

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of YVONNE ZARAGOZA-GARCIA and U.S. POSTAL SERVICE,  
POST OFFICE, Tampa, FL

*Docket No. 02-1662; Submitted on the Record;  
Issued June 19, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty causally related to factors of her employment.

On August 6, 2001 appellant, then a 46-year-old clerk, filed an occupational disease claim, alleging that fear of retaliation after filing a sexual harassment complaint caused her severe depression, stress, anxiety, headaches, insomnia and intestinal problems.<sup>1</sup> She had stopped work on July 25, 2001 following an interview with the postal inspector service regarding leave she had taken and regarding a second job with Hilton, Incorporated. In support of her claim, appellant submitted a personal statement and medical evidence from Dr. Jeremy S. Gaies, psychologist, who diagnosed a major depressive disorder and post-traumatic stress disorder (PTSD).

By letters dated October 29, 2001, the Office informed appellant of the type of evidence needed to support her claim and requested that the employing establishment furnish information regarding her allegations.

In a letter dated November 28, 2001, appellant further alleged that she underwent constant harassment by Dena Greenidge and that she had filed two Equal Employment Opportunity (EEO) Commission claims, copies of which she included. She also submitted information regarding 1998 sexual harassment, which included a 1999 grievance, additional medical evidence and a letter dated November 3, 2001 to the employing establishment. By letter dated December 19, 2001, appellant informed the Office that she had been terminated by the employing establishment effective December 21, 2001.

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<sup>1</sup> The record indicates that appellant initially filed an Office of Workers' Compensation Programs Form CA-2a, claim for recurrence of disability on August 6, 2001. She then submitted the Form CA-2 and dated it both August 6 and September 21, 2001.

By decision dated February 26, 2002, the Office denied appellant's claim, finding that she failed to establish that she sustained an injury in the performance of duty. The instant appeal follows.

The Board finds that appellant failed to meet her burden of proof to establish that she sustained an injury in the performance of duty causally related to factors of employment.

To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.<sup>2</sup>

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,<sup>3</sup> the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.<sup>4</sup> There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.<sup>5</sup> When an employee experiences emotional stress in carrying out his or her employment duties, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from an emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.<sup>6</sup>

In the instant case, appellant alleged that she sustained an emotional condition as a result of sexual harassment that occurred in 1998, fear of retaliation because she filed a grievance regarding the harassment and harassment by the employing establishment management since that time. The Office denied her claim on the grounds that she did not establish any compensable employment factors. The Board must, therefore, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant is initially claiming that her emotional condition was caused by sexual harassment that occurred in November 1998. She stated that on January 17, 1999 she reported to her supervisor Lily Kirby<sup>7</sup> that she had been sexually harassed by "Al [Guice]," a seasonal casual who "made several sexual innuendoes, which I did not condone." Appellant stated that Ms. Kirby Bennett tried to persuade her that the remarks had been misconstrued and did not

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<sup>2</sup> *Donna Faye Cardwell*, 41 ECAB 730 (1990).

<sup>3</sup> 28 ECAB 125 (1976).

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> See *Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

<sup>6</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>7</sup> Now Lily Kirby Bennett.

report the incident. She stated that an investigation then took place but that Mr. Guice was allowed to read her statement, which she considered to be retaliation. Appellant further stated that in the months that followed Ms. Kirby Bennett threatened to have her bid rescinded, which led to continued feelings of anxiety and fear of retaliation. She indicated that two other female employees reported incidents regarding Mr. Guice, that Ms. Kirby Bennett was dating him and that following her complaint she was chastised and ridiculed by male coworkers. Appellant concluded that she continues to suffer three years after the event and has been seeing a psychologist since August 1999.

A step one grievance summary dated January 22, 1999 stated the following:

“Sometime around the third week of November of 1998, [appellant] was twice approached by Casual, [Mr.] Guice. On the first occasion [she] was pulling a hamper from the SPBS when the casual came up to her and commented about how she left work one morning, saying, ‘I saw how you drove out of here yesterday and I saw you drive very fast.’ [Appellant] responded saying, ‘[i]t [i]s not me, it [i]s the car.’ She said she did [not] wish to engage in conversation with him but did [not] want to be rude. Later when she was working at the racks, [appellant] said the [c]asual ‘leaned’ into her and said, ‘[d]o you do everything the way you drive ... fast?’ She said, ‘[y]ou [will] never know.’ Then she walked away and avoided the [c]asual ever since.”

