U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PEGGY MATHIS and U.S. POSTAL SERVICE,
POST OFFICE, Little Rock, AK

Docket No. 00-1161; Submitted on the Record;
Issued March 11, 2003

DECISION and ORDER

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

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

On October 11, 1994 appellant, then a 45-year-old post office operations manager, filed an occupational disease claim alleging that on September 27, 1994 she first realized that her depression was caused by factors of her federal employment. Appellant stated that she experienced day-to-day harassment both directly and indirectly from Wayne Dick, her district manager.

By decision dated July 12, 1995, the Office of Workers' Compensation Programs found the evidence of record insufficient to establish that appellant sustained an emotional condition in the performance of duty. In a January 3, 1996 letter, appellant requested reconsideration.

In a January 17, 1996 decision, the Office modified its prior decision finding the evidence of record sufficient to establish fact of injury, but insufficient to establish that appellant sustained an emotional condition in the performance of duty.

The Office denied appellant's subsequent requests for modification based on a merit review of her claim in decisions dated April 22, 1996, June 11 and October 1, 1997 and March 30, 1999. In an April 20, 1999 letter, appellant disagreed with the Office's March 30, 1999 decision and requested an oral hearing.

By decision dated December 23, 1999, the hearing representative affirmed the Office's decision.[1]

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[1] In her December 23, 1999 decision, the hearing representative noted that the Office inadvertently advised appellant of her right to an oral hearing in the appeals rights accompanying the Office's March 30, 1999 decision. Due to the Office's error, the hearing representative granted appellant's request for a hearing.

The Board finds that appellant has failed 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 illness has some connection with the employment, but nevertheless does not come within the coverage of the Federal Employees' Compensation Act. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned work duties or requirements of the employment, the disability comes within the coverage of the Act. On the other hand, where disability results from such factors as an employee's emotional reaction to employment matters unrelated to the employee's regular or specially assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the scope of coverage of the Act.[2]

Perceptions and feelings alone are not compensable. 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 factors of her federal employment.[3] To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; (2) medical evidence establishing that she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.[4]

In this case, appellant has alleged that she was sexually harassed and discriminated against by Mr. Dick and sexually harassed by her coworkers. Specifically, appellant alleged that Mr. Dick: (1) questioned her decisions; (2) scrutinized her travel vouchers; (3) threatened to fire her if she did not respect his position or accept his sexual advances; (4) yelled at her during meetings; (5) accused her of informing his wife about the divorce of his acting secretary, Delaura Simmons; (6) instructed her to promote his friend's spouse to postmaster by reposting the announcement for this position; (7) made sexual advances towards her at social functions that she was required to attend after work sessions; (8) refused to allow her to leave social functions; (9) issued a notice of proposal to demote her from the position of manager of post office operations to a customer service supervisor; (10) reassigned her to a new territory; (11) denied her request to have a clerk reassigned to her; (12) required her and another coworker, Elizabeth Hamsher, to work while he and the other male coworkers took golf lessons on the clock; and (13) investigated her for mailing third-class brochures without postage.

Appellant alleged that her male coworkers wore sexually explicit hats at a barbecue held after a work session.

[2] *Lillian Cutler*, 28 ECAB 125 (1976).

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

[4] *Donna Faye Cardwell*, 41 ECAB 730 (1990).

Appellant also alleged that she was overworked.

Appellant filed complaints against the employing establishment alleging harassment and discrimination.

Actions of an employee's supervisor or coworkers, which the employee characterizes as discrimination or harassment may constitute a compensable factor of employment. However, for discrimination or harassment to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did, in fact, occur.[5] Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.[6] An employee's charges that he or she was harassed or discriminated against is not determinative of whether or not harassment or discrimination occurred.[7] To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting her allegations with probative and reliable evidence.[8]

In support of her allegation that she was sexually harassed and discriminated against by Mr. Dick and her male coworkers, appellant submitted Ms. Hamsher's June 12, 1995 narrative statement. In this statement, Ms. Hamsher indicated the mistreatment of Patricia Gale, manager of operations programs, by Mr. Dick. Regarding appellant, Ms. Hamsher stated that she witnessed Mr. Dick single appellant out at meetings, particularly during the first quarter in 1994 when appellant presented her area's statistics. Ms. Hamsher stated that Mr. Dick questioned (hounded) appellant about the figures in her report and demanded incredible detail to the point of shouting. She noted that, after Mr. Dick had humiliated appellant, he did not have any one else make their presentation.

