

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY A. OCHOA and U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, San Francisco, CA

*Docket No. 00-2314; Submitted on the Record;
Issued May 17, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, MICHAEL E. GROOM,
A. PETER KANJORSKI

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

The Board has duly reviewed the case record and finds that appellant has failed to establish that she sustained an emotional condition in the performance of duty.

On June 1, 1999 appellant, then a 36-year-old nixie clerk, filed an occupational disease claim alleging that her post-traumatic stress condition was caused or aggravated by factors of her federal employment. She stated that she was unnecessarily harassed by her supervisor, Leo Dacasin.

By decision dated October 26, 1999, the Office of Workers' Compensation Programs found the evidence of record insufficient to establish that appellant sustained an emotional condition in the performance of duty. In a November 2, 1999 letter, appellant requested an oral hearing before an Office representative.

In a June 12, 2000 decision, the hearing representative affirmed the Office's decision.

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 the Federal Employees' Compensation Act. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned work duties or requirements of the employment, the disability comes within the coverage of the Act. On the other hand, where disability results from such factors as an employee's emotional reaction to employment matters unrelated to the employee's regular or specially assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the scope of coverage of the Act.¹

¹ *Lillian Cutler*, 28 ECAB 125 (1976).

Perceptions and feelings alone are not compensable. 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

Appellant alleged that her emotional condition was caused by harassment by her supervisor, Mr. Dacasin, and her coworkers and discrimination by Mr. Dacasin. An incident report described a verbal altercation involving appellant and Florida Hill, an employing establishment employee, on April 24, 1998. The report indicated that Ms. Hill parked in a parking space that appellant was waiting for and that appellant threatened to vandalize Ms. Hill's car. The report also indicated that, while appellant was at the water fountain on April 28, 1998, she bumped Ms. Hill and Ms. Hill accused appellant of vandalizing her car.

Appellant contended that her coworkers signed a petition opposing her appointment as a union representative and requesting that she be reassigned to another unit.

Appellant also contended that Mr. Dacasin made angry stares on May 20, 21 and 25, 1999 while she was working.

Appellant alleged that she was involved in a verbal altercation with Linda Valencia, a coworker, on May 6, 1999. She stated that she merely warned Ms. Valencia not to leave for break until 11:30 p.m. based on Mr. Dacasin's instructions, which he provided in a meeting a few hours earlier. Appellant stated that, in response, Ms. Valencia shouted "don't tell me what to do" and Ms. Valencia continued to shout at her a few minutes later when she returned to the work area. She also stated that after a safety talk about workplace violence and the incident involving Ms. Valencia, she requested a meeting with Mr. Dacasin and a union steward to mediate the discussion. Appellant noted that Mr. Dacasin refused to have the meeting.

Appellant also alleged that Mr. Dacasin retaliated against her because he was being investigated about her allegations of harassment by having her coworker, Ella Rose Lee, tell her not to perform certain job duties at a specific time. She stated that Mr. Dacasin also retaliated against her by issuing letters of warning to her for helping a coworker, Tony Bell, being negligent in injuring her finger and in threatening Ms. Hill. Appellant indicated that the letter regarding her injury was rescinded. Further, appellant stated that Mr. Dacasin retaliated against her by removing a U-cart from her area that she had been using to hold her mail for two years. Appellant stated that the makeshift table that was set up in place of the U-cart posed a safety hazard.

Appellant contended that the employing establishment failed to provide a safe work environment. She filed a safety report alleging that she tripped over a white plastic bin while

² *Pamela R. Rice*, 38 ECAB 838 (1987).

³ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

walking down a narrow pathway on May 12, 1999. Appellant indicated that an employee was using the bin without any regard for her safety.

Appellant stated that on May 30, 1999 a supervisor, Maxine Allen, questioned her about her medical limitations and where she was when she left the unit for 10 minutes. Appellant noted that Ms. Allen did not question a coworker, May Chug, regarding her whereabouts when she left the unit for one hour.

Finally, appellant alleged that Mr. Dacasin called her and other female employees fat.

