U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALEIA L. ROBINSON and U.S. POSTAL SERVICE,
BULK MAIL CENTER, Cincinnati, OH

Docket No. 02-401; Submitted on the Record;
Issued July 7, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has met her burden of proof in establishing that she developed an emotional condition due to factors of her federal employment.

This decision has previously been on appeal before the Board. In its November 26, 1999 decision,[1] the Board denied appellant's claim for an emotional condition finding that she had not established that her supervisor, Jerry Dossenback, harassed her on January 18, 1996. The facts and circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

Appellant filed both a notice of traumatic injury and a notice of occupational disease on November 2, 1996 alleging that she sustained an emotional condition as a result of various actions of the employing establishment. In a request for reconsideration dated September 15, 1997, prior to the adjudication of appellant's claim by the Board on November 26, 1999, her attorney specifically limited her claim to the incidents of January 18, 1996. Therefore, the decisions of the Board and the Office of Workers' Compensation Programs after that date specifically addressed only the traumatic injury aspect of appellant's claim. In her November 21, 2000 request for reconsideration, appellant stated that her claim included incidents which predated January 18, 1996. In its January 22, 2001 decision, the Office addressed appellant's claim for error or abuse in administrative actions and found that she had not submitted sufficient evidence to warrant modification of its prior decisions. Therefore, on appeal the Board will consider whether appellant has submitted sufficient evidence to establish that she sustained a traumatic injury as a result of the January 18, 1996 exchange with Mr. Dossenback as well as determining whether appellant has established an occupational disease through the additional employment events addressed by her. Appellant requested reconsideration on June 14, 2001. The Office reviewed her claim on the merits and denied modification of its prior decision on September 17, 2001.

---

[1] Docket No. 98-730.

The Board finds that appellant has failed to meet her burden of proof in establishing that she developed an emotional condition due to factors of her federal 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 concept of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment to hold a particular position.[2]

Appellant alleged that Mr. Dossenback harassed her on January 18, 1996. For harassment or discrimination to give rise to a compensable disability under the Federal Employees' Compensation 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. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. 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 evidence.[3] The Board reviewed appellant's claim regarding the January 18, 1996 incident in its November 26, 1999 decision and found that appellant failed to establish harassment or discrimination as a result.

Following the Board's decision, appellant submitted additional evidence regarding the January 18, 1996 incident. She alleged that the witness relied on by the Board, Mr. Boehle, was not credible. Appellant contended that, in a separate sworn statement, Mr. Boehle, her coworker and witness to the disagreement with Mr. Dossenback, lied under oath. She stated that in a July 17, 1997 statement Mr. Boehle improperly alleged that he arrived at work at 7:00 a.m. on January 18, 1996 and that the discussion between appellant and Mr. Dossenback occurred at 8:00 a.m., when in fact his time sheet revealed that he did not arrive until after 9:00 a.m. In his original statement dated November 19, 1996 and reviewed by the Board on November 26, 1999, Mr. Boehle stated that the discussion between appellant and Mr. Dossenback occurred at approximately 12:45 p.m. Appellant confirmed that the discussion occurred at approximately 12:45 p.m. Mr. Boehle's time sheet indicates that he was present at the employing establishment at 12:45 p.m. and appellant does not dispute that he was a witness to the discussion. The Board finds that the discrepancies in Mr. Boehle's statements regarding the time of his arrival and the time that the discussion between appellant and Mr. Dossenback took place do not cast sufficient doubt on his veracity and finds that his statements consistently assert that neither appellant nor Mr. Dossenback raised voices on January 18, 1996. Appellant did not submit any additional evidence after the Board's November 26, 1999 decision, establishing that Mr. Dossenback harassed or discriminated against her on January 18, 1996 and the Board finds that she has not established this incident as a compensable factor of employment.

[2] *Lillian Cutler*, 28 ECAB 125, 129-31 (1976).

[3] *Alice M. Washington*, 46 ECAB 382 (1994).

Appellant also attributed her emotional condition to a car accident on the employing establishment property on January 26, 1992, a miscarriage in February 1992, wrongful termination as a result of her car accident and retaliation as a consequence of her resulting lawsuit. The employing establishment provided appellant with a notice of removal on February 10, 1992 on the grounds of willful disregard of safety rules.