Ms. Hamsher stated that, after the completion of off-site meetings, the staff was encouraged or maybe pressured to go to the hotel's lounge/bar. She noted that the first quarterly meeting was held at Mr. Dick's home and that after the cookout was over she left. She stated that she received direct reports from staff members who stayed and consumed alcohol in a social atmosphere. She noted that the next quarterly meeting was held at Lake DeGrey Park. Ms. Hamsher stated that on the first night after the meeting she went to her room to make a telephone call. Ms. Hamsher asked appellant what time she went to her room that night and appellant responded that they had been playing cards and when she tried to leave at 1:30 a.m. or so Mr. Dick told her to sit down. She stated that appellant told her that, after she expressed concern about the time, Mr. Dick swore at her and told her to stay. At another off-site meeting in Jonesboro, Ms. Hamsher stated that she accompanied appellant to the hotel bar as she was expected to make an appearance and noted that the table where Mr. Dick and her male coworkers were seated had many empty beer bottles on it. She also noted that Mr. Dick asked appellant to

[5] *Shelia Arbour (Vincent E. Arbour)*, 43 ECAB 779 (1992).

[6] *See Lorraine E. Schroeder*, 44 ECAB 323 (1992); *Sylvester Blaze*, 42 ECAB 654 (1991).

[7] *William P. George*, 43 ECAB 1159 (1992).

[8] *See Anthony A. Zarcone*, 44 ECAB 751 (1993); *Frank A. McDowell*, 44 ECAB 522 (1993); *Ruthie M. Evans*, 41 ECAB 416 (1990).

dance several times and thought this was odd since she considered the environment to be a business environment.

Ms. Hamsher stated that after she became postmaster in Jacksonville appellant visited periodically and she described alarming instances of harassment by Mr. Dick. Ms. Hamsher noted that Mr. Dick overturned appellant's selections for postmaster and that he encouraged appellant to downgrade to the position of postmaster in Van Buren, Arkansas. Regarding the investigation of appellant for mailing advertising materials to her offices, Ms. Hamsher stated that she thought it was odd because other managers had mailed advertising materials to their offices like appellant and no corrective action was taken against them. Ms. Hamsher concluded her statement by describing her reaction to finding out that appellant had been hospitalized for an attempted suicide and her visit to see appellant in the hospital.

In a June 12, 1995 narrative statement, Roger L. Marcum, a manager of post office operations, indicated that appellant complained about sexual advances during private meetings and that she attempted to file a complaint but, that she was told she could not do so. Mr. Marcum stated that he did not personally observe any sexual advances from either appellant towards Mr. Dick or from Mr. Dick towards appellant. He noted that Mr. Dick questioned appellant's decisions particularly, postmaster selections and officer-in-charge assignments and that Mr. Dick would tell appellant to be quiet. He further noted that conditions worsened and that appellant told him about the inspectors who were assigned to follow her and the heated discussions that she had with Mr. Dick.

The narrative statements of Ms. Hamsher and Mr. Marcum are insufficient to establish that appellant was harassed by Mr. Dick. The manner in which appellant's supervisor performed his duties as a supervisor or the manner in which he exercised his supervisory discretion in questioning appellant about her presentation and decisions falls, as a rule, outside of compensable factors of employment.[9] Ms. Hamsher's and Mr. Marcum's comments regarding the questioning of appellant's presentation and overturning of her job selections by Mr. Dick do not establish that Mr. Dick abused his supervisory discretion. In addition, there is no evidence establishing that Mr. Dick acted in an unreasonable manner in telling appellant to be quiet.[10] Ms. Hamsher's statements indicating that alcohol was consumed at Mr. Dick's cookout, that Mr. Dick did not allow appellant to leave the hotel room, that he encouraged appellant to accept a downgraded position and that he committed "alarming" acts of harassment were based on statements from appellant and her coworkers. Ms. Hamsher did not witness any of these incidents. Similarly, Mr. Marcum did not indicate that he witnessed the alleged heated discussions that took place between appellant and Mr. Dick. The Board notes that appellant testified at the hearing that no witness statements were submitted in support of her contention that Mr. Dick yelled at her during staff meetings.

