

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHELLE HALLORAN and U.S. POSTAL SERVICE,
POST OFFICE, St. Petersburg, FL

*Docket No. 02-715; Submitted on the Record;
Issued June 5, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

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

On September 28, 2000 appellant, then a 33-year-old custodian, filed a notice of traumatic injury alleging that she suffered from anxiety and stress arising from an incident of sexual harassment at work on September 24, 2000. Appellant stopped work on September 25, 2000 and received continuation of pay.

The record reflects that appellant filed an Equal Employment Opportunity Commission (EEO) complaint of sexual harassment against her supervisor, Steve Maltinos, which was investigated by the employing establishment but ultimately determined to be without merit per a report of management's findings dated November 28, 2000.¹

Appellant alleged in several written statements that sometime between 9:15 a.m. and 9:45 a.m. on September 24, 2000, Mr. Maltinos told her he needed her to clean a stairwell and then proceeded to grab her left breast when he got her alone in that stairwell. She stated that, while she told him to stop, he expressed no concern over getting caught and reminded her that the worst that could happen to him was that he would be told to stay away from her. Appellant related that later at lunch Mr. Maltinos sat down uninvited at her table. He is also alleged to have approached appellant later in the afternoon while she was placing items in a storage room, at which time he began talking dirty to her and making sexual advances. Appellant stated that Mr. Maltinos approached her while she was working at a flat sorter machine to "remind" her that

¹ It was noted in the report of management's findings dated November 28, 2000, that appellant had previously filed a sexual harassment complaint against supervisor Nick Papageorge when he required her to fill out a request for eight hours of sick leave after she became sick at work on November 14, 1999. Appellant was ultimately told that she only had to use seven hours of sick leave. She also apparently filed a sexual harassment claim when she was told to comply with the dress code, but this was not proven and she was specifically directed to follow postal guidelines for appropriate work attire.

he wanted to see her after work so she could “grab his cock.” She stated that he also told her he wanted to take her out to the parking lot in the car and “fuck her like a real man.” Appellant related that she asked a male coworker to walk her to her car after work to avoid any further contact with Mr. Maltinos. She further related that, on September 23, 2000, Mr. Maltinos grabbed her butt and made comments to her about her breasts.²

In a September 26, 2000 statement, Barbara Lubas indicated that, on September 24, 2000, she was having lunch with appellant when Mr. Maltinos joined them at the lunch table. She did not recall appellant inviting Mr. Maltinos to sit with them. She further related that, at 2:30 p.m. on the same day, appellant appeared upset and told Ms. Lubas that Mr. Maltinos had fondled her breasts in the stairwell that day, would not leave her alone and had been following her around all day. Ms. Lubas advised appellant to file a report against him.

In a statement signed on September 28, 2000, Brian Zemaitis related having overheard Mr. Maltinos comment something like “You [ha]ve got a nice pair there” in reference to appellant’s breasts. This apparently occurred three weeks prior to the alleged incident.

In a September 27, 2000 statement, Kim Halloran indicated that she was appellant’s sister-in-law. She noted that Mr. Maltinos had told appellant and her that it looked bad to upper management that they were always together instead of separately performing their job duties. Ms. Halloran related that appellant told her that Mr. Maltinos grabbed her breasts in the stairwell. She also stated that Mr. Maltinos had sexually harassed her in the past and, therefore, she believed appellant’s version of the events.

In an October 13, 2000 statement, James B. Speyers stated that he walked in and saw appellant and Mr. Maltinos together in the downstairs swing room on September 24, 2000. Mr. Speyers described appellant as smiling as she was hanging on Mr. Maltinos arm. He opined that everything appeared to be okay.

In an October 2, 2000 statement, Jay Windson related that appellant had asked him to walk out with her on September 24, 2000 and that at the time she appeared to be very upset and very agitated. She called him later that night to explain what was wrong but he was not at home to take the call. Mr. Windson stated that he helped appellant move from her apartment back into her mother’s house on September 26, 2000, at which time appellant told him that Mr. Maltinos had grabbed her twice and hurt her. He indicated that on September 25, 2000 he had heard about “the grabbing of the breasts” at work from another coworker.

