

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BELINDA R. DARVILLE and U.S. POSTAL SERVICE,  
NORTHWOOD POST OFFICE, West Palm Beach, FL

*Docket No. 02-1183; Submitted on the Record;  
Issued June 26, 2003*

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DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to rescind its acceptance of appellant's emotional condition; and (2) whether the Office properly denied appellant's request for subpoenas.

On August 19, 1996 appellant, then a 37-year-old clerk, filed an occupational disease claim alleging that she sustained an emotional condition due to harassment, retaliation and a hostile environment.

After initially denying appellant's claim, by decision dated February 17, 2000, the Office accepted her claim for acute stress disorder and anxiety disorder. In the Office's February 17, 2000 decision, vacating its earlier decisions denying appellant's claim, the Office found that new evidence was sufficient to establish that appellant was sexually harassed by supervisor Arthur Bullard and Steve Cooper, a coworker. The Office noted that a customer, Willie White, provided a statement that on September 19, 1997 he observed Mr. Bullard tell appellant that she should stop filing Equal Employment Opportunity (EEO) complaints and grabbed his genital area in front of her.<sup>1</sup> The Office noted that manager and labor relations specialist Jane DiLisio provided a statement that Mr. Bullard told her that employee Mr. Cooper made a derogatory sexual remark about appellant to a custodian.<sup>2</sup> Ms. DiLisio also indicated that both appellant and Mr. Cooper had been counseled regarding their unprofessional conduct toward each other.

On April 10, 2000 the employing establishment submitted a copy of its February 8, 1999 decision regarding appellant's claim for gender discrimination and sexual harassment by the employing establishment concerning the September 19, 1997 incident with Mr. Bullard. The official who issued the decision stated: "I find that you have not borne the burden of proving by a preponderance of the evidence that you were subjected to hostile environment sexual

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<sup>1</sup> Mr. White noted that he witnessed the incident by looking through a medium-size post office box.

<sup>2</sup> The Office noted that Mr. Cooper was transferred to another post office as a result of this incident.

harassment. Additionally, you have failed to satisfy the burden of proving that you were the victim of intentional discrimination based on retaliation. Therefore, your complaint is closed with a finding of no discrimination based on the merits of your case.”

The employing establishment also submitted a declaration dated October 1, 1999 from employee Valerie Wedges, who stated that she witnessed the September 19, 1997 incident and that Mr. Bullard did not make any sexual gesture or comment towards appellant then or on any other occasion.<sup>3</sup> She noted that Mr. Bullard had a habit of putting his hands in his pockets and jingling his change but this was not a sexual gesture. Ms. Wedges also stated that she never saw Mr. Cooper sexually harass appellant. She stated: “I am well aware that [appellant] and Mr. Cooper did not get along well with each other. I witnessed many disagreements between [them]. In my opinion, these disagreements were the result of a strong personality conflict between them.”

By letter dated July 25, 2000, the Office advised appellant that it proposed to rescind its acceptance of her emotional condition and terminate her compensation based on new evidence from the employing establishment including the employing establishment’s February 8, 1999 decision and the October 1, 1999 statement from Ms. Wedges that refuted appellant’s allegations of sexual harassment, retaliation and a hostile work environment.

Appellant subsequently stated her disagreement with the Office’s proposed rescission of its acceptance of her claim.

By decision dated May 29, 2001, the Office rescinded its acceptance of appellant’s claim and terminated her compensation.

On June 1, 2001 appellant requested a hearing. By letter dated July 19, 2001 appellant requested that the Office hearing representative issue subpoenas for Barbara Baris, the attorney, who represented her in a lawsuit against the employing establishment, her psychologist Dr. McKinley Cheshire, Mr. White, Barry Shapiro, a clerk and union official at the employing establishment and supervisor Jane DiLisio. She also requested a subpoena for all documents concerning her EEO and harassment complaints dated 1995 to 1998.