Actions of an employee's supervisor or coworkers, which the employee characterizes as discrimination or harassment may constitute a compensable factor of employment. However, for discrimination or harassment to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did, in fact, occur.⁴ Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.⁵ An employee's charges that he or she was harassed or discriminated against is not determinative of whether or not harassment or discrimination occurred.⁶ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting her allegations with probative and reliable evidence.⁷

Regarding the April 24, 1998 incident, Mr. Dacasin stated that a witness heard appellant threaten to damage Ms. Hill's car. He also stated that no one actually witnessed the vandalism, but that he received an anonymous letter indicating that appellant was the culprit. Mr. Dacasin noted that the letter was not considered as evidence because there was no way to interview the witness to verify the statement. Appellant failed to submit any evidence establishing that she was harassed by Mr. Dacasin in his investigation of this matter.

Mr. Dacasin stated that no one witnessed the verbal altercation involving appellant and Ms. Valencia at the water fountain regarding the April 28, 1998 incident. He noted that, since there were no witnesses, he was unable to take corrective action against either woman. As appellant failed to submit sufficient evidence corroborating her allegation, she has not established that the incident occurred as alleged.

Regarding the petitions signed by employees opposing appellant's decision to become a union representative, the Board has held matters pertaining to union activities are not deemed employment factors.⁸ Mr. Dacasin explained that certain employees felt alienated by appellant and believed that she would not best represent their interest as a union representative. He further explained that management did not participate in the petition that was prepared and signed by the employees. Appellant's desire to become a union representative is personal in nature and has no

⁴ *Shelia Arbour (Vincent E. Arbour)*, 43 ECAB 779 (1992).

⁵ *See Lorraine E. Schroeder*, 44 ECAB 323 (1992); *Sylvester Blaze*, 42 ECAB 654 (1991).

⁶ *William P. George*, 43 ECAB 1159 (1992).

⁷ *See Anthony A. Zarcone*, 44 ECAB 751 (1993); *Frank A. McDowell*, 44 ECAB 522 (1993); *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁸ *Dinna M. Ramirez*, 48 ECAB 308, 313 (1997); *George A. Ross*, 43 ECAB 346, 353 (1991).

relation to her regular or specially assigned duties and, therefore, cannot be considered a factor of employment.

Appellant's reaction to the petition signed by her coworkers who did not wish to work with her relates to her frustration at not being able to work in a particular environment or hold a particular position which does not come within coverage of the Act.⁹ The Board finds that appellant has not established a compensable work factor based on frustration with her work environment.

In support of her allegation that Mr. Dacasin stared at her, appellant submitted statements from her coworkers, Maxine Davis and Baseemah B. Galahudir. Ms. Davis stated she saw Mr. Dacasin stare at appellant in a hostile manner and that she heard Mr. Dacasin yell out to appellant "so long sucker!" when appellant left the work area. Ms. Galahudir stated appellant was working when Mr. Dacasin walked in behind appellant. She further stated she heard appellant tell Mr. Dacasin to stop staring at her because it was intimidating. Ms. Galahudir noted that Mr. Dacasin intensely stared at appellant with a red and twisted face. She further noted that Mr. Dacasin continued to stare at appellant the entire time he was in the room, which was about 10 minutes. Ms. Galahudir concluded that Mr. Dacasin appeared to be harassing appellant.

Mr. Dacasin denied appellant's allegation that he stared at her, he retaliated against her and he treated her differently from other employees. He stated that on one occasion he noticed that appellant was not in her work area and he found her talking to and interrupting the work of another clerk. Mr. Dacasin also stated that appellant ignored his comment about where she was supposed to work. Twice he gave her a direct order to return to work and he warned her about possible administrative action if she refused to do so. Mr. Dacasin explained that his role as a supervisor was to make sure his employees were gainfully employed. He noted appellant's poor work habits and that she made a point to show him that she was not working when he visited her work area. Mr. Dacasin also denied calling appellant a sucker and stated that appellant made the comment.

Statements from employees, Ms. Lee and Martin Lamorena, Jr., indicated that appellant stated, "you will soon see what you are looking for" in response to Mr. Dacasin's order to return to work. Mr. Lamorena also stated appellant stared angrily at Mr. Dacasin. Ms. Valencia stated she saw appellant show Mr. Dacasin that she was not working. She further stated Mr. Dacasin did not stare at appellant, rather he came to see whether they had finished canceling the reject mail. Jenny Clow stated when Mr. Dacasin checked her unit, he did not stare at any particular individual rather, Mr. Dacasin looked at the entire staff as a whole.

