

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KELLY D. BOGY and U.S. POSTAL SERVICE,  
POST OFFICE, Billings, MT

*Docket No. 02-28; Submitted on the Record;  
Issued June 14, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

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

On May 26, 1999 appellant, then a 38-year-old postal carrier, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that she had situational depression and anxiety as a result of a hostile environment and sexual harassment in her federal employment. The employing establishment controverted the claim.

Appellant submitted a July 8, 1999 statement describing her duties as a postal carrier and indicated that the employing establishment hired a transfer employee, Frank Haczewski and a new postmaster in 1994. She stated the office began to change and "hostility increased." Appellant noted that she took a leave of absence on December 15, 1995 to recover from stress-induced illnesses, recurring bladder and kidney infections, depression and anxiety. She stated that she was crying all the time and was unable to handle pressure from the work environment about using leave for children's needs as she was a single parent with two teenage boys. She also alleged degrading and sexist comments by Mr. Haczewski, about being a woman and using leave to care for family and management did nothing to stop this harassment. Appellant was treated for depression and health problems in 1995, including a kidney infection. She stated that the postmaster gave her a letter in April 1996, that sent her over the edge, implying that she was the cause of all the hostility and required her to attend a psychiatric evaluation. Appellant alleged that Mr. Haczewski made sexist remarks, vulgarity and inappropriate sexual references and displays from 1995 through present. She alleged that "[Mr. Haczewski] unbuckled and unzipped his pants and said, 'I [will] show you my gherkin' to me in front of coworkers, on the workroom floor." Appellant indicated that Mr. Haczewski regularly made loud comments to the postmaster and the supervisors. She also cited an incident involving Mr. Haczewski when he mocked and mimicked an inspector with Tourette's syndrome. Appellant alleged that in the fall 1997 Mr. Haczewski blew up about a female carrier that had an injured ankle and needed to switch routes and yelled out, "all woman were just a bunch of [g]od [d]amn [s]kirts, that they got

no business working here....” In November 1997, she stated that Mr. Haczewski threw a bag of licorice at her in anger and left. Appellant stated that she reported incidents involving Mr. Haczewski’s behavior eight times to supervisors between 1997 and 1999 with no result and that she was verbally harassed for reporting these incidents. She alleged that Mr. Haczewski yelled, whistled loudly and was not respectful of others, even mocking management during and after stand-ups, safety talks. Appellant stated that Mr. Haczewski was to work next to her for two months, starting in December 1998 and she began obsessing about having to work next to him. She told management that she felt threatened by Mr. Haczewski. Appellant also stated that she began writing down everything said and done and she was crying everyday and not able to concentrate and do her job effectively. She stated that she began seeing Dr. Bruce T. Smith, a Board-certified psychiatrist, on March 31, 1999 for depression and realized that she could no longer tolerate the hostile work environment, degradation and lack of resolve.

In a May 26, 1999 disability certificate, Dr. Smith stated that appellant had a long history of harassment at work and was upset and tearful at times and had a problem with work concentration, emotionality and interference with decision making. He indicated that appellant had post-traumatic stress disorder (PTSD) which was caused or aggravated by employment. In a June 16, 1999 report, Dr. Smith added that appellant’s disorder was severely aggravated by the harassment and lack of support in her employment. He stated further that the degradation in her employment was similar to a previous abusive relationship.

In a July 28, 1999 letter, the Office of Workers’ Compensation Programs advised appellant that additional factual and medical evidence was needed to establish her claim.

