

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANE R. JOHNSTON and DEPARTMENT OF AGRICULTURE,
BEAVERHEAD-DEERLODGE NATIONAL FOREST, Butte, MT

*Docket No. 03-423; Submitted on the Record;
Issued July 9, 2003*

DECISION and ORDER

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

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

On July 25, 2001 appellant, then a 40-year-old civil engineer technician, filed an occupational disease claim (Form CA-2), alleging that in 1998, she first realized that her stress was due to harassment and inequitable treatment from the employing establishment towards herself and another employee. She also alleged that her stress was due to her filing an Equal Employment Opportunity (EEO) claim under the Equal Pay Act in February 2001 and retaliation by the employing establishment in August 2001. Regarding the alleged discrimination under the Equal Pay Act, appellant attributed it to gender, unfair treatment, hostile work environment and the failure to be promoted. Regarding the hostile work environment, appellant alleged various incidents during the period 1998 to 2001. Incidents alleged in 1998, included her supervisor informing her that she “was not given a couple of jobs because it could justify a promotion,” that her supervisor was hostile and related to another employee that she was questioning his authority when she provided another design for a road. Appellant also alleged that in 1999, although her supervisor hassled her by stating her position description was fine, she was subject to “continually downgrading that I really did n[o]t have the knowledge that was being stated.” In 2000, she alleged that the new supervisor stated that people in Butte were the problem and she resented “people saying I have a problem due to the consolidation when I was n[o]t even there” and in 2001, appellant alleged that she had been treated with “constant disrespect and retaliation to me and my employee for seeking fair and equitable treatment.” In support of her allegation of retaliation, appellant stated that subsequent to her filing an EEO complaint her projects were subject to increased scrutiny. Dick Judge, appellant’s supervisor, “changed the specification format from CSI to FS Spec book” and he changed her cost estimates without informing her. Without appellant’s knowledge, he changed the design of one contract without informing her and her jobs have been changed without her being informed of the change. In regards to appellant’s allegation that there was a violation of the Equal Pay Act, she stated that she had been

performing duties of a GS-11 since July 19, 1998, but was paid as a GS-9 and that a January 17, 2001 classification supported her contention that she was working at the GS-11 level.

In an August 20, 2001 report, Dr. Brett Kronenberger, an attending Board-certified internist, noted that appellant was being treated for anxiety and depression.

In a September 10, 2001 report, Dr. Kenneth C. Olson, an attending Board-certified psychiatrist, noted that appellant was evaluated on August 24, 2001 for “depression and an acute stress reaction in regard to work-related concerns.”

In a letter dated November 27, 2001, the Office of Workers’ Compensation Programs informed appellant that the evidence was insufficient to support her claim and advised her as to the type of factual and medical evidence required to support her claim.

Dr. Olson, in a December 3, 2001 report, diagnosed post-traumatic stress and major depression, which he attributed to her work conflicts and tensions. The physician concluded that: “Largely due to work-related problems [appellant] had developed depression and an adjustment disorder to the work situation itself.” He also noted: “Despite the sometimes incapacitating symptoms of depression and anxiety, due to filing EEO complaints and the backlash, she continues to work.”

By decision dated April 30, 2002, the Office denied appellant’s claim on the basis that she failed to establish any compensable factor of employment.

On May 29, 2002 appellant requested a written review of the record by an Office hearing representative. In support of her request, she submitted a March 1, 2002 EEO affidavit and rebuttal affidavits dated March 26 and April 4, 2002.

The March 1, 2002 affidavit was signed by appellant and Mr. Lee Mandell, a contract investigator for the employing establishment. The affidavit noted that the issues accepted for investigation included whether the employing establishment violated the Equal Pay Act, based upon her gender and whether there was reprisal for filing her EEO complaint. Appellant provided details supporting her allegations of discrimination and reprisal. In her rebuttal affidavits, she provided a chronological history of her allegations that the employing establishment violated the Equal Pay Act and retaliated against her for filing her EEO complaint.

By decision dated September 20, 2002, the hearing representative affirmed the denial of appellant’s claim on the basis that she failed to establish any compensable factors of employment.

The Board finds that appellant has not established that she sustained an emotional condition in the performance of duty.

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.¹ 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.²

In the present case, appellant alleges that she sustained an emotional condition as a result of a number of employment incidents and conditions. She has also alleged that she has been subjected to harassment and retaliation from her superiors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered factors of employment under the terms of the Federal Employees' Compensation Act.³

A number of the employment incidents appellant identified as contributing to her emotional condition involve administrative and personnel matters. As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of the Federal Employees' Compensation Act.⁴ However, to the extent that the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.⁵

Appellant has alleged that the employing establishment wrongfully failed to promote her when she was performing the duties of a higher grade and had replaced a male, who had retired, at the higher grade. The Board has previously held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Federal Employees' Compensation Act, as they do not involve appellant's ability to perform her regular or specially assigned work duties, but rather constitute appellant's desire to work in a different position.⁶ Appellant has not submitted any evidence to show that there was any error or abuse to support her allegations regarding the employing establishment's failure to award her any of the open jobs she applied for. Thus, she has not established a compensable employment factor under the Federal Employees' Compensation Act in this respect.