Appellant submitted an October 29, 1993 findings of fact and conclusions of law from the Equal Employment Opportunity (EEO) Commission. The Administrative Law Judge reviewed the evidence and concluded that, on the morning of January 26, 1992, appellant was not yet on the clock and was driving her personal vehicle on the employing establishment's property. She lost control of her car and crashed into a utility pole in the parking lot. Appellant attributed her accident to hazardous road conditions including ice and excess salt on the employing establishment's road, which caused her to lose control of her car when she attempted to brake. The initial police report from Officer Paul Healey found that appellant was traveling in excess of 50 miles an hour and that the posted speed limit was 25 miles an hour. In a supplemental statement, Officer Healey stated that he later recalculated the measurements and concluded that appellant was traveling at 39 miles an hour and that she was not negligent nor reckless. Appellant noted that she had never received any disciplinary actions from the employing establishment prior to the 1992 accident and that her supervisor instituted the proposed removal within three days of the date that she filed a claim with the Office. The judge noted in a similar case where an employee, C. Wells, a black male, lost control of his car in the employing establishment parking lot and hit a fence. As Mr. Wells was not on the clock he did not receive any discipline. The judge found that the employing establishment's reasons for treating appellant differently were that her actions resulted in danger to herself and other employees and that the seriousness of appellant's offense warranted removal rather than progressive discipline. The judge concluded that appellant had established race and sex discrimination based on her notice of removal. She noted that appellant had pursued her claim through the grievance procedure and had been reinstated to a comparable position, had received back pay and awarded all benefits of employment lost. The Administrative Law Judge recommended compensatory damages and that appellant be awarded attorney fees.

The Board has noted that findings of other government agencies are not dispositive with regard to questions arising under the Act. However, such evidence may be given weight by the Office and Board.[4] In the October 29, 1993 EEO findings, the judge considered the employing establishment actions in disciplining other employees, the circumstances surrounding appellant's accident and the actions of the employing establishment and concluded that appellant was subject to discrimination. The Board finds that, while these findings are entitled to great weight, appellant failed to submit any other evidence regarding her 1992 accident and resultant removal such that the Board can reach an independent determination of whether the employing establishment discriminated against appellant through the disciplinary actions. The judge indicated that appellant had received remedy through the grievance procedure, but she did not submit any evidence regarding grievances filed in this action. The record does not contain the testimony of witnesses nor the supportive documentation that coworkers of a different gender or race were treated differently. Without this evidence, the Board is unable to find that appellant

[4] *Ernest J. Malagrida*, 51 ECAB 287, 291 (2000); *Shelby J. Rycroft*, 44 ECAB 795, 805 (1993).

was subject to discrimination and she has not substantiated a compensable employment factor in this regard.

Appellant attributed her condition to actions by the employing establishment which she felt constituted harassment or retaliation including leave denials on December 5, 1995, disciplinary actions including a discussion on attendance, the requirement that she work "her holiday" on Veterans day, a lack of training, exclusion from meetings and the fact that while on leave the employing establishment improperly utilized her annual leave rather than leave without pay. Appellant stated that she was moved from her office due to retaliation. Glenn Wolf, the manager of maintenance support operations, responded to appellant's allegations and asserted that she was not the only employee moved and that the move was not in retaliation. He further stated that appellant's holiday was granted in accordance with the contract and that she was aware of her annual leave usage while she was out on leave. Mr. Wolf noted that appellant did not pursue training opportunities afforded her. Appellant also stated that Mr. Dossenback required her to go through additional steps to remove her name from the overtime desired list. Mr. Dossenback stated that he provided appellant with the appropriate form to remove her from the overtime desired list and that appellant was only excluded from meetings which concerned projects which did not involve her.

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, issued unfair performance evaluations, wrongly addressed leave and improperly assigned work duties, the Board finds that these allegations related to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[5] As a general rule, an employee's emotional reaction to an administrative or personnel matter is not covered under the Act. But error or abuse by the employing establishment in what would otherwise be an administrative or personnel matter or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[6] Appellant has not submitted any evidence establishing that the employing establishment acted unreasonably in addressing her leave requests, in administering discipline or in granting training. Appellant, therefore, has not established that these actions constituted compensable factors of employment.