Appellant submitted an additional statement dated September 3, 1999 and enclosed witness statements. The additional information submitted by appellant included a description of the statements that she believed were causing her stress from Mr. Haczewski. Appellant described his statements to her as “If I only had tits, women can[not] handle a real job, inferior species, if only I had children, better yet juvenile delinquent children, I could have all the time off I wanted.” She stated these comments were said very loudly, so the whole work floor could hear, including the supervisors. Appellant stated that the employing establishment did nothing to correct his attacks on women. She included a diagram of the work floor. Appellant alleged another statement from Mr. Haczewski, “[w]ho the hell does [appellant] think she is, guess you have to be damn woman to get what you want around here or maybe you just have to be [appellant].” And another statement from him when the telephone would ring, “[t]hat’s for [appellant], bet it’s the [p]olice [d]ep[artment] telling her to pick up one of those delinquent boys of hers, why don’t you just send them to the military, [o]h [appellant’s] out of here!, guess we [are] gonna have to do her work, why don’t ya just get a man! Then those boys would know how to act, like real men! Why don’t ya just get the hell out of here let a real man have your job.” She also stated that Mr. Haczewski referred to her as “that fucking bitch” and called her “bitch” to her face numerous times. Appellant stated that he would try to cover this up with, “[o]h female dog.” She indicated that these type of comments continued every day, making it very hard for her to work in this environment and many employees would no longer speak to her because Mr. Haczewski would then harass them when they did so. Appellant stated that she did not report any of this to my supervisors in this time period because this daily abuse was no secret to anyone in the office and her supervisors’ desks were right there on the workroom floor. She

included statements from witnesses labeled as attachments #2, #3 and #4. Appellant also stated that she felt that she was being harassed and singled out for taking earned leave because other employees were not harassed for taking leave for such reasons as illness, stress, drug or alcohol treatment or family needs. She indicated that it was Mr. Haczewski's behavior that made her requests for leaves of absence an office spectacle as he has continuously and on a daily basis behaved disrespectfully in public to her, to his supervisors, to the postmaster and to other staff, especially female employees. Appellant noted that Mr. Haczewski has used sexist remarks, vulgarity and inappropriate sexual references and physical displays from 1995 through present. She provided an example, where in the summer of 1995, Mr. Haczewski unbuckled and unzipped his pants and said, "I [will] show you my gherkin" to her in front of coworkers on the workroom floor. She included another statement from Mr. Haczewski who said, "[w]ho you got under your desk today, who's ass do I got to kiss today, what dick-head made up this schedule, damn bitches always get whatever route they want, damn skirts." Appellant stated in the fall of 1997 that Mr. Haczewski blew up and ranted very loudly about a female carrier, Diane Polly, who was injured and needed to switch routes. She stated that Mr. Haczewski yelled: "[a]ll woman are just a bunch of [g]od [d]amn skirts, they got no business working here, they are taking jobs away from us men, why don't they just stay home where they belong." Appellant stated he repeated this over and over. And she was so upset by Mr. Haczewski outburst she said Frank, "F- --you Frank just shut your mouth." Appellant stated she then went immediately to her supervisor and was informed that she was not to speak like that again or she would be disciplined. She inquired about Mr. Haczewski and was told that they would conduct an investigation. Appellant alleged that Mr. Haczewski hollered to music, whistled loudly, harassed other female employees, was so noisy, he made it difficult to concentrate. She described an incident at Christmas time in 1998 when another employee offered Mr. Haczewski a tray of Christmas cookies and he threw the tray of cookies down on the floor. Appellant indicated that her last day of work was May 19, 1999 and her Equal Employment Opportunity (EEO) claim was denied for timeliness and failure to state a claim of injury.

Appellant provided statements from Peggy Williams and Judith Utz. However, none of the statements described a specific incident as alleged by appellant.

In a September 7, 1999 letter, the Office advised the employing establishment of the additional evidence needed and requested such.