Appellant's allegations and supporting evidence do not establish harassment by Mr. Dacasin in monitoring her work. Her complaints about the manner in which her supervisor performed his duties as a supervisor or the manner in which he exercised his supervisory discretion fall, as a rule, outside of compensable factors of employment.¹⁰ The evidence does not establish error or abuse by her supervisor.

⁹ See *Anne L. Livermore*, 46 ECAB 425 (1995).

¹⁰ *Donald E. Ewals*, 45 ECAB 111 (1993); see also *David W. Shirey*, 42 ECAB 783 (1991).

Regarding appellant's allegation that the employing establishment failed to provide a safe work environment, appellant has not submitted any evidence to substantiate this allegation. Ms. Valencia stated that on May 12, 1999 appellant passed by her table and intentionally kicked a white plastic bin that she and Ms. Clow were using. She stated that this was an escalation of the May 7, 1999 incident. Ms. Clow reiterated that appellant intentionally kicked the bin and that her action was an escalation of the May 7, 1999 incident.

In response to appellant's allegation that she was treated differently than her coworker, Ms. Chug, Mr. Dacasin stated that the employee who left the work area did not get into any trouble because her absence was legitimate in that it involved her work-related injury. Further, appellant did not submit any evidence that Mr. Dacasin called her and other female employees fat.

Appellant's allegation that she was harassed by Mr. Dacasin and her coworkers, and discriminated against by Mr. Dacasin is not substantiated by the record. Therefore, the Board finds that appellant has failed to establish that harassment and discrimination actually occurred.

Regarding the May 6, 1999 incident¹¹ involving appellant and Ms. Valencia, Mr. Dacasin stated that appellant provoked the incident and that her action was based on reports of her poor work habits that she thought were made by Ms. Valencia. Mr. Dacasin also stated that he could not find any one who witnessed the initial verbal exchange involving appellant and Ms. Valencia on May 7, 1999. Mr. Dacasin noted that he reprimanded Ms. Valencia for later interrupting the unit when she confronted appellant in a loud voice. He warned both Ms. Valencia and appellant about the employing establishment's zero tolerance policy and the consequences of such action. He noted previous altercations involving appellant and other employees that caused Ms. Valencia to fear appellant. Mr. Dacasin denied appellant's allegation that he refused to have a meeting following the May 7, 1999 incident to discuss mounting tensions in the workplace. He stated that appellant did not request such a meeting and that there were no mounting tensions. He further stated that appellant had created an indifferent work environment because she refused to work and she was aloof and uncooperative.

Ms. Valencia explained that on May 7, 1999 she was stalked by appellant as she went to the restroom. She noted that appellant overtook her and accused her of telling Mr. Dacasin about her poor work habits. She stated that she told appellant to mind her own business just as she minded her own business. Ms. Valencia further stated that she was frightened when appellant threatened her because appellant stated that she owned a gun and appellant had previous altercations with other employees.

No one witnessed the initial verbal exchange involving appellant and Ms. Valencia on May 6, 1999. Appellant has failed to establish that the incident occurred, as alleged or that she was harassed.

Similarly, appellant's allegation that Mr. Dacasin retaliated against her by issuing letters of warning¹² and Ms. Chug's request for medical documentation¹³ involve administrative or

¹¹ The Board notes that appellant alleged that Ms. Valencia and Mr. Dacasin stated the verbal altercation took place on May 7, 1999.

¹² *Sharon R. Bowman*, 45 ECAB 187 (1993).

¹³ *Thomas D. McEuen*, 41 ECAB 389 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

personnel matters. Mr. Dacasin stated that he issued a letter of warning to appellant for the threat she made against Ms. Hill's car which was based on a witness statement. Concerning the rescission of the letter of warning issued to appellant due to her negligent injury, the Board has held the mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse.¹⁴ Appellant has not submitted any probative evidence of error or abuse in the issuance of any of the letters of warning by Mr. Dacasin and in Ms. Chug's request for medical documentation. In the absence of such evidence, the Board finds that appellant has not substantiated a compensable work factor as contributing to an emotional condition.

As appellant has not established any compensable factors of her federal employment that she implicates in causing or contributing to the development of her emotional condition, appellant has failed to meet her burden of proof to establish that she sustained an emotional condition in the performance of duty.¹⁵

The June 12, 2000 and October 26, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
May 17, 2002

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁴ *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

¹⁵ As appellant has not submitted the necessary evidence to substantiate a compensable factor of employment, the medical evidence need not be reviewed in this case.