Appellant also submitted statements from two coworkers who also alleged that they had been harassed by Mr. Guice. As a resolution to the grievance, he was to be fired and was to be kept from future employment at the employing establishment.

On October 25, 2001 appellant filed an EEO complaint regarding the same incident and on November 19, 2001 submitted a second EEO complaint, alleging that she had been removed from the employing establishment in retaliation for her original complaint.

In a November 8, 2001 statement, Debbie Reeves, a union steward, advised that she had represented appellant during the 1999 grievance procedure. Ms. Reeves recalled that Mr. Guice had been fired. By letter dated November 19, 2001, Richard A. Phillips, a union representative, stated that appellant’s emotional condition began in January 1999, when the employing establishment’s management would not take action against Mr. Guice and that, even though he had been fired, appellant still felt threatened because Mr. Guice was a black belt in karate and she had been informed that he had made threats to get even with an employing establishment supervisor.

Ms. Kirby Bennett, SDO, submitted statements dated September 26 and November 8, 2001, in which she advised that appellant’s 1999 sexual harassment claim had been handled properly and that appellant had continued to work except for an absence for surgery in 2000. She stated that she did not become aware of appellant’s emotional condition until she filed the instant claim and related that on July 24, 2001 appellant was called to a meeting with postal inspectors. Ms. Kirby Bennett advised that there had been no retaliation against appellant and that her quality of work was never an issue.

Rudine Greenidge, P/L Manager, Annex II, submitted a statement dated November 8, 2001, in which Ms. Greenidge advised that she first became aware of appellant's sexual harassment claim when she filed the instant claim. Ms. Greenidge indicated that appellant had been interviewed by the postal inspector service regarding her second job.

The record also indicates that in April 2000, appellant began working part time at the Hilton Worldwide Reservation Center.

To the extent that appellant is claiming that the employing establishment improperly investigated her leave usage, the Board finds that this relates to administrative or personnel matters, unrelated to her regular or specially assigned work duties and do not fall within the coverage of the Act.<sup>8</sup> The Board has long held that matters pertaining to investigations relate to administrative or personnel matters.<sup>9</sup> The Board has found, however, that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.<sup>10</sup> There is no evidence of record to indicate that the employing establishment acted abusively in investigating appellant's leave usage. The Board, therefore, finds that the employing establishment acted reasonably regarding the investigation.

Appellant is also alleging that she was harassed and discriminated against because she filed a grievance regarding the 1998 sexual harassment and that she had been harassed since that time.

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced, which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act.<sup>11</sup> 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.<sup>12</sup>

The Board finds that appellant has not established that the employing establishment acted inappropriately when informed of the harassing incidents. The record indicates that appellant informed Ms. Kirby Bennett on January 17, 1999.<sup>13</sup> She provided a statement advising that

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<sup>8</sup> See *Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

<sup>9</sup> *Ruth S. Johnson*, 46 ECAB 237 (1994).

<sup>10</sup> See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

<sup>11</sup> See *Michael Ewanichak*, 48 ECAB 354 (1997).

<sup>12</sup> *Id.*

<sup>13</sup> Appellant also indicated that she did not inform Ms. Kirby Bennett until February 1999. This is, however, contradicted by the grievance settlement dated January 22, 1999.

appellant's complaint was handled correctly with Mr. Guice being reassigned and eventually terminated. The grievance settlement was dated a mere five days after appellant first reported the incident. The Board, therefore, finds that the employing establishment acted reasonably in handling this matter.

The record, however, contains the above-mentioned settlement agreement, which indicates that harassment did in fact occur in November 1998. The Board, therefore, finds that the two incidents that occurred in November 1998, when appellant was approached by Mr. Guice, are compensable factors of employment. There is, however, no evidence that appellant was harassed or retaliated against after that time. The record indicates that she continued to work for over two years until she was investigated by the employing establishment regarding her leave usage, which as discussed previously, was reasonable in this case. Appellant, therefore, has not established any additional factors of employment.

