U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHARON C. DONAHUE and DEPARTMENT OF THE ARMY, PITTSBURGH DISTRICT CORPS OF ENGINEERS, Pittsburgh, PA

Docket No. 01-1006; Submitted on the Record;
Issued January 9, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has met her burden of proof to establish that she sustained an emotional condition in the performance of duty causally related to the factors of her federal employment.

On August 20, 1998 appellant, then a 49-year-old supply technician, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that since 1993 she has been required to work in a sexually harassing hostile work environment and that this has caused depression, anxiety, panic attacks and post-traumatic stress disorder. In a statement submitted with her claim, she stated that from 1993 until 1997 her former immediate supervisor, Mr. Foster, would on an almost daily basis, grab and slap her buttocks and make sexual innuendoes with regard to having sex. Appellant stated that, when these unwelcome sexual advances failed to work, he began threatening her. She also alleged that she was the victim of several sexual assaults. One of these assaults allegedly occurred on October 8, 1993 when appellant stated that the supervisor came to her home about 11:00 p.m. on the pretext of asking about her husband who was ill in the hospital and made sexual advances. Appellant alleged that she did not take this problem to her second level supervisor because he had two female subordinates file a sexual harassment claim against him. She also stated that Mr. Foster continually "badgered" her about her use of leave when her husband was in the hospital. Appellant said that around March 1997 the supervisor informed her that the employing establishment would be a good place for her to work. She stated that she perceived the supervisor's statements as threatening in nature and that her rejecting the supervisor's unwelcome sexual advances was now considered a condition of her continued federal employment. Appellant also stated that her supervisor told her to keep a log on a fellow employee and when she refused, he became hostile. She stated that, on August 22, 1997, her supervisor made a threatening telephone call to her at her place of employment, wherein he made false allegations that she had made a false complaint against him and used very foul language. Appellant further stated that after she filed a sexual harassment claim against the supervisor, she was involuntarily transferred to another duty station, which was the same duty station that the supervisor was reassigned to. She noted that in her new assignment, she was given very little to do. Appellant also stated that in the spring of 1998 she inadvertently entered an internet site containing pornographic material due to the fact that her computer "had been programmed to

allow access to pornographic web sites," and that left her emotionally upset. She also alleged problems with her new supervisor, Mr. Gustis. Appellant noted that he gave her a "Stop Sex" pamphlet and made the comment: "You need it" which she found offensive. She also alleged that when she told Mr. Gustis that she did not appreciate the way he treated his female subordinates, berating other employees in her presence and beating his chest and yelling, "I am the boss", he threatened her with a letter of reprimand. She also noted that an issue arose with respect to her time sheets with respect to the time that she arrived each morning, and that she was told that she would have to either use four hours of annual leave or face charges for fraud, that her union representative informed Mr. Gustis that she would sign for four hours of annual leave and then file a grievance, and that Mr. Gustis would not let her take four hours of annual leave and do a payroll correction on this issue. Appellant believed that such behavior was in retaliation for her filing a grievance against him and for filing sexual harassment allegations against another manager. She also referred to another incident where she was charged with sleeping on duty even though the charge was wrong.

Numerous signed statements are contained in the record. These include statements with regard to appellant's time sheets and the hours she worked, a statement with regard to appellant sleeping on duty, statements about the pornographic material appellant found on her computer,[1] and statements regarding a dispute Mr. Gustis had with appellant regarding working in the LM stock room. Copies of appellant's time sheets were also submitted.

By decision dated March 18, 1999, the Office found that appellant had not established that her emotional condition arose in the course of employment.

By letter dated April 6, 1999, appellant requested a hearing which was held on September 27, 1999. At the hearing, she discussed in detail the specific incidents that she alleged led to her claim of sexual harassment. Appellant noted that there were no witnesses to these incidents.

In a decision dated March 13, 2000, the hearing representative found that appellant had not established any compensable factors of employment and accordingly, affirmed the Office's earlier decision denying the claim.

By letter dated April 4, 2000, appellant requested reconsideration. In support thereof, she submitted a copy of her civil complaint with regard to sexual harassment, an offer of judgment wherein the employing establishment offered to settle appellant's case in civil court for $85,000.00, appellant's acceptance of that offer and the court's entry of that settlement. By decision dated May 17, 2000, the Office denied modification of its prior decision.

On June 9, 2000 appellant again requested reconsideration. By decision dated November 14, 2000, the Office denied modification of the prior decision for the reason that the evidence submitted in support of the request was not sufficient to establish that appellant's illness occurred in the performance of duty.

By letter dated November 21, 2000, appellant again requested reconsideration. In support thereof, she submitted a report of Dr. Katherine C. Ke, a Board-certified family

[1] Both Sharon A. McGuigan and Brian Graham note that the pornographic files were deleted from appellant's Internet directory.

practioner, and a notice dated May 15, 2000 removing appellant from federal service. By decision dated January 5, 2001, this was denied for the reason that the evidence submitted in support was insufficient to warrant modification.

