U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of VALERIE J. OESTREICH and U.S. POSTAL SERVICE,
POST OFFICE, Boston, MA

*Docket No. 02-1894; Submitted on the Record;*
*Issued June 2, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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

On August 31, 2000 appellant, then a 45-year-old distribution and window clerk, filed a claim alleging that she sustained an emotional condition in the performance of duty. Appellant alleged that she was harassed and discriminated against by supervisors and coworkers. She claimed that the employing establishment mishandled disciplinary actions, leave usage, work assignments and other matters. By decision dated March 19, 2001, the Office of Workers' Compensation Programs denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors.

Appellant requested a hearing before an Office hearing representative which was held on August 29, 2001. Appellant provided further detail of her claimed employment factors at the hearing. Appellant's attorney also arranged for Mary Hogarty, the union steward at appellant's workplace, to provide testimony at the hearing. By decision dated and finalized April 23, 2002, an Office hearing representative affirmed the Office's March 19, 2001 decision.

The Board finds that appellant did not meet her burden of proof to establish 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

[1] 5 U.S.C. §§ 8101-8193.

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]

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by employment factors.[3] This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[4]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[5] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[6]

In the present case, appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. The Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant has alleged that she was harassed and discriminated against by Jacquelyn Kennerly-James, a supervisor. She indicated that on May 24, 2000 Ms. Kennerly-James harassed and threatened her by telling her "something bad was going to happen to her tomorrow." Appellant indicated that she felt that this situation was like a "loaded gun" being held to her head and that no one would tell her what would happen to her the next day. She claimed that someone placed signs in her work area which she felt criticized her and asserted that she was told she would be fired if she took pictures of the signs.[7] Appellant alleged that supervisors or coworkers stole or otherwise disposed of some of her personal property. She

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[2] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[3] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[4] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[5] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[6] *Id.*

[7] The record contains copies of pieces of paper with handwritten text delineating various axioms of a caustic nature such as, "Minding your own business is the most successful enterprise!" The text does not specifically refer to any person.

claimed that she was threatened because she chose not to work on May 23, 2000, which was a nonscheduled day. Appellant claimed that coworkers singled her out for abuse; she suggested that they made prank telephone calls to her house and threw furniture into her pool.

Appellant claimed that, on August 24 and 25, 2000, Ms. Kennerly-James told her not to make comments to customers, paged her when she went to the restroom, blamed her for long lines and threatened her regarding her use of lunch time. She asserted that on August 25, 2000 she was verbally abused by John Murphy, a coworker, and that she was verbally attacked by a coworker, Jerry Jones, who threatened to come to her home. Appellant claimed that on September 5, 2000 she was harassed because supervisors would not sign a claim form at her request. She alleged that, during a predisciplinary meeting on November 20, 2000, Ms. Kennerly-James harassed her by yelling and pointing a finger at her as she told her things she had done. Appellant indicated that the meeting lasted two minutes because she walked out of the room due to the abuse she received. She claimed that Calvin Johnson, a supervisor, unfairly prevented her from delivering express mail and harassed her regarding overtime work. Appellant claimed that the employing establishment retaliated against her for filing grievances, frustrated her attempts to serve the union and ignored her complaints about management abuses. She asserted that the employing establishment discriminated against her by treating her differently with respect to the assignment of her work hours and the management of her use of leave and lunch time.

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[8] However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[9]

In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that she was harassed or discriminated against by her supervisors or coworkers.[10] Appellant alleged that supervisors and coworkers made statements and engaged in actions which she believed constituted harassment and discrimination, but she did not provide sufficient corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.[11] She filed grievances regarding a number of these claims, but the record does not contain any findings of these grievances which show that the employing establishment committed harassment or discrimination.

[8] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[9] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[10] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[11] *See William P. George*, 43 ECAB 1159, 1167 (1992). It should be noted that the record contains numerous statements in which coworkers testified that appellant acted abusively towards them.

