U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALICE E. KYLE and DEPARTMENT OF AGRICULTURE, NATIONAL FINANCE CENTER, New Orleans, LA

Docket No. 00-323; Submitted on the Record;
Issued June 19, 2001

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 to establish that she sustained an emotional condition in the performance of duty.

On April 23, 1996 appellant, then a 31-year-old peripheral equipment operator, filed an occupational disease claim alleging that she sustained obsessive compulsive disorder, agoraphobia, severe panic attacks, generalized anxiety and depression which she attributed to factors of her federal employment. She stopped work on September 14, 1995 and did not return.

By decision dated October 15, 1996, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that she had not established a compensable factor of employment occurring in the performance of duty. On October 14, 1997 appellant requested reconsideration, which the Office denied in a merit decision dated March 30, 1998. Appellant again requested reconsideration on April 22, 1998. By decision dated March 10, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was immaterial and; therefore, insufficient to warrant a merit review of her claim. In a letter dated March 28, 1999, appellant requested reconsideration. By decision dated July 12, 1999, the Office found that the evidence submitted was insufficient to warrant modification of its prior merit decision.

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

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation

Act.[1] 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.[2]

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by employment factors.[3] This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[4]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or 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.[5] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted the Office must base its decision on an analysis of the medical evidence.[6]

Appellant attributed her condition to harassment by coworkers after she filed an Equal Employment Opportunity (EEO) complaint, harassment and verbal abuse by Rose Meneses, a coworker, and sexual harassment by Kim DiBetta, a coworker. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[7] However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[8] In this case, appellant's supervisor, Sandra Evans, denied knowledge of any harassment or confrontations between appellant and her coworkers after she filed her EEO complaint and appellant has not submitted sufficient evidence to establish that she was harassed

[1] 5 U.S.C. §§ 8101-8193.

[2] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[3] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[4] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[5] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[6] *Id.*

[7] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[8] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

by her coworkers.[9] Thus, appellant has not established a compensable employment factor under the Act with respect to her allegation that she was harassed by coworkers after filing her EEO complaint.

Regarding the claimed harassment and verbal abuse, appellant alleged that Ms. Meneses said derogatory things about her to coworkers. Appellant further related that, at a May 1995 meeting with Ms. Meneses and her supervisor, Diane Goudeau, Ms. Meneses "began yelling about me, 'went off,' while jumping up and putting herself directly in my face; she was screaming in my face and I could feel the hot breath coming from her mouth." Appellant related that she became frightened and left the area. In a statement to the Office dated August 30, 1996, appellant related that she yelled and threw things at her and attacked her at a meeting. As discussed above, harassment by coworkers, when sufficiently substantiated by the evidence of record, may constitute a compensable factor of employment. Similarly verbal altercations with coworkers, when sufficiently detailed by the claimant and supported by the evidence of record, can constitute factors of employment.[10] This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[11] In this case, while appellant described Ms. Meneses yelling at her, she did not provide any details regarding the content of the conversation or provide supporting corroborative statements establishing that Ms. Meneses yelled at her, threw things at her or attacked her. Ms. Evans confirmed that appellant and Ms. Meneses had a verbal exchange during a meeting with Ms. Goudeau. Ms. Evans related that following the meeting Ms. Meneses left work and appellant stated that she no longer wanted to work with Ms. Meneses. Ms. Evans further indicated that Ms. Meneses was placed in an absent without leave status for going home and that appellant was moved as a result of the confrontation. While Ms. Evans confirmed that a verbal exchange occurred between appellant and Ms. Meneses, she did not provide any details regarding the content or extent of the incident.[12] Appellant, therefore, has not met her burden of proof to establish harassment or verbal abuse by Ms. Meneses.

Appellant primarily attributed the aggravation of her obsessive compulsive disorder, anxiety and depression to sexual harassment by a coworker, Mr. DiBetta. She related that the harassment occurred from October 1994 through June 1995. Appellant stated that Mr. DiBetta asked her personal questions of a sexual nature, told her about his past sexual relationships and asked her to go motel rooms with him. She further indicated that Mr. DiBetta placed his hand on her leg on several occasions and that he also put a piece of paper down her blouse with his hands and touched her breasts. Appellant noted that she had complained to her supervisor about Mr. DiBetta's actions.

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[9] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[10] *Samuel F. Mangin, Jr.*, 42 ECAB 671 (1991).

[11] *See Mary A. Sisneros*, 46 ECAB 155, 163-64 (1994); *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

[12] The record does not contain a statement from Ms. Goudeau. At the time she gave her statement to the Office, Ms. Evans related that Ms. Goudeau was on extended sick leave recuperating from surgery.

In a statement dated December 12, 1995, Ms. Evans related:

> "I questioned [Mr. DiBetta] in the past initially about [appellant's] accusation of [him] brushing her leg, he never acknowledged that this happened. Then on a later occasion, after [Ms.] [Meneses] and [appellant] got into a verbal altercation, [appellant] got more descriptive, stating that [Mr. DiBetta] put his hand in her blouse, I then questioned him about that, he listened and still did [not] state that this took place. On speaking with Robert Baldwin, an other … room employee, whom [appellant] stated witnessed [Mr. DiBetta] doing this, Bob stated that he saw [Mr. DiBetta] with a piece of paper and that [he] might attempt to put this in [appellant's] blouse but did not see this and turned away. I counseled [Mr. DiBetta] on both occasions on what his conduct should be at work."

