U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOYCELYN J. CAVAZOS and DEPARTMENT OF THE AIR FORCE, KELLY AIR FORCE BASE, TX

Docket No. 00-2193; Submitted on the Record;
Issued September 25, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT, PRISCILLA ANNE SCHWAB

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

On May 19, 1999 appellant, then a 48-year-old management analyst, filed a traumatic injury claim alleging that on May 7, 1999 she sustained stress due to harassment by management, causing her blood sugars to elevate. She stated that she was given a reduction-in-force (RIF) letter on May 7, 1999 and was told to report to a new area on May 10 or May 11, 1999. Appellant submitted a medical report from her treating physician, Dr. Sherwyn L. Schwartz, a Board-certified internist, dated May 14, 1999 in which he stated that appellant, who is diabetic, experienced increased stress from her job affecting her blood sugar readings and he advised that she take off 30 to 45 days of work.

The employing establishment controverted the claim. Appellant's supervisor, Leland Taylor, stated that every employee had been notified of the RIF, which would affect 3,000 to 4,000 employees. Mr. Taylor denied that anyone raised his or her voice or threatened appellant in anyway and added that appellant was hostile toward "him" when he approached her on May 11, 1999 to discuss her new job and location. Management also stated that it told appellant to report to her new job on May 10 or May 11, 1999 because they had no work for her. Management also stated that it granted appellant's request to retain her GS-11 temporary pay. The statement refers to a meeting management had with appellant regarding keeping her door open or he would remove the door. It does not actually say, however, that Mr. Taylor said those words.

By decision dated July 12, 1999, the Office of Workers' Compensation Programs denied appellant's claim, stating that the evidence failed to establish that her condition arose in and out of the performance of her federal duties.

By letter dated August 13, 1999, appellant requested reconsideration of the Office's decision and submitted additional evidence. In a lengthy statement chronicling events at work from March 29 through May 25, 1999, appellant explained the nature of the alleged harassment. On March 29, 1999 Mr. Taylor told her that there was a new "sheriff" in town and she could not go to the gym during lunch anymore. On April 7, 1999 Mr. Taylor queried why she had closed her office door the previous day and told her not to close her door again. He added that he was instructed to take the hinges off if she did close the door. On April 19, 1999 Mr. Taylor told appellant that her coworker, Rosie Padilla, was trying "to get rid" of her. Appellant stated that another coworker, Martha Munoz, told her that Ms. Padilla had called her one evening to tell her not to hang around with appellant because she would pick up her bad habits. Later that day, Ms. Padilla denied that she was trying to get rid of appellant and said, "it was all [Mr. Taylor's] idea." Later that same day, Ms. Padilla called appellant and apologized and said that appellant did not have to move from her office.

Appellant stated that on May 7, 1999, Mr. Taylor gave appellant the RIF letter telling her she must report to her new assignment on May 10 or May 11, 1999. He also told her that Ms. Padilla had already called her new supervisor to see if they could send appellant over as soon as possible.

Appellant said that on May 10, 1999 Nato Buentello walked into her office and told her that he was on her computer and had got her "files and stuff." Appellant also stated that she called Wanda Anderson to discuss the status of her temporary promotion which had been scheduled to terminate October 24, 1999 but would now terminate on September 11, 1999 due to the RIF. Appellant stated that she called Mr. Brown and he told her that he was concerned with her problem and would "get to the bottom" of it.

Appellant stated that on May 11, 1999, Mr. Taylor came into her office and shouted at her three times to shut down her computer while a coworker was present. Appellant stated that she felt "embarassed, humiliated, afraid and … terrible." Appellant stated that when Mr. Cavazos asked Mr. Taylor why he told appellant to shut down her computer and that he was going to take it away, Mr. Leland told Mr. Cavazos that appellant was a hostile employee and he was afraid she would destroy the files.

Appellant stated that Richard Nichols and Mr. Leland came into her office at noontime to discuss her temporary promotion. They told her that she would be on loan to "MQS" with a temporary promotion, and when she stated she wanted to make some phone calls, Mr. Nichols told her that she "needed to get the fuck out of here real [quick]" and Mr. Leland told her to "get the hell out now." Later that day, Mr. Nichols walked backed into her office, and when she told him that the union representative, Mr. Castoreno, was checking some details, he "walked off -- saying he did not have to call anybody and that the union could not represent [her] and he did not have to discuss shit with him or anybody else." Later, she told Herb Rippa that Mr. Leland had confiscated her computer and put it on his desk, and Mr. Rippa said he would see if he could get the computer back. Appellant stated that on May 11, 1999 Mr. Leland called her into his office and wanted her to sign a letter which she did not want to sign, and he told her that she must report to her new work area the next day.

