurate factual history in this case. The weight of medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.[17] Dr. Dang-Vu does not demonstrate a complete or accurate factual background or provided an opinion relating appellant's shift change as a causative factor to her diagnosed emotional condition. For these reason, the Board finds the report of Drs. Nguyen and Dr. Dang-Vu to be if diminished probative value.

[16] Appellant submitted a copy of a June 6, 1999 settlement agreement pertaining to an EEO claim; however, this did not constitute an admission of wrongdoing on the part of the employing establishment. The mere fact that the employing establishment lessens or reduces a disciplinary action or sanction does not establish that the employer acted in an abusive manner towards the employee. *See Richard J. Dube*, 42 ECAB 916 (1991).

[17] *See Anna C. Leanza*, 48 ECAB 115 (1996).

The August 4 and June 24, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
August 7, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member