By decision dated November 14, 2001, the Office hearing representative denied appellant’s request for subpoenas on the grounds that she had failed to show that a subpoena was the best method or opportunity to obtain evidence from the individuals named in her request because there were no other means by which the testimony or documents could have been obtained. She noted that appellant could submit statements from the individuals or present voluntary testimony from them.

On November 27, 2001 a hearing was held and appellant testified.

By decision dated March 18, 2002, the Office hearing representative affirmed the Office’s May 29, 2001 decision on the grounds that the Office met its burden in rescinding its

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<sup>3</sup> During the hearing held on July 19, 2001, Mr. White testified that Ms. Wedges was looking directly at Mr. Bullard during the September 19, 1997 incident.

acceptance of appellant's claim based on the employing establishment's February 8, 1999 decision and the statement by Ms. Wedges.

The Board finds that the Office met its burden of proof in rescinding its acceptance of appellant's emotional condition.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees Compensation Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.<sup>4</sup> The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.<sup>5</sup> It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where the Office later decides that it has erroneously accepted a claim for compensation.<sup>6</sup> In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.<sup>7</sup>

The Board finds that the Office met its burden of proof in rescinding its acceptance of appellant's claim for an emotional condition based on new evidence consisting of the employing establishment's February 8, 1999 decision and the October 1, 1999 statement from Ms. Wedges.<sup>8</sup> The official who rendered the February 8, 1999 decision on the merits regarding the September 19, 1997 incident involving Mr. Bullard stated that appellant had not proven her claim that she was subjected to sexual harassment. Ms. Wedges stated that she witnessed the September 19, 1997 incident and that Mr. Bullard did not make a sexual gesture toward appellant. She indicated that Mr. Bullard's habit of putting his hands in his pockets and jingling his change may have been misinterpreted as grabbing his genital area. This new evidence established that appellant was not subjected to harassment or discrimination by the employing establishment regarding the September 19, 1997 incident involving Mr. Bullard and the Office, therefore, properly rescinded its acceptance of this factor as a compensable employment factor. Regarding appellant's allegation that Mr. Cooper made a sexual comment to a custodian, Ms. Wedges stated that she never saw Mr. Cooper sexually harass appellant. The record shows that the employing establishment disciplined Mr. Cooper for this one incident by transferring him to another post office. Considering this fact and all the evidence of record, including Ms. Wedge's statement, the Office properly found that this incident involving Mr. Cooper did not rise to the level of a compensable employment factor and rescinded its acceptance of this factor as a compensable factor.

The Board finds that the Office properly denied appellant's request for subpoenas.

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<sup>4</sup> *Eli Jacobs*, 32 ECAB 1147 (1981).

<sup>5</sup> *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

<sup>6</sup> *See* 20 C.F.R. § 10.610.

<sup>7</sup> *Alice M. Roberts*, 42 ECAB 747 (1991).

<sup>8</sup> *See James C. Bury*, 54 ECAB \_\_\_ Docket No. 03-596, (issued April 24, 2003).

Section 8126<sup>9</sup> of the Act provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles. This provision gives the Office discretion to grant or reject requests for subpoenas. Office regulations state that subpoenas for documents will be issued only where the documents are relevant and cannot be obtained by any other means. Subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.<sup>10</sup>

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issue in the case and show that a subpoena “is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.”<sup>11</sup> The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken that are clearly contrary to logic and probable deductions from established facts.<sup>12</sup>

Appellant submitted a request for subpoenas on July 19, 2001. She cited several witnesses for whom she requested the issuance of subpoenas, including two employing establishment workers. However, appellant did not show why information from these individuals could not be obtained other than through the subpoena process. The Board finds that the hearing representative acted within her discretion in denying appellant’s request for subpoenas.

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<sup>9</sup> 5 U.S.C. § 8126.

<sup>10</sup> 20 C.F.R. § 10.619.

<sup>11</sup> *Id.*

<sup>12</sup> *Dorothy Bernard*, 37 ECAB 124 (1985).

The decisions of the Office of Workers' Compensation Programs dated March 18, 2002 and November 14, 2001 are affirmed.

Dated, Washington, DC  
June 26, 2003

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member