In a September 14, 1999 letter, Elaine Falevitch, an EEO counselor investigator, indicated that appellant had contacted her on April 17, 1999 and described sexual harassment by Mr. Haczewski and how he created a hostile work environment. She conducted an investigation and found that the only recent incident outlined by appellant was that he had referred to women as skirts in 1997 but the context of the remark was uncertain. Ms. Falevitch noted the throwing of the package of licorice and cookies on the floor but concluded these were not recent or evidence of sexual harassment. She also mentioned an incident where Mr. Haczewski had yelled at Harvey Goldstein in a teasing manner. Ms. Falevitch closed the complaint for untimeliness and not stating a claim. She noted further that there was no history of grievances filed by appellant and that Mr. Haczewski was a union steward. Ms. Falevitch stated that appellant did not go to another steward or officer, nor did she request mediation. She concluded that nearly all

of her incidents were well over the 45-day time limit and appellant was not harmed by any whistling.

In a September 23, 1999 statement, the supervisor of customer services, Edmund Matthews, stated that the first time appellant came to him concerning complaints about Mr. Haczewski was in 1997, when he allegedly referred to women as “skirts.” He further noted appellant’s inappropriate remarks to Mr. Haczewski and stated after interviewing witnesses and Mr. Haczewski, they denied hearing or seeing anything and he advised Mr. Haczewski to limit his interactions with appellant. Mr. Matthews noted that appellant’s allegations that she has spoken to supervisors eight times between 1997 and 1999 was not true and stated appellant only spoke to him twice about Mr. Haczewski, the first regarding the “skirt” comment and the second was regarding Mr. Haczewski’s whistling. Mr. Matthews noted that he spoke to Mr. Haczewski but did not feel it required disciplinary action. He noted that appellant did not request formal mediation on February 18, 1999 and her allegations were untrue.

In a September 20, 1999 statement, Mr. Haczewski stated that he never said anything about appellant and family care, although he was approached on questions about this matter, since he was a union steward. He stated that he did not use inappropriate language and he had two teenage children, so there was no need to say anything of that nature. Mr. Haczewski stated that he never made any derogatory remarks about appellant and did not get involved in her personal affairs. He specifically denied calling her a “bitch” or “female dog.” Regarding the “gherkin incident,” he stated that another carrier had referred to his own private part as such and denied inappropriate language. He stated that he was casing a route next to appellant and she kept taking licorice from the other route, so he took it and put it on her case. Mr. Haczewski noted that only when she “buted into my conversation,” did he throw words at her, stating, “I better stop because she will tell Johnny on me.”

In a September 27, 1999 statement, John O’Leary, the supervisor of customer services, indicated that appellant’s leave requests from December 21, 1999 were for depression, family problems and emotional needs. He further advised that he had not personally witnessed or heard any inappropriate acts or comments made by Mr. Haczewski. Mr. O’Leary stated that the few times appellant came to him, she did not have any specifics. He further advised that appellant’s statement that she reported incidents involving Mr. Haczewski to him eight times was untrue. Mr. O’Leary stated that the times she did mention Mr. Haczewski involved singing loudly or whistling but she offered no specifics. He stated he told Mr. Haczewski to keep it down. Mr. O’Leary further advised that appellant stated that Mr. Haczewski was harassing Mr. Dobler, but when he was questioned, he did not know what she was referring to. Mr. O’Leary was generally aware of animosity between Mr. Haczewski and appellant and, when Mr. Haczewski won the bid for the route next to appellant, he advised appellant to report anything to him. He advised that he was on sick leave on February 5, 1999 and therefore, he could not have had a discussion with appellant on that date.<sup>1</sup> Mr. O’Leary advised that appellant left work on April 29, 1999 and did not return.

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<sup>1</sup> During the hearing, appellant explained that she had made a mistake regarding the date and it was actually, January 29, 1999.

In an October 12, 1999 decision, the Office found that the evidence was not sufficient to establish that appellant sustained an injury in the performance of duty as alleged.

By letter dated November 1, 1999, appellant requested a hearing, which was held on April 6, 2000.

By letter dated April 7, 2000, appellant's representative submitted additional evidence consisting of legal arguments.