In another October 2, 2000 statement, Christina Theinart indicated that appellant came to her in the afternoon of September 24, 2000, looking for boxes and that she did not appear to be upset over anything.

² The employing establishment noted in its investigation that appellant started out reporting only the stairwell incident and then her allegations grew over a period of four days to include the remaining incidents alleged on September 23 and 24, 2000.

In a statement signed on October 2, 2000, John McGrath related that appellant complained to him approximately three months prior to the incident that she was tired of people trying to look up her clothes when she stood on a veralift to change light bulbs.

In a report of investigative interview dated December 1, 2000, Mr. Maltinos denied making any sexual advances towards appellant. He alleged that he had spoken to appellant and Ms. Halloran on the morning of September 23, 2000, remarking that they could always be found together. He apparently told them he had something to talk to them about later in the day but was too busy at that time. Mr. Maltinos alleged that appellant invited him to sit with her at lunch. He related that appellant asked him for some boxes sometime after lunch, then he saw her again in the custodial room. He stated that appellant asked him whether or not he felt she was pretty. Mr. Maltinos said he replied "yes" as he was put on the spot. He stated that the conversation was interrupted by Mr. Speyers who came into the room. Mr. Maltinos specifically denied asking appellant to clean the stairwell and denied having any physical contact with her, although he noted that she tapped him on the shoulder at the end of her shift to say goodbye. Mr. Maltinos speculated that appellant made up the sexual harassment charges because she thought she was going to get into trouble about always being seen with Ms. Halloran.

Appellant submitted reports from Dr. Gerard E. Bout dated October 3 and November 1, 2000, wherein the physician advised that appellant was under his care for major depressive disorder and acute stress disorder as a result of being sexually harassed at work. Dr. Bout opined that appellant was totally disabled by her emotional condition.

In a letter dated October 16, 2000, the Office of Workers' Compensation Programs advised appellant of the factual and medical evidence required to establish her claim for compensation. In a decision dated December 20, 2000, the Office denied compensation on the grounds that appellant failed to allege a compensable work factor and was, therefore, unable to establish that she sustained an emotional condition in the performance of duty. Appellant requested a hearing, which was held on June 27, 2001. Appellant and her treating psychologist appeared and gave testimony.

Subsequent to the hearing, the employing establishment submitted a July 19, 2001 letter, in response to appellant's allegations of sexual harassment and her hearing testimony. The letter noted that, when appellant first reported the sexual assault, she stated that it occurred at 3:00 p.m. and then changed the time of the incident to 9:00 a.m. The employing establishment stated that appellant worked her entire tour of duty on September 24, 2000 including having lunch with Mr. Maltinos on the day of the alleged incident. The employing establishment related that Mr. Maltinos was placed on administrative leave pending investigation of the sexual assault charge, but the charge could not be proven through the investigation. He returned to work in December 2000, but was moved to another tour to avoid contact with appellant. The employing establishment stressed that the tour move was not the fault of Mr. Maltinos and was not a reflection of guilt on his part in the alleged incident.

In a decision dated November 28, 2001, an Office hearing representative affirmed the Office's December 20, 2000 decision.

The Board finds that appellant failed to establish that she sustained an emotional condition in the performance of duty.

In order to establish that an employee sustained an emotional condition in the performance of duty, the employee must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the emotional condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.³ Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the employee's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.⁴

Workers' compensation law is not applicable 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. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within coverage of the Federal Employees' Compensation Act.⁵ On the other hand, there are situations when an injury has some connection with the employment, but nonetheless does not come within the coverage of workers' compensation because it is not considered to have arisen in the course of the employment.⁶

As a general rule, an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee.⁷ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.⁸

In this case, appellant contended that she was harassed at work on September 24, 2000 by her supervisor. She alleged that Mr. Maltinos grabbed her left breast in the stairwell at work.

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

⁴ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Joel Parker, Sr.*, 43 ECAB 220 (1991).

