

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THU M. MCGILL and OVERSEAS PRIVATE INVESTMENT
CORPORATION, Washington, DC

*Docket No. 02-2391; Submitted on the Record;
Issued July 11, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant's emotional condition was caused by factors of her federal employment.

This case is on appeal to the Board for the second time.¹ On the first appeal, by decision dated July 14, 2000, the Board found that the Office of Workers' Compensation Programs erred in summarily rejecting additional evidence that appellant submitted in her request for reconsideration dated January 29, 1998. The Board found that the evidence could support appellant's allegations of error or abuse and might raise a substantial question as to whether the employing establishment committed error or abuse in the handling of personnel matters with respect to appellant. The additional evidence consisted of a jury verdict dated April 11, 1997 from the United States District Court for the District of Columbia finding that the employing establishment violated Federal Title VII and the American with Disabilities Act. The jury found that the employing establishment intentionally discriminated against appellant on the basis of a handicap and treated her less favorably than similarly situated nonhandicapped employees and intentionally terminated her because of her handicap and failed to provide her with reasonable accommodation. The jury awarded appellant \$75,000.00 in compensatory damages.

Appellant also submitted a six-page affidavit describing incidents of alleged discrimination which she had submitted as evidence in her civil action, affidavits from coworkers including a legal assistant and secretary, a vocational rehabilitation counselor's report and investigative reports from the Equal Employment Opportunity (EEO) Commission written by Marguerite A. Donnelly and Robert Fletcher which appellant alleged showed that the employing establishment knew of her disability, *i.e.*, depression. The Board therefore remanded the case for the Office to describe the evidence that appellant submitted and give detailed reasons for accepting or rejecting it. By decision dated July 14, 2000, the Board set aside the Office's

¹ Docket No. 98-1867 (issued July 14, 2000). The facts and history surrounding the prior appeal are set forth in the initial decision and are hereby incorporated by reference.

April 8, 1998 decision and remanded the case to the Office for a merit review to be followed by a *de novo* decision.

By letter dated March 11, 2002, the employing establishment contended that appellant's emotional claim should be denied because appellant did not prevail on any of her EEO claims and the District Court and the Court of Appeals for the District of Columbia denied appellant relief on the identical claims for which she sought compensation under the Federal Employees' Compensation Act. The decisions by the District of Columbia Courts are as follows: In an order dated December 5, 1996, the U.S. District Court granted the employing establishment partial summary judgment on the issues of retaliation, *i.e.*, that appellant was not dismissed because of her EEO activities or due to intentional discrimination based on race and national origin.

Regarding appellant's claim that there was a causal link between her EEO activities and her dismissal, the District Court considered that appellant was admonished for her failure to follow orders in May 1994, that she received two counseling memoranda regarding her performance problems and was placed on leave restriction in that month, her supervisor proposed suspending her in September 1994, she was placed on a performance improvement program in October 1994, and three additional critical memoranda were placed in her file in November and December 1994 before her termination was proposed in January 1995. The District Court found, however, that this "steady progression of disciplinary action" began before appellant's protected activities, which commenced in August 1994.

Regarding her claim for disparate treatment on the basis and national origin, the District Court considered that affidavits from other secretaries at the employing establishment stated that appellant's supervisor checked on her constantly, gave her assignments that she did not understand how to complete, and in her deposition testimony appellant's supervisor stated that she printed out and saved emails concerning the assignments she gave appellant. The District Court found, however, that "these bits of evidence" did not "amount even to *de minimis* proof that [appellant] was treated differently from other similarly situated persons." The Court therefore dismissed appellant's race and national origin claim because appellant failed to provide any comparison of her treatment with those of other nonprotected individuals who had performance problems.

Two remaining claims of discrimination due to disability went to the jury who rendered a verdict in appellant's favor on April 11, 1997, and awarded appellant \$75,000.00 be recovered from the employing establishment.