Appellant also alleged that her emotional condition was caused by not being assigned work which would help her to be promoted. The Board has also explained that job transfers and changes in duty shifts or assignments or promotions, are not compensable factors of employment as they do not involve the employee's ability to perform his or her regularly or specially assigned duties. Assignment of work is an administrative or personnel matter of the employing establishment and not a duty of the employee and, absent evidence to support a finding of error

¹ 5 U.S.C. §§ 8101-8193.

² *Clara T. Norga*, 46 ECAB 473 (1995); see *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

³ 5 U.S.C. §§ 8101 *et seq.*

⁴ *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁵ *Id.*

⁶ *Donald W. Bottles*, 40 ECAB 349 (1988).

or abuse by the employing establishment, is not compensable.⁷ In this case, no such administrative error or abuse has been demonstrated. Appellant's desire for a job which would help her to gain a promotion does not rise to compensability.

Regarding appellant's dislike of her supervisor changing her work duties, such allegations pertain to a desire to work in a particular position. The evidence of record indicates that appellant's employment duties and job title did change, there is no evidence of record that she was demoted. While appellant may have been unsatisfied in her new job role, the Board has held that self-generated frustration arising from not being allowed to work in a particular position or to hold a particular job is not compensable under the Federal Employees' Compensation Act.⁸

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.⁹ The issue is not whether the claimant has established harassment or discrimination under standards applied the EEO Commission. 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.¹⁰ To establish entitlement to benefits, the claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.¹¹

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.¹² However, for harassment to 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.¹³

Appellant attributed her emotional condition to a number of incidents she alleged were harassment and discrimination by her supervisor including creating a hostile work environment. She alleged that her supervisor was hostile and that he had related to another employee that she was questioning his authority when she provided another design for a road. Appellant also alleged that in 1999, her supervisor hassled her by stating her position description was fine and she was subject to "continually downgrading, that I really did n[o]t have the knowledge that was being stated." She alleged that her supervisor in 2000, stated that people in Butte were the

⁷ See *Janet D. Yates*, 49 ECAB 240 (1997); *Ronald C. Hand*, 49 ECAB 113 (1997).

⁸ See *Katherine A. Berg*, 54 ECAB ____ (Docket No. 02-2096, issued December 23, 2002); *Michael Thomas Plante*, 44 ECAB 510 (1993).

⁹ *Michael Ewanichak*, 48 ECAB 364 (1997); *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

¹⁰ See *Martha L. Cook*, 47 ECAB 226 (1995).

¹¹ *Barbara E. Hamm*, 45 ECAB 843 (1994).

¹² *Clara T. Noga*, *supra* note 2; *David W. Shirey*, 42 ECAB 783 (1991).

¹³ *Jack Hopkins, Jr.*, 42 ECAB 818 (1991).

problem and she resented “people saying I have a problem due to the consolidation, when I was n[o]t even there” and in 2001, appellant alleged that she had been treated with “constant disrespect and retaliation to me and my employee for seeking fair and equitable treatment.”

In support of her claim for harassment, appellant provided a detailed statement of the actions by her supervisors she believed constituted discrimination and reprisal and affidavits submitted in support of her EEO complaints, but she provided insufficient evidence, such as witness statements, to establish that the specific statements actually were made or that the actions actually occurred.¹⁴ Thus, appellant has not established a compensable employment factor under the Federal Employees’ Compensation Act with respect to the claimed harassment and discrimination.

Further, although appellant references the two EEO complaints she filed, the results of the EEO complaints are not in the record. The absence of such documentation diminishes the validity of her contentions in this case, where there is no evidence to document that she was discriminated or retaliated against. As appellant has not submitted sufficient evidence such as witnesses’ statements or findings from an adjudicatory body regarding her EEO complaints and grievances she has failed to establish discrimination, harassment or retaliation as a compensable factor of employment. For these reasons, the Board finds that appellant has failed to establish discrimination as a compensable factor of employment.

Appellant also alleged that her condition was caused by retaliation by her supervisor. She claimed that subsequent to her filing her EEO complaint, her supervisor subjected her projects to increased scrutiny and “changed the specification format from CSI to FS Spec book.” Her supervisor also changed the design of a contract without informing appellant and she was not informed of her job changes. These situations if corroborate would be insufficient to substantiate harassment or discrimination against her in retaliation for her EEO complaint.¹⁵ As such, appellant’s allegations constitute mere perceptions or generally stated assertions of dissatisfaction with a certain superior at work and her work environment which do not support her claim for an emotional disability.¹⁶

As appellant has failed to submit the necessary factual evidence to establish a compensable factor of employment, the Office properly denied her claim for an emotional condition.¹⁷

¹⁴ See *William P. George*, 43 ECAB 1159 (1992).

¹⁵ See *Joel Parker, Sr.*, 43 ECAB 220 (1991). (The Board held that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

¹⁶ See *Curtis Hall*, 45 ECAB 316 (1994).

¹⁷ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496 (1992).

The September 20, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 9, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member