The employing establishment again denied appellant's allegation on age 24, line 12, that appellant went to see Mr. O'Leary, her manager, on either January 29 or February 5, 1999. Mr. O'Leary stated that no conversation took place with appellant on either date. The employing establishment also provided statements from Mr. Haczewski and from Postmaster Goldstein and Supervisor O'Leary stating appellant never came forward with complaints. The employing establishment stated that appellant alleged events happened but they could not be verified and Mr. Haczewski stated that these events did not occur. The employing establishment addressed Mr. Haczewski's bidding routes and stated that he did not intentionally bid on routes near appellant. Additionally, Mr. Haczewski stated that he on many occasions assisted appellant in the casing of her mail and that they at one time had a good working relationship. The employing establishment noted the alleged incident in which reference is made to a gherkin and that Mr. Haczewski denied this allegation. The employing establishment submitted a statement from Mike Crogan, State NALC President, who was there at the time that the discussion on a gherkin took place. His statement clarified what transpired and he denied seeing Mr. Haczewski unbuckling or removing his pants. The employing establishment also noted that appellant was an active member in the banter that took place amongst the letter carriers.

By letter dated May 3, 2000, appellant submitted additional medical documentation and evidence for her claim. She enclosed acupuncture notes, psychotherapist notes and treatment notes, rebuttal and statements.

Appellant also included a copy of a cartoon that was taped to her supervisor's desk for four months with her name written on it, she added she discussed Mr. Haczewski behavior with a coworker, Bob Schmitz, and stated she was given a letter of warning for unauthorized leave without pay (AWOL) for being late. She indicated that she was placed on probation because of this. Appellant also stated mediation was requested but nothing was resolved in the Helena office. She further added that Mr. Haczewski was discussing her leave schedule on the workroom floor and the leave request box was moved.

In an April 24, 2000 report, Dr. Smith stated that he first saw appellant on December 15, 1995 for depression symptoms resulting from a significant kidney infection that started in July 1995 and from trying to maintain her work at the employing establishment. He diagnosed depression disorder NOS and opined that, since she was working in therapy and sleeping moderately well, she could continue without medication and stated that they negotiated a reduction in her work hours to help her decrease her stress level. Dr. Smith noted that appellant returned to his office on March 31, 1999 in a panic state about her situation at work as she was having sleep problems. He again diagnosed depression disorder NOS and in May 1999, noticed that appellant was showing other signs of PTSD, *i.e.*, nightmares, intrusive thoughts, tearfulness

and problems with concentration. Dr. Smith opined that appellant's reaction to the inappropriate behavior by a coworker precipitated a delayed PTSD reaction.

By decision dated December 21, 2000, the hearing representative found that appellant had failed to establish any compensable factors of employment and affirmed the Office's October 12, 1999 decision.

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the course of employment.

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 illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.<sup>2</sup> On the other hand, the disability is not covered where it results from such factor as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.<sup>3</sup>

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.<sup>4</sup> The 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.<sup>5</sup>

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.<sup>6</sup> 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

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>4</sup> *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

<sup>5</sup> *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

<sup>6</sup> See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.<sup>7</sup>

Appellant has attributed her emotional condition to harassment by her coworker, Mr. Haczewski, specifically, rude statements concerning women and children, inappropriate actions, including reference to a “gherkin,” loud singing and whistling. The Board has held that actions of an employee’s supervisors or coworkers which the employee characterizes as harassment may constitute a factor of employment giving rise to a compensable disability under the Act. For harassment to give rise to a compensable disability there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions of harassment are not compensable.<sup>8</sup> Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment occurred.<sup>9</sup>

In this case, appellant alleged that Mr. Haczewski made rude statements, that included being referred to as a “bitch” and having her children referred to as “delinquents,” rude statements concerning women and children, inappropriate actions, loud singing and whistling, Mr. Haczewski denied the allegations. In reference to the gherkin incident, he stated that some other person referred to his “gherkin” but he never used the term himself. A witness recalled references to the gherkin but did not see Mr. Haczewski do anything or hear him use the word. The witness indicated that appellant participated in the banter. Appellant did not provide a witness to corroborate her allegations. The Board finds that appellant has not substantiated her allegations of harassment by Mr. Haczewski and thus, she has not established a compensable factor of employment under the Act with respect to the claimed harassment and discrimination.