In *McGill v. Callear*, 973 F. Supp. 20, 23 (D.D.C. 1997), the District Court denied the employing establishment's motion for judgment on the disparate treatment claim and granted the employing establishment's motion for judgment on the reasonable accommodation claim. The District Court found that appellant's failure to respond to the employing establishment's notice of removal on January 30, 1995 and its letter dated March 16, 1995 requesting that she submit additional medical evidence was "fatal" to her accommodation claim.² The District Court found that there was no evidence that, at the time of her termination, appellant was able to perform her job with reasonable accommodation. Rather, the Court found that the evidence suggested that

² 973 F. Supp. at 23.

she was unable to work at all.³ Moreover, the Court considered that appellant testified about the lack of training opportunities but the Court found “the record did not reflect disparate treatment on that basis.”⁴

In a judgment dated January 19, 1999, No. 97-7077, the Court of Appeals stated that it was “ordered and adjudged that the District Court’s December 5, 1996 order granting summary judgment on claims for retaliation and for discrimination based on national origin and race, and its January 17, 1997 order granting in part a post-trial motion for judgment as a matter of law in favor of OPIC on the disability claim for failure to accommodate under the Rehabilitation Act, 29 U.S.C. § 790 *et seq.*, be affirmed substantially for the reasons stated by the District Court.”

By order dated April 19, 1999, the Court of Appeals denied appellant’s petition for a rehearing *en banc*.

The employing establishment appealed the District Court’s denial of motion of judgment on the disparate treatment claim. In a decision issued by the Court of Appeals, decided February 18, 2000, the Court found that the evidence that the employing establishment engaged in disparate treatment of appellant by requiring her to make up time spent in attending aerobics class and evidence that the employing establishment discriminated against appellant by requiring her to provide a doctor’s note for absences for which she sought to use sick leave was insufficient for submission to the jury.⁵ Regarding the disparate treatment claim, the Court noted that appellant stated that she needed one and a half hours to work out during lunch and her supervisors advised her that taking that amount of time was permissible but that she must make up the extra half hour that went beyond her lunch. The Court considered that several of appellant’s coworkers who testified at the hearing also attended the aerobic class, which lasted 40 minutes, but none of the them testified that they required more time than the allotted lunch hour to return to work. The Court concluded that appellant failed to offer any evidence that she was treated unfavorably compared to other employees.

Regarding appellant’s claim that the employing establishment discriminated against her by requiring her to provide a doctor’s note for absences from work for which she sought to use sick leave, the Court found that the employing establishment acted in accordance with its written policy on sick leave. The Court considered that the written policy stated that, when an employee appeared to be using sick leave improperly as in chronic use of brief periods, the employee might be required to comply with special leave procedures more stringent than those applied to other employees.⁶ The Court found that, in the summer of 1994, appellant’s supervisor, Connie Downs, noted that appellant missed work five times in a one-month period and that her absences conformed to a pattern whereby each she received a poor performance appraisal she took off the following one or two days of work. The Court considered that, pursuant to the employing establishment’s written policy, Ms. Downs instructed appellant to provide a physician’s

³ *McGill*, 973 F.Supp. at 23.

⁴ *Callear*, 973 F.Supp. at 22.

⁵ *McGill v. Munoz*, 203 F.3d 843 (2000).

⁶ *Id.* at 847.

certificate when she wanted to take sick leave for future absences and that the requirement would be reviewed in six months to determine whether it could be rescinded. The Court concluded that appellant did not show that there was evidence of disparate treatment or that employees with similarly suspicious patterns of absenteeism were treated differently than she was.⁷ The Court therefore reversed the order denying in part the employing establishment's motion for judgment as a matter of law and remanded the case for entry of judgment for the employing establishment.

By order dated April 20, 2000, the Court of Appeals denied appellant's request for a rehearing *en banc*.

By decision dated July 12, 2002, the Office found that appellant's request for reconsideration dated February 4 and 29, 2001 of the Office's December 1, 1995 merit decision was not timely filed and appellant failed to present clear evidence of error.

By letter dated August 2, 2002, the Office informed appellant that the July 12, 2002 decision was vacated and should be disregarded pending the issuance of another decision in the near future.