Ms. Evans noted that appellant stated that after she talked with Mr. DiBetta there were no further incidents. She further related that Mr. DiBetta told her appellant had been to his house, that he thought their relationship had changed and "that he did touch her leg one time and did throw some paper in her blouse. But soon found out from me that she had a problem with it. He never did anything again."[13]

In an affidavit dated January 8, 1997, Mr. Baldwin related that he knew that appellant had complained about sexual harassment from Mr. DiBetta and originally informed his supervisor that he had not seen any incidents between the two. He stated:

> "I did clarify my original statement that I had [not] seen anything. What I saw was Kim DiBetta making a move toward [appellant] in the … room. What Mr. DiBetta did at that moment, I [am not] sure because I turned my head…. I was kind of embarrassed by other persons' personal activities. But I did see Mr. DiBetta reaching for her blouse as if to touch her, but that [is] the point at which I quickly turned my head."

In a statement told to an employing establishment official on August 1, 1996, Mr. DiBetta related that on two occasions in January 1995 appellant went to his home. He stated that on one occasion they talked and that on the other "we did much more." Mr. DiBetta stated:

> "The next day at work, when I saw her sitting there I went up to her, rested my hands on her legs and asked her how she felt. She told me not to do that kind of stuff at work and I stopped immediately. I thought that she was too unpredictable (acting much younger than her age) and decided then not to continue a relationship with her. I continued to be polite but really had as little business contact with her as I could during the one hour that our [two] shifts overlapped in the mornings."

[13] In a statement dated May 17, 1996, Ms. Evans related that in April 1995 appellant "described an incident" of sexual harassment to her and told her that "she only wanted him to leave her alone, that was it; she had no interest in filing anything and did [not] want to get anyone in trouble." She stated that she spoke with the alleged harasser "about behavior that was inappropriate in the workplace." Ms. Evans indicated that following appellant's confrontation with Ms. Meneses in May 1995, she further described incidents of sexual harassment by Mr. DiBetta.

Mr. DiBetta indicated that he got married on January 15, 1995. He further stated:

> "The blouse incident occurred during that same early period. We were horsing around. I made a wad of paper, pulled the top of her blouse to make an opening and dropped the wad in.
>
> "Except for her message to me not to grab her legs *at work*, she gave no indication that I was out of line, bothering her, or doing something which she had a problem with. At any rate, I was not more than courteous after the leg incident. I never approached her again." (Emphasis in the original.)

In a statement received by the Office on October 9, 1996, appellant related that Mr. DiBetta trained her when she began work in October 1994. She stated that after the third or fourth telephone call from Mr. DiBetta inviting her over, she stopped by his house on the way to work. She stated, "Everything went fine. I stayed for about 10 minutes[;] he talked about his fiancé and showed me his old-fasion[ed] stereo. I asked for a glass of water and left for work." Appellant related that she stopped by his house for a second time and sat down to watch a television show. She stated:

> "A few minutes later he sat by me and started feeling and trying to kiss me. I started to feel tricked and disgusted so I got up and told him I did not want to be with him and that I was not going to be. These are the two occasions outside the workplace we met as he stated. I did not have a relationship with him[;] I have never had sex with him and always made that clear to him that I did not want to. We never met out in town or at his house for the purpose of a sexual relationship or anything other than an employee trying to be cordial to her senior coworker as far as I was concerned. Both parties have to agree to be part of a relationship and I in no way agreed to be a part of a relationship with Mr. DiBetta. He knows this."[14]

Appellant alleged that Mr. DiBetta continued to harass her after she asked him not to touch her.

The Board finds that appellant has not supported her allegations of sexual harassment with sufficient probative evidence. While the evidence establishes that on one occasion Mr. DiBetta placed paper down appellant's blouse, this sole incident is insufficient to rise to the level of sexual harassment, particularly in view of their relationship outside the workplace. Further, it appears that supervisors at the employing establishment immediately spoke to Mr. DiBetta regarding his actions and transferred appellant's workstation. Appellant alleged that Mr. DiBetta continued to harass her after a supervisor spoke to him; however, she has not submitted sufficient corroborating evidence, such as witness statements, to establish that the actions by Mr. DiBetta actually occurred.[15] Appellant submitted an affidavit dated January 19,

[14] Appellant also submitted a statement dated December 16, 1996, in which she further described incidents of alleged sexual harassment by Mr. DiBetta as well as the incident, which occurred at his house.

[15] *See William P. George*, 43 ECAB 1159 (1992).

1997 from Hein Trinh, a coworker, who related that appellant complained to him about Mr. DiBetta's behavior but indicated that he did not see Mr. DiBetta with appellant. In an affidavit dated January 8, 1997, Robert Baldwin stated that appellant discussed problems with Mr. DiBetta with him but noted that he did not actually witness any sexually suggestive conduct by Mr. DiBetta. John Baniff provided an affidavit in which he indicated that Mr. DiBetta made derogatory comments about appellant but that he did not hear him "say anything sexually or improper to [appellant]. I did hear [Mr. DiBetta] say things sexually or improper about her when she was not around." As the statements provided by appellant do not support any specific instances of sexual harassment by Mr. DiBetta, she has not submitted sufficient corroborating evidence to establish her allegation of sexual harassment by Mr. DiBetta.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.[16]

The decisions of the Office of Workers' Compensation Programs dated July 12 and March 10, 1999 are affirmed.

Dated, Washington, DC
June 19, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

[16] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).