Appellant's burden of proof is not discharged by the fact that she has established a compensable employment factor, which may give rise to a compensable disability under the Act. To establish an occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that she has an emotional or psychiatric disorder and that such disorder is causally related to the compensable employment factors.<sup>14</sup>

The Board finds, however, that, while appellant established two compensable factors of employment, *i.e.*, the two incidents that occurred in November 1998, she did not meet her burden of proof to establish that her emotional condition was work related because she did not submit rationalized medical evidence explaining how these factors of employment caused or aggravated her emotional condition.

The relevant medical evidence includes a September 25, 2001 report, in which Dr. Gaies, psychologist, noted that he began treating appellant in August 1999. He diagnosed a major depressive disorder with delayed onset PTSD, stating:

“[Appellant] have related a history of sexual harassment and employment harassment at your job that is likely to be a primary contributing condition to [her] symptoms and continuing stress at this worksite appears to continue to cause you dysfunction. For this reason, I have frequently recommended that [appellant] take periods of leave from [her] job at the [employing establishment]. Because the conditions at [appellant's] secondary job with Hilton [World Reservation Center,] are not contributory to [her] symptoms, I have generally not recommended that [she] take leave from that position.”

In a report dated October 18, 2001, Dr. Gaies advised that appellant should have zero contact with the employing establishment. By report dated November 19, 2001, he reiterated his conclusions, stating “It is my opinion that [appellant's] employment directly precipitated [her] conditions, with specific contributing factors including the sexual harassment and the alleged failure of [her] supervisors to adhere to [the employing establishment's] policies in addressing [her] claims, both past and current.”

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<sup>14</sup> *Id.*

Dr. Stuart D. Helms, Board-certified in internal medicine, provided a November 28, 2001 report, in which Dr. Helms noted that he had diagnosed an anxiety reaction in June 1998, when he placed appellant on medication and that her depression increased in January 1999, stating that she “related this to [her] ongoing concerns regarding [her] exhusband’s relationships with one of [her] coworkers and frequent encounters with [her] exhusband at work.” He further described continued problems with panic attacks and depression, stating that she “mentioned problems with coworkers including sexual harassment and clashes involving this claim with supervisors and other superiors.”

In a December 14, 2001 report, Dr. Conrad P. Weller, a Board-certified psychiatrist, reported:

“In November and December of 1998, [appellant] was repeatedly harassed on her job at the [employing establishment] by a seasonal casual employee (‘a tall, big guy’) named [Mr. Guice]. This individual would make embarrassing comments to her about her breasts (‘for your size and weight you have big breasts.’ ‘Are your breasts real?’ ‘Your breasts bounce when you walk -- why do you walk so fast?’) Moreover, on one occasion, as [appellant] was alone on the workroom floor, [Mr. Guice] approached her, leaned forward toward her and brushed against her while making some provocative statement. [She] felt very threatened by all these incidents. However, [appellant] refrained from reporting them to management since she expected Al to leave soon.”

Dr. Weller diagnosed PTSD and major depressive disorder, single episode, severe, without psychosis. He advised that appellant’s anxiety and depression “developed as a result of specific stressors at work” including the “repeated sexual harassment at work.”

The Board finds that, while Dr. Gaies generally advised that appellant’s condition was employment related, he did not specifically relate her condition to the compensable employment factors. Dr. Helms, who diagnosed an anxiety reaction in June 1998, five months prior to the compensable harassing incidents, noted that appellant “mentioned” problems with coworkers as well as problems concerning her former husband. He, however, did not provide a cause of her condition. Dr. Weller, who advised that appellant’s condition was caused in part by the harassing incidents, related a history regarding these incidents that does not agree with the history provided by appellant at the time the incidents occurred. As his opinion was not based on a complete and accurate factual history, the Board finds that his report of decreased probative value.<sup>15</sup> Appellant, therefore, did not meet her burden of proof to establish that her emotional condition was work related because she did not submit rationalized medical evidence explaining how these factors of employment caused or aggravated her emotional condition.

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<sup>15</sup> See *Elizabeth W. Esnil*, 46 ECAB 606 (1995).

The decision of the Office of Workers' Compensation Programs dated February 26, 2002 is hereby affirmed as modified.

Dated, Washington, DC  
June 19, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member