Appellant stated that on May 17, 1999, Mr. Castoreno called a meeting with Roy Castillo, Harry Ahlers, Mr. Nichols, Mr. Cavazos, Mr. Ram and herself and all concluded that she would remain in her area until she received her doctor's diagnosis regarding her diabetes problem. Mr. Ahlers apologized for the way appellant had been treated. She stated that later that day she asked Mr. Nichols about her computer and he had someone return her computer.

On May 18, 1999 appellant stated that Mr. Nichols raised his voice at her when asking how much leave she was taking for an Equal Employment Opportunity (EEO) meeting. Appellant stated that on May 21, 1999 Mr. Nichols told her that she must vacate her office and that he would find her a new location as soon as he could.

The records contains a list of actions taken in appellant's defense from May 12 through July 23, 1999 indicating that a union grievance was filed on May 12, 1999 addressing her reassignment and temporary promotion, a letter of concern dated May 12, 1999 was sent to management addressing the confiscation of her computer and the threatening manner of her supervisor, and on May 18, 1999 an EEO complaint was filed addressing harassment. On June 29, 1999 an unfair labor practice was filed "in reference to failure to provide data," on June 29, 1999 an office of special counsel complaint was filed regarding continuation of pay and controversion by the agency without notification to the employee, and on July 14, 1999 there was a Merit Systems Protection Board (MSPB) appeal regarding the change to a lower grade without due process. Further, an EEO complaint was filed regarding disparate treatment and denial of assigned job and on July 23, 1999 a response regarding a proposed five-day suspension handed to appellant on that date and denial of union representation.

A memorandum dated July 23, 1999 addressed to appellant informed her of a notice of suspension for five-calendar days for misuse of her electronic mail (e-mail).

A memorandum dated May 7, 1999 from Mr. Taylor informed appellant of her RIF her reassignment to another position effective September 11, 1999 and could retain her present grade and salary.

By decision dated March 6, 2000, the Office denied appellant's request for reconsideration.

The Board finds that appellant did not establish that she sustained an emotional condition while 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 RIF or her frustration from not being permitted to work in a particular environment or to hold a particular position.[2]

Where an employee alleges harassment and cites to specific incidents and the employer denies that harassment occurred, the Office or some other appropriate fact finder must make a determination as to the truth of the allegations.[3] The issue is not whether the claimant has established harassment or discrimination under standards applied the Equal Employment Opportunity Commission. Rather the issue is whether the claimant under the Act has submitted evidence sufficient to establish an injury arising in the performance of duty.[4] To establish entitlement to benefits, the claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.[5]

To the extent that disputes and incidents alleged as constituting harassment by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[6] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[7]

Many of appellant's allegations of harassment were not corroborated by other evidence of record: That Mr. Leland told her she could not go to the gym for lunch and must not close her door or else he would take the hinges off, that she was insulted by Ms. Padilla, that Mr. Taylor yelled at her to close her computer down on May 11, 1999 and subsequently confiscated it, that Mr. Nichols raised his voice when asking her about her requested leave on May 18, 1999 and that in a meeting on that day both Mr. Nichols and Mr. Leland swore at her regarding the need to leave her office. Further, the employing establishment denied that anyone raised his or her voice or threatened appellant. Thus, appellant has failed to establish a factual basis for these allegations. No documentation of the grievances, complaints, letter of concern and the MSPB appeal addressing the alleged incidents of harassment was provided so the outcome of the grievances and complaints is not known.

[1] 5 U.S.C. §§ 8101-8193.

[2] *Clara T. Norga*, 46 ECAB 473, 480 (1995); *see Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[3] *Michael Ewanichak*, 48 ECAB 364, 366 (1997); *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

[4] *See Martha L. Cook*, 47 ECAB 47 ECAB 226, 231 (1995).

[5] *Barbara E. Hamm*, 45 ECAB 843, 851 (1994).

[6] *Clara T. Norga*, *supra* note 2 at 481; *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

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

The actions involving appellant's RIF notice and move are administrative matters and not compensable factors unless appellant shows that management acted unreasonably or abusively.[8] Management stated that 3,000 to 4,000 employees would be affected by the RIF. It also stated that it told appellant to report to her new job on May 10 or May 11, 1999 because it had no work for her. Management also granted her request to retain her GS-11 temporary pay. Appellant has not shown that management acted abusively or unreasonably.

In the request for reconsideration, appellant contended that her request for continuation of pay was "put off" and that the controversion of her claim was done without her knowledge. Evidence of record does not support these contentions. Further, issues regarding continuation of pay are administrative matters and as such are compensable factors only if management acted abusively or unreasonably.[9] Appellant had not made this showing.[10]

The March 6, 2000 and July 12, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
September 25, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

[8] *Clara T. Norga*, *supra* note 2; *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

[9] *See Beverly Diffin*, 48 ECAB 125, 129 (1996); *Diane C. Bernard*, 45 ECAB 223, 227 (1993).

[10] Since appellant did not establish any compensable factors of employment, the medical evidence need not be considered. *See Diane C. Bernard*, *supra* note 9.