By decision dated September 19, 2002, the Office denied appellant's request for modification. In the decision, the Office noted that the employing establishment provided an update on all appellant's EEO claims showing that they had been rejected and presented copies of the relevant EEO decisions. [These decisions are not in the record but appellant's attorney acknowledged that appellant was not successful in her EEO claims.] The Office also considered the final decisions in the District Court and Court of Appeals which denied appellant's claims for disparate treatment based on race and national origin and her disability.

The Office concluded that EEO, the District Court and Court of Appeals found that claimant's allegations of harassment and discrimination were not accurate. The Office stated that it "will find accordingly with respect to the employment factors and incidents decided by the Courts and which were also implicated in her compensation claim."

The Office referred to the EEO investigative reports from Ms. Donnelly and Mr. Fletcher, the rehabilitation counselor's report and the affidavits from appellant's coworkers including the legal assistant and secretary and found that the employing establishment's awareness of appellant's disability was not pertinent to the denial of her emotional claim inasmuch as the employing establishment accepted appellant's claim for depression in 1989 and 1990 and the District Court found that the employing establishment did not fail to accommodate her disability. Further, the Office considered appellant's six-page affidavit alleging acts of discrimination, and like the District Court, did not find that appellant was discriminated against based on that affidavit.

The Board finds that appellant did not establish that she sustained an emotional condition caused by factors of her federal employment.

⁷ *Id.* at 847.

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.⁸ On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or her frustration from not being permitted to work in a particular environment or to hold a particular position.⁹

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.¹⁰ The issue is not whether the claimant has established harassment or discrimination under standards applied the EEO Commission.¹¹ The Board notes that findings of other administrative agencies are not dispositive of proceedings under the Federal Employees' Compensation Act, which is administered by the Office and under Board review, where such findings are made pursuant to different standards of proof.¹² Moreover, decisions by the federal Courts under other laws, *i.e.*, in this case decisions pursuant to the Rehabilitation Act, Title VII, and the Americans with Disabilities Act are relevant and instructive, as they provide a substantive review of the allegations made by appellant. The findings of other federal agencies are not dispositive with regard to questions arising under the Federal Employees' Compensation Act, but such evidence may be given weight by the Board.¹³ Rather the issue is whether the claimant under the Federal Employees' Compensation Act has submitted evidence sufficient to establish an injury arising in the performance of duty.¹⁴ To establish entitlement to benefits, the claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.¹⁵

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 her regular duties, these could constitute employment factors.¹⁶ However, for harassment to

⁸ 5 U.S.C. §§ 8101-8193.

⁹ *Clara T. Norga*, 46 ECAB 473, 480 (1995); *see Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

¹⁰ *Michael Ewanichak*, 48 ECAB 364, 366 (1997); *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

¹¹ *See James E. Norris*, 52 ECAB 93 (1999).

¹² *Michael A. Deas*, 53 ECAB ____ (Docket No. 00-1090, issued November 14, 2001); *Wayne E. Boyd*, 49 ECAB 102 (1997).

¹³ *See Leonard W. Larson*, 48 ECAB 507, 510 (1997); *Michael A. Deas*, *supra* note 12; *Wilfredo Carillo*, 50 ECAB 99, 102 (1998).

¹⁴ *See Martha L. Cook*, 47 ECAB 226, 231 (1995).

¹⁵ *Barbara E. Hamm*, 45 ECAB 843, 851 (1994).

¹⁶ *Clara T. Norga*, *supra* note 9 at 481; *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

give rise to a compensable disability under the Federal Employees' Compensation Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Federal Employees' Compensation Act.¹⁷

In this case, as stated in the Board's July 14, 2000 decision, appellant alleged that from April 1994 and continuing she was subject to "unlawful discrimination and severe harassment" by her supervisor and the Director of Personnel, Ms. Downs. Appellant stated that Ms. Downs and the personnel officer, Stephanie Mannon, "failed to make reasonable accommodations for her mental disability by requiring her to obtain a physician's certificate" whenever she used sick leave. She also stated that Ms. Downs and Ms. Mannon closely monitored her work assignments but "failed to provide her with proper training and workable resources to complete the assignments." Appellant also complained that Ms. Downs singled her out from other employees in requiring her to submit a progress report on her work production for attending an aerobic class during the lunch hour which the other employees taking the class were not required to do and which ultimately discouraged her from taking the class.