Appellant stated that Mr. Dossenback directed her not to wear shorts to work and appellant asserted that this was not part of the dress code for her position. Mr. Dossenback confirmed that he directed appellant not to wear shorts. She alleged that the employing establishment sent her pay check to the wrong location and that she had to wait five days for her pay when normally the issue was resolved within one day. The employing establishment admitted a clerical error occurred on March 28, 1995. Appellant has substantiated that she was directed not to wear shorts; however, she did not submit any evidence that Mr. Dossenback erred in issuing this directive. She further established that the employing establishment improperly

[5] 5 U.S.C. §§ 8101-8193; *see Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gates*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*,39 ECAB 1260, 1266-57 (1988).

[6] *Martha L. Watson*, 46 ECAB 407 (1995).

addressed her paycheck. However, appellant has not submitted any evidence that the employing establishment unreasonably delayed addressing this issue which is her contention. The Board notes that appellant did not allege that the mere fact that the employing establishment mistakenly addressed her paycheck caused or contributed to her emotional condition, instead she alleged that the employing establishment erred by not timely addressing the mistake and that this was in retaliation. Appellant has not established error or abuse by the employing establishment in rectifying the mistake in her pay.

Appellant stated that Mr. Dossenback improperly disciplined her by administering a discussion regarding her tardiness. She filed a grievance and the discussion was reduced. Mr. Dossenback stated that he properly conducted an official discussion on December 6, 1995. The Board has held that the mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse.[7] Appellant has not submitted any independent evidence that Mr. Dossenback erred in conducting the official discussion regarding her tardiness. Therefore, appellant has not established error or abuse in the administration of this discipline.

Appellant also alleged that Mr. Wolf treated male and female employees differently. As noted above, in order to establish discrimination, she must submit evidence that discrimination did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting her allegations with probative and reliable evidence.[8] Appellant did not submit any specific incidents of discrimination by Mr. Wolf and did not submit any evidence in support of these allegations. Therefore, she failed to establish discrimination by Mr. Wolf as a compensable factor of employment.

Appellant asserted that Mr. Wolf pointed his finger at her and at her coworker and told each of them that they were fired on February 8, 1993. Mr. Wolf stated that he did not remember making that remark. The Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the work place will give rise to coverage under the Act.[9] Appellant has not shown how such an isolated comment would rise to the level of verbal abuse or otherwise fall within the coverage of the Act.[10]

Appellant further alleged that Mr. Dossenback called her a trouble-maker and that he suggested that a coworker describe her duties in the terms of a "grocery store" to insure appellant understood. Mr. Wolf stated that he instructed Mr. Dossenback not to talk down to appellant. Mr. Dossenback admitted that he was disciplined for the grocery store remark as a sexist comment. However, he explained that his reasoning was to demonstrate the separations between

[7] *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

[8] *Alice M. Washington, supra* note 3.

[9] *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

[10] *See, e.g., Alfred Arts*, 45 ECAB 530 543-44 (1994) and cases cited therein (finding that the employee's reaction to coworker's comments such as "you might be able to do something useful" and "here he comes" was self-generated and stemmed from general job dissatisfaction).

product and commodity center in the list of products that appellant needed to procure, noting that some products would have to be obtained from the Defense Department, or General Services Administration and others from local purchase. Mr. Dossenback stated: "In most cases, the *product* would determine the source, hence the grocery list." The Board finds that Mr. Dossenback has offered an explanation for his use of a "grocery list" analogy to explain appellant's purchasing duties. The Board does not find that the term "grocery list" is derogatory and that the mere use of this term is insufficient to establish verbal abuse by Mr. Dossenback.[11]

Appellant alleged that she was given busy work. Mr. Wolf stated that he provided her with an opportunity for additional computer training and more complex work, but that she did not pursue the training. The Board has held that an employee's dissatisfaction with working in an environment which is considered to be tedious, monotonous, boring or otherwise undesirable 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.[12]

For the foregoing reasons, appellant has not established a compensable employment factor 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.[13]

The September 17 and January 22, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
July 7, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[11] *Compare Abe E. Scott*, 45 ECAB 164, 173 (1993) and the cases cited therein (finding that a supervisor's calling an employee by the epithet "ape" was a compensable employment factor.)

[12] *See David M. Furey*, 44 ECAB 302, 305-06 (1992).

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