At the hearing before an Office hearing representative which was held on August 29, 2001, Ms. Hogarty, the union steward at appellant's workplace, provided testimony about various matters. Ms. Hogarty testified that during a meeting on November 20, 2000 Ms. Kennerly-James read from a stack of paper, pointed her finger at appellant and told her things she had done wrong. She claimed that Ms. Kennerly-James "just started basically to yell" at appellant. The Board notes, however, that Ms. Hogarty did not provide any significant detail about what Ms. Kennerly-James said to appellant during this meeting. Her testimony must, therefore, be regarded as vague and generalized in nature. Ms. Hogarty's mere assertion that Ms. Kennerly-James pointed her finger at appellant and "yelled" would not in itself be sufficient to establish that she harassed appellant.[12]

Ms. Hogarty also testified that Ms. Kennerly-James denied saying to appellant during a meeting on May 24, 2000 that she had one more thing to say to appellant, but that it could wait until the next day. Appellant had alleged that she felt threatened by Ms. Kennerly-James' comments in this regard. In her claim statements, appellant asserted that Ms. Kennerly-James harassed and threatened her by telling her "something bad was going to happen to her tomorrow." However, the Board notes that nothing in Ms. Hogarty's testimony or the other evidence of record establishes that Ms. Kennerly-James made a threatening or harassing statement as characterized by appellant. Appellant has not adequately articulated how Ms. Kennerly-James' statement that she would speak to her the next day about a given issue would rise to the level of harassment.[13]

The record also contains unsigned notes in which an unidentified individual made comments about various claims advanced by appellant. Some of the comments in the notes suggest that the actions of Ms. Kennerly-James were improper. Ms. Hogarty indicated in her testimony that these notes were prepared by Rickie Banning, a intervention specialist. However, the comments in the notes are vague in nature. The factual bases for the opinions contained in the notes remain unclear and it appears that they actually memorialize appellant's own unsupported assertions. For the above-described reasons, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant also claimed that she was improperly given 14-day suspension letters on two occasions, including an instance when such a letter was mailed just prior to a scheduled Equal Employment Opportunity mediation session. She alleged that the employing establishment improperly delayed her return to duty until July 5, 2000, despite the fact that she had been cleared for such a return effective June 7, 2000. Appellant asserted that the employing establishment failed to investigate who posted the signs in the retail area where she worked. She

[12] The record also contains a November 20, 2000 statement in which Ms. Hogarty indicated that Ms. Kennerly-James read from a notepad and told appellant she was not being courteous to customers and had berated coworkers. Ms. Hogarty indicated that appellant stated that "it was all lies" and that she needed to leave due to stress. The statement does not indicate that Ms. Kennerly-James yelled at appellant. Appellant noted in her claim statements that she left the meeting after only two minutes.

[13] Ms. Hogarty testified about other matters such as the signs which were placed in the workplace and appellant's claim that her personal items were stolen. However, none of this testimony revealed any harassment or discrimination by the employing establishment.

claimed that on June 21, 2000 Margie Owens-Harris, a supervisor, failed to attend a mediation meeting with Ms. Banning. Appellant asserted that on December 7, 2000 Ms. Kennerly-James and other supervisors improperly failed to meet with her and her union representative to discuss various mediation issues. She alleged that Ms. Kennerly-James wrongly required her to undergo a fitness-for-duty examination in June 2000. Appellant claimed that on various occasions the employing establishment mishandled requests for leave usage, changes in her lunch time and adjustments to work assignments.

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, wrongly denied leave, improperly managed work duties and mishandled investigations and mediation meetings, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[14] Although these matters are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[15] However, the Board has also found 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.[16] Appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. She filed grievances regarding a number of these claims, but the record does not contain any findings of these grievances which show that the employing establishment engaged in wrongdoing. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.[17]

[14] *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).

[15] *Id.*

[16] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[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, 502-03 (1992).

The April 23, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
June 2, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member