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 factors of her federal employment.[2] To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; (2) 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.[3]

Worker's compensation laws are 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 coverage of workers' compensation. Distinctions exist as to the types of situations giving rise to an emotional condition that will be covered under the Federal Employees' Compensation Act. When 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 Act. On the other hand, there are situations where an injury has some connection with the employment, but nonetheless does not come within the coverage of workers' compensation because it is not considered to have arisen in the course of employment.[4]

The Board finds that appellant has failed to establish that her emotional condition was causally related to compensable factors of her federal employment.

As a general rule, an employee's reaction to administrative or personnel matters fall outside the scope of coverage of the Act.[5] Administrative and personnel decisions are generally related to the employment but they are functions of the employer and not duties of the employee.[6] The Board has held, however, that administrative and personnel matters will be considered as an employment factor where the evidence of record discloses error or abuse on the part of the employing establishment.[7] In determining whether the employing establishment has erred or acted abusively, the Board will examine the record to determine whether employing establishment personnel acted reasonably.[8] There was evidence in the record that indicated that

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[2] *Edward C. Heinz*, 51 ECAB ____ (Docket No. 99-992, issued September 12, 2000); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

[3] *Ray E. Shotwell, Jr.,* 51 ECAB ___ (Docket No. 99-2032, issued September 12, 2000); *Donna Faye Cardwell*, *supra* note 2.

[4] *Beverly Diffin*, 48 ECAB 125, 128 (1996).

[5] *See Janet I. Jones*, 47 ECAB 345 (1996).

[6] *See Alberta Kinloch-Wright*, 48 ECAB 459 (1997).

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

[8] *See Richard J. Dube*, 42 ECAB 916 (1991).

appellant would "sign in" one-half an hour prior to her coming to work. The supervisor reasonably asked her to either take annual leave or face the consequences. Accordingly, the Board finds that the Office did not act unreasonably with regard to the dispute about appellant's time sheets.

Appellant also noted that she had various disagreements with Mr. Gustis and that she was erroneously accused of sleeping on the job. The Board has held that a claimant's feelings or perceptions that a form of criticism or disagreement is unjustified, inconvenient or embarrassing is self-generated and does not give rise to coverage under the Act absent evidence that the interaction was, in fact, abusive. This principle recognizes that a supervisor or management in general must be allowed to perform their duties and that, in the performance of such duties, employees will dislike actions taken or decisions made. However, mere dislike of a supervisory or management action will not be compensable without a showing through supporting evidence that the incidents complained of were unreasonable. Appellant has not made that showing in this case. Although certain of the alleged actions by appellant's supervisors may be considered unreasonable, there is no proof that these incidents occurred.

Appellant alleged frustration with regard to being transferred to a new job where she had nothing to do. This does not constitute a compensable factor of employment because it does not involve appellant's ability to perform her work duties but rather constitutes a desire to work in a different position, which is a noncompensable factor.[9]

Appellant alleged that she accidentally came across pornography on her computer, and that seeing this material offended her. There is evidence that this incident occurred, in that there are supporting affidavits from some of her colleagues. The evidence is not clear as to whether appellant was working on office work or personal work when she accidentally accessed the pornographic sites. There is no evidence that the employing establishment had anything to do with her accessing these sites and there is evidence that other employees deleted these files from her internet explorer cache directory. Accordingly, this does not constitute a compensable factor of employment.

Appellant's main allegations concern her contention that she was exposed to sexual harassment and crude language during the course of her federal employment. Verbal altercations or abuse in the workplace may constitute a compensable factor of employment.[10] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that the harassment or discrimination did, in fact, occur.[11] Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.[12] An employee's charge that he or she was harassed or discriminated against is not determinative of whether or not harassment or discrimination occurred.[13] To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable

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[9] *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

[10] *See Harriet J. Landry*, 47 ECAB 543, 546 (1996).

[11] *Sheila Arbour (Vincent E. Arbour)*, 43 ECAB 779 (1992).

[12] *See Lorraine E. Schoeder*, 44 ECAB 323 (1992).

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

evidence.[14] In the present case, the Board finds that appellant has not supported her allegations of harassment and discrimination with sufficient probative evidence. Although appellant has provided her personal and detailed accounting of the alleged sexual harassment, she has not provided any evidence from other witnesses that would support her allegations. Furthermore, although appellant alleged she was subjected to sexual harassment from 1993 to 1997, she continued to work at her job during that time and made no allegations regarding sexual harassment until she filed her claim in August 1998. This is particularly noteworthy when one considers the seriousness of some of her charges and in particular, her allegation that she was sexually assaulted on October 8, 1993. This delay in reporting sexual harassment, in combination with the fact that she has no corroborating witnesses, leads us to the conclusion that appellant has not met her burden of proof to establish that she was sexually harassed. We note that evidence of a settlement in her civil case is not persuasive evidence of sexual harassment in that it did not include any admission that this activity occurred by the employing establishment.

For the foregoing reasons, appellant has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.[15]

The decisions of the Office of Workers' Compensation Programs dated January 5, 2001, November 14, May 17 and March 13, 2000 are affirmed.

Dated, Washington, DC
January 9, 2002

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

[14] *See Frank A. McDowell*, 44 ECAB 522 (1993); *Ruthie M. Evans*, 41 ECAB 416 (1990).

[15] As appellant has failed to allege a compensable factor of employment substantiated by the record, the medical evidence need not be discussed; *see Margaret S. Krzycki*, 43 ECAB 818, 827 (1991).