The hearing testimony of Albert S. Mathis, appellant's husband, noting that appellant was sexually harassed by Mr. Dick is insufficient to establish appellant's burden because he did not identify any specific incidents of such harassment.

[9] *Donald E. Ewals*, 45 ECAB 111 (1993); *see also David W. Shirey*, 42 ECAB 783 (1991).

[10] *See Paul Trotman-Hall*, 45 ECAB 229, 242 (1993) (Groom, M.E., concurring).

Regarding appellant's attendance at social gatherings held after work meetings, the general criteria for determining whether an individual is in the performance of duty as it relates to recreational and social activities is set forth in Larson[11] as follows:

"Recreational or social activities are within the course of employment when:

(1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or

(2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or

(3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employees health and morale that is common to all kinds of recreation and social life."[12]

The Board has emphasized that these are distinct criteria noting that Larson characterized these as "three independent links … by which recreation can be tied to the employment and if one is found the absence of the others is not fatal."[13]

The Board finds that the evidence establishes that the social gatherings at Mr. Dick's home, the hotel room and hotel bar were none other than informal social functions, which the managers were not required to attend. Appellant's reaction to harassment by Mr. Dick at his barbecue and in the hotel room and bar, did not occur on the employing establishment's premises. Regarding the second criterion, Ms. Hamsher's statement that she did not socialize with her coworkers in a hotel room after the first quarterly meeting and at the cookout at Mr. Dick's house indicates that attendance at these gatherings was not required. Regarding the third criterion, Karen Wilson, signing on behalf of the injury compensation manager, Carolyn Sims-Lambert, stated that the sole purpose of appellant's travel was to attend meetings scheduled during the day. Ms. Wilson further stated that, if appellant attended social gatherings with coworkers, it was at her own discretion and that the barbecue held by Mr. Dick was not a business-related activity, rather, it was a social gathering and appellant could have exercised her own discretion in deciding whether to attend the event. She noted that the condominium was personally rented by Mr. Dick and Jim Cianciolo, an employing establishment manager, rather than paid for by the employing establishment. Ms. Wilson also noted the pictures submitted by appellant revealing the managers at the cookout wearing casual clothing and condom hats. She stated that the clothing would not have been considered appropriate attire for a business meeting. She further stated that appellant did not allege sexual harassment until after she became aware that she was under investigation by the employing establishment. The circumstances of this case do not show that the employer derived substantial direct benefit from the activities beyond the

[11] Larson, *The Law of Workers' Compensation* § 22.00 (1997).

[12] *Id.* at § 22.00.

[13] *See Stephen H. Greenleigh*, 23 ECAB 53 (1971).

intangible value of improvement in employees' health and morale that is common to all kinds of recreation and social life.

Regarding appellant's allegation that Mr. Dick threatened to fire her if she did not respect his position or accept his sexual advances, Ms. Wilson stated that appellant's fear of losing her job was self-inflicted.

Mr. Dick submitted a December 28, 1994 narrative statement, denying appellant's allegation that he harassed her. He stated that he had minimal contact with appellant and that appellant failed to submit evidence supporting her allegations.

Concerning appellant's allegation that she was overworked, the Board has held that overwork may be a compensable factor of employment.[14] In this case, appellant has failed to establish that she was overworked. Malcolm H. Wright, a postmaster, stated that he was in appellant's area and that when she visited his office, her stay was brief. Mr. Wright noted that her cell phone would ring or her schedule was so tight that she had no time to spend there. He stated that he suspected that appellant was being pressured from Mr. Dick and that on occasion appellant mentioned the pressure and stress she was undergoing. He further stated that, when he previously worked with appellant, her department performed astronomical work. He noted that appellant traveled throughout Arkansas and southwest Texas, staying away from home for weeks at a time and working 10 to 12 hours daily for long periods of time and performing route and safety inspections, operations analysis and other postal operations audits.

Mr. Mathis testified that appellant's normal workday schedule was from 6:00 a.m. until at least 6:00 p.m. and as late as midnight Monday through Friday and normally she would not have lunch. He also testified that on weekends he drove appellant to postmaster installation ceremonies where she gave 15- to 20-minute speeches.