The issues of the employing establishment failing to make reasonable accommodations for her and requiring her to obtain a physician's certificate was specifically addressed and decided by the Court of Appeals for the District Court which found that appellant's failure to respond to the employing establishment's notice of removal on January 30, 1995 and its letter dated March 16, 1995 was "fatal" to her accommodation claim under the Rehabilitation Act. The Court also found that the medical evidence at the time suggested that appellant was unable to work. Appellant's contention on this issue must also fail under the Federal Employees' Compensation Act for the same reason in that, by failing to provide the employing establishment with the requested medical documentation, appellant did not show that the employing establishment acted unreasonably or abusively in failing to accommodate her. That the employing establishment did not accommodate appellant is an administrative matter not directly related to appellant's regular or specifically-assigned duties and is therefore not a compensable factor of employment.¹⁸

Similarly, regarding appellant's contention that the employing establishment harassed her by requiring her to make up a half hour of time that she used for her aerobic class which it allegedly did not require of her coworkers who attended the aerobics class, appellant did not show that she was treated differently from her coworkers. She did not show that they required an extra half hour of time. The Court of Appeals ruling on this issue supports that appellant failed on this issue. Appellant also did not show that the employing establishment acted abusively or unreasonably in requiring her to provide a doctor's note for absences from work for which she sought to use sick leave. In an extensive analysis, the Court of Appeals found that the employing establishment, in accordance with its written policy, found that appellant's erratic pattern of absences warranted asking her to provide documentation. Appellant has failed to establish that this was a compensable factor of employment. Matters of leave relate to administrative or personnel matters, unrelated to the employee's regular or specially-assigned work duties and do

¹⁷ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁸ *See Diane C. Bernard*, 45 ECAB 223, 227-28 (1993).

not fall within the coverage of the Federal Employees' Compensation Act unless the employing establishment acted unreasonably or abusively.¹⁹ Appellant has not made this showing.

Regarding appellant's contention that the employing establishment dismissed her in retaliation for her EEO activities, the District Court determined that the disciplinary actions the employing establishment took against her began before she commenced her EEO activities in September 1994. The Court therefore concluded that appellant had not shown that the employing establishment's disciplinary actions were in retaliation for her EEO activity. The disciplinary actions the Court referred to were management's admonishing appellant for failing to follow orders in May 1994, sending her two counseling memoranda for her performance problems and placing her on leave restriction in that month. The Court also referred to management's issuing a notice of proposed suspension, placing appellant on a performance improvement program (PIP) in October 1994 and placing three additional critical memoranda in her file in November and December 1994. The Board has held that disciplinary measures as in management's issuing notices of proposed suspension and critical memoranda, and placing appellant on a PIP are administrative and do not constitute compensable factors of employment unless appellant shows that management acted unreasonably or abusively.²⁰ Appellant did not show that the disciplinary actions were retaliatory.

Regarding appellant's claim that she was harassed based on national origin and race because her supervisor checked on her constantly, gave her assignments she did not understand and printed and saved emails concerning her assignments, appellant did not show that she was treated differently from other employees. Further, a supervisor's monitoring appellant is an administrative action and as such is not compensable, unless appellant shows that the employer acted unreasonably or abusively. Appellant did not show that the supervisor was abusive or unreasonable in the assignments she issued appellant.

The Board therefore finds that appellant has failed to establish a compensable factor of employment. Since no compensable factors have been established, it is not necessary to address the medical evidence.²¹

¹⁹ *Dinna M. Ramirez*, 48 ECAB 308, 313 (1997); *O'Paul Gregg*, 46 ECAB 624, 636 (1995).

²⁰ *See Frederick D. Richardson*, 45 ECAB 454, 463 (1994); *Sharon R. Bowman*, 45 ECAB 187, 194 (1993).

²¹ *Diane C. Bernard*, *supra* note 18.

The September 19, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 11, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member