⁷ See *Michael L. Malone*, 46 ECAB 957 (1995); *Gregory N. Waite*, 46 ECAB 662 (1995).

⁸ *Ruth S. Johnson*, 46 ECAB 237 (1994).

Appellant further stated that Mr. Maltinos made inappropriate and lewd sexual comments to her as previously described in this decision.

For harassment to give rise to a compensable disability under the Act, there must be some evidence that such implicated acts of harassment or discrimination did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act.⁹ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. The issue is whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹⁰

The Board finds that appellant failed to present specific, reliable and probative evidence that Mr. Maltinos sexually assaulted her in the stairwell or that he made sexual advances to her on September 24, 2000 as alleged. This case presents a classic “he said, she said” situation with Mr. Maltinos denying any inappropriate sexual conduct. The Board has carefully considered the record and finds that there is no witness statement to corroborate that Mr. Maltinos was actually in the stairwell between 9:15 a.m. and 9:45 a.m. such that he attempted to grab appellant’s breast. There is also no witness statement to corroborate any of the alleged lewd comments, as these also apparently occurred only when appellant was alone with her supervisor. One witness statement indicated that appellant did seek out Mr. Maltinos after the alleged sexual assault to see if she could have some boxes for her move. This seems at odds with appellant’s assertion that she was afraid of Mr. Maltinos and her statement that he followed her around all day making suggestive remarks. It is established that appellant was alone with Mr. Maltinos in the custodial room at some point in the afternoon of September 24, 2000, but the version of the conversation that took place is disputed. Mr. Maltinos denied having made suggestive remarks to appellant while in the custodial room and alleged that appellant specifically asked him whether or not he thought she was attractive. Again, there is no witness statement to verify the actual conversation that took place.¹¹

Following an investigation conducted by the employing establishment, Mr. Maltinos was found not to have engaged in sexual harassment. The Board is not bound by that investigative finding, but finds no basis upon which to disagree with the conclusion. Appellant bears the burden of proof to establish her claim and the record is insufficient to establish either that she was sexually harassed or assaulted as alleged. The Board further finds no error or abuse on behalf of the employing establishment in the manner in which they conducted the investigation.¹²

⁹ *William P. George*, 43 ECAB 1159 (1992); *Ruth C. Borden* 43 ECAB 146 (1991).

¹⁰ *See Michael Ewanichak*, 48 ECAB 354 (1997).

¹¹ The Board notes that the witness statements merely relate appellant’s version of events as told to the individual by appellant. They are not an independent assessment or account of the incidents alleged to have occurred on September 24, 2000. None of the witnesses heard Mr. Maltinos make a sexual remark to appellant on that date nor did anyone see him grab her breast.

¹² The fact that appellant filed a grievance or complaint against her supervisor with the employing establishment does not in and of itself establish that sexual harassment occurred in the workplace. *See Alice M. Washington*, 46 ECAB 392 (1994).

The employing establishment reasonably reviewed all of the witness statements and found that none of them supported the events of September 24, 2000 as alleged by appellant. In the absence of factual support for appellant's contention that she was the victim of sexual harassment, the Board finds that appellant is not entitled to compensation for emotional stress as her emotional condition appears to be self-generated and noncompensable.¹³

Additionally, the Board notes that although appellant also alleged that Mr. Maltinos grabbed her butt while she was at work on September 23, 2000, the Board finds insufficient factual evidence to establish that this alleged incident occurred. Moreover, appellant filed a CA-1 claim form for a traumatic injury that occurred on September 24, 2000.¹⁴ If appellant felt her emotional condition was due to actions of her supervisor over the course of more than one workday, she is required to file a claim for an occupational disease. The Board's review is limited to the confines of appellant's Form CA-1 application, which alleged a traumatic injury occurring within the course of the workday of September 24, 2000.

The November 28, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 5, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

¹³ See generally *Mary A. Sisneros*, 46 ECAB 155 (1994).

¹⁴ A traumatic injury is defined by a specific event or course of events that occurred within a single workday or work shift. See 20 C.F.R. § 10.5(a)(15) (1999).