Mr. Dick and Ms. Wilson denied that appellant was overworked. Mr. Dick stated that appellant's duties did not vary from those listed in her position description. He further stated that no staffing shortages, additional workloads or extra demands existed that would have adversely affected appellant's work environment at any time. In addition, he stated that appellant appeared generally able to perform her required duties. He concluded by noting that appellant has personally mentioned financial and marital problems to him on more than one occasion.

Ms. Wilson stated that appellant was an exempt upper level management official who had the opportunity to set her own schedule and choose who she met with and what meetings she wished to attend. She submitted a description of appellant's position revealing that her scheduled work hours were from 7:30 a.m. until 4:30 p.m. with Saturday and Sunday off.

Mr. Wright's statements are insufficient to establish appellant's burden because the employing establishment set forth appellant's work schedule, which did not appear to exceed a

[14] *Robert W. Wisenberger*, 47 ECAB 406, 408 (1996); *William P. George, supra* note 7; *Georgie A. Kennedy*, 35 ECAB 1151 (1984).

normal workweek schedule of 80 hours. Further, the employing establishment indicated that appellant maintained the discretion over what she wanted to do during this work schedule.

Inasmuch as the record does not substantiate appellant's allegation that she was harassed and discriminated against by Mr. Dick or sexually harassed by her male coworkers, the Board finds that appellant has failed to establish that harassment and discrimination actually occurred. Thus, appellant has failed to establish a compensable factor of employment under the Act.

Appellant's allegations regarding her demotion,[15] reassignment to a new territory,[16] the denial of her request to have a clerk reassigned to her, the investigation of the mailing of advertising material[17] and the filing of harassment and discrimination complaints[18] constitute administrative or personnel matters. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the handling of administrative matters, coverage may be afforded.[19]

A January 25, 1996 decision of the Merit Systems Protection Board (MSPB), dismissed appellant's appeal of the employing establishment's decision to demote her because appellant and the employing establishment had settled the appeal. The decision found that the settlement agreement was lawful and freely reached and understood by the parties. The decision did not make any finding of error or abuse on the part of the employing establishment in demoting appellant.

The January 24, 1996 settlement agreement rescinded and expunged from appellant's personnel record the letter of decision reducing her grade and pay. Specifically, the agreement provided:

> "This settlement agreement does not constitute an admission of discrimination or wrongdoing by [the employing establishment] or any of its agents. This agreement is entered into for the sole purpose of settlement."

Regarding appellant's reassignment, an Equal Employment Opportunity counselor/investigator, Betty J. Davis, stated that Mr. Dick explained that the changes in the territories affected all six of the managers of post office operations. He further stated that the changes were discussed and explained at length with all of the managers. He also stated that the changes had proven to be extremely beneficial. Mr. Dick indicated that the changes were not made to undermine appellant's performance.

The record contains an investigative memorandum dated December 8, 1994, accompanied by witness statements and evidence. The evidence establishes that a complaint was

[15] *Martha L. Watson*, 46 ECAB 407 (1995).

[16] *James W. Griffin*, 45 ECAB 774 (1994).

[17] *Sammy N. Cash*, 46 ECAB 419, 423-24 (1995).

[18] *Janet I. Jones*, 47 ECAB 345, 347 (1996).

[19] *James W. Griffin*, *supra* note 16.

filed alleging that appellant had distributed sales material through the mail network without postage and an investigation was conducted. Appellant has not submitted any probative evidence of error or abuse by the employing establishment in the handling of the above administrative matters. In the absence of such evidence, the Board finds that appellant has not substantiated a compensable work factor as contributing to an emotional condition.

Further, the MSPB decision and settlement agreement, Mr. Dick's statements and the employing establishment's investigative memorandum do not establish that the employing establishment erred or acted abusively in handling the above administrative matters. The Board finds that since there is no evidence of error or abuse appellant has failed to establish a compensable employment factor under the Act.

For the foregoing reasons, as appellant has not alleged any compensable factors of employment, appellant has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.[20]

The December 23 and March 30, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
March 11, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[20] Unless appellant alleges a compensable factor of employment substantiated by the record, it is unnecessary to address the medical evidence; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).