Additionally, with respect to the rude statements referring to women as “skirts,” whistling and loud singing, *etc.* although the Board has recognized the compensability of verbal altercations or abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.<sup>10</sup> Appellant has not shown that referring to women in skirts, loud singing or whistling would rise to the level of verbal abuse or otherwise that would fall within coverage of the Act.<sup>11</sup>

Appellant also alleged that Mr. Haczewski made fun of an inspector with Tourette’s syndrome. The employing establishment determined that this incident was not directed at appellant. Furthermore, appellant alleged that a tray of cookies was thrown down by

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<sup>7</sup> *Id.*

<sup>8</sup> *Jack Hopkins, Jr.*, 42 ECAB 818m 827 (1991).

<sup>9</sup> *William E. Seare*, 47 ECAB 663 (1996).

<sup>10</sup> *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

<sup>11</sup> *See, e.g., Alfred Arts*, 45 ECAB 530, 543-44 (1994) and cases cited therein (finding that the employee’s reaction to coworkers’ comments such as “you might be able to do something useful” and “here he comes” was self-generated and stemmed from general job dissatisfaction). *Compare Abe E. Scott*, 45 ECAB 164, 173 (1993) and cases cited therein (finding that a supervisor’s calling an employee by the epithet “ape” was a compensable employment factor).

Mr. Haczewski after another coworker offered him some at Christmas time. She indicated that nothing was done about this by management. This was determined to be not directed at appellant. The Board has held that an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.<sup>12</sup>

Appellant alleged concern for her safety after Mr. Haczewski started working beside her and expressed that she did not wish to work next to him. However, there were no specific reported events. Additionally, appellant had made inappropriate comments to him. Both parties were counseled. The Board has held that appellant's reactions to such conditions and incidents at work must be considered self-generated in that it resulted from her frustration over not being permitted to work in a particular environment or to hold a particular position.<sup>13</sup>

Appellant also alleged that Mr. Haczewski threw a pack of licorice at her. He claimed he placed it on her case. The Board has recognized the compensability of physical threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.<sup>14</sup> As appellant did not provide any other corroborating evidence, this was insufficient.

The witnesses' statements of record do not establish a pattern of verbal harassment by appellant's coworker. In the absence of probative evidence, the Board finds that appellant has not established a compensable work factor in this case.

Additionally, appellant alleged that she reported Mr. Haczewski's actions to management eight times between 1997 and 1998. She also alleged that Mr. Haczewski was harassing another employee, Mr. Dobler. However, this was also denied and appellant did not provide any additional documentation. Appellant also stated that she reported the situation regarding Mr. Haczewski to management on February 2, 2000, this was also denied. As appellant had not provided any corroborating evidence, the Board finds that her claim with respect to management's actions, is found not to have occurred as alleged.

In the absence of such evidence, the Board finds that appellant has not substantiated a compensable work factor as contributing to an emotional condition. Since appellant has not established a compensable work factor, the Board will not address the medical evidence.<sup>15</sup>

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<sup>12</sup> See *Michael Thomas Plante*, 44 ECAB 510, 515 (1993).

<sup>13</sup> *Tanya A. Gaines*, 44 ECAB 923, 934-35 (1993).

<sup>14</sup> See *Leroy Thomas, III*, 46 ECAB 946, 954 (1995); *Alton L. White*, 42 ECAB 666, 669-70 (1991).

<sup>15</sup> See *Margaret S. Krzycki*, 43 ECAB 496 (1992).

The December 21, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
June 14, 2002

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member