

**United States Department of Labor
Employees' Compensation Appeals Board**

LORI A. FACEY, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Everett, WA, Employer**

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**Docket No. 03-2015
Issued: January 6, 2004**

Appearances:
Lori A. Facey, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On August 13, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated July 16 and 31, 2003, denying an emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

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

FACTUAL HISTORY

On May 28, 2003 appellant, then a 35-year-old secretary, filed a claim alleging that she sustained an emotional condition, including depression, due to incidents and conditions at work. On the claim form she indicated that she had filed a lawsuit, which involved the taking of a deposition while she was "on the clock," and asserted that the employing establishment had not been supportive regarding leave she needed to use in connection with an "on-the-job injury."

Appellant claimed that she was the subject of retaliatory action at the employment establishment and asserted that confidential documents had been “let out.” She indicated that she first became aware of the claimed condition and its relation to work factors on April 30, 2003.

By letter dated June 12, 2003, the Office requested that appellant submit additional evidence in support of her claim. She responded by submitting a letter dated June 30, 2003, in which she discussed in greater detail the incidents and conditions at work which she felt caused her emotional condition. Appellant indicated that she had reported sexual harassment committed by Charles Feathers, a supervisor, and asserted that she had been harassed at the employing establishment since that time. She alleged that in October 2002 she settled an Equal Employment Opportunity (EEO) complaint with the employing establishment, which led to reinstatement of 480 hours of leave and a payment to her of \$25,000.00. Appellant indicated that in September 2002, someone placed a \$56,800.65 check in her personal mailbox, at work which had been issued to Mr. Feathers. She claimed that Mr. Feathers’ attorney improperly questioned her for eight hours regarding this matter and that, after discovering the check she was unable to work for three months.

Appellant further alleged that another supervisor, Terri Dickinson, “did nothing but harass and intimidate” her upon appellant’s return to work in January 2003. She asserted that Ms. Dickinson told another employee, Steve Formhals, “That damn woman never comes to work.”¹ Appellant claimed that she was made a “PEG coordinator” and had to perform “PEG duties” in addition to her regular duties as a secretary. She alleged that this was unfair because other PEG coordinators were not required to perform their regular duties in addition to their PEG duties and claimed that her many duties prevented her from succeeding in her work. Appellant alleged that she was harassed for taking leave related to personal matters and was unfairly prevented from taking leave under the Family and Medical Leave Act (FMLA). She claimed that she was unfairly reprimanded during a meeting for requesting leave to visit her terminally ill father.² Appellant asserted that she was unfairly singled out for discipline as there were other employees who committed infractions, yet were not punished. She claimed that she was the only Executive Administrative Schedule (EAS) employee in her building who did not receive an award check in April 2003. Appellant regretted filing a sexual harassment claim against Mr. Feathers as he was guaranteed the right to privacy, but she was not. She claimed that in March or April 2003, Ms. Dickinson unfairly criticized her after someone left confidential files on her chair.

The record contains documents concerning a lawsuit that Mr. Feathers had filed against the employing establishment to contest his termination for cause in late 2001.³ In connection with this suit, Mr. Feathers’ attorney, Mr. Guarnero, obtained appellant’s medical records from her hospital in January 2002 and used them in a deposition which he took from her in May 2002.

¹ Appellant claimed that Mr. Formhals told her that Ms. Dickinson was out to get her and asserted that Mr. Formhals tried to “protect” her, but that Ms. Dickinson was “constantly on him to do something about” her. She indicated that Mr. Formhals refused Ms. Dickinson’s request to place her on restricted leave.

² Other evidence of record indicates that this meeting occurred on April 30, 2003.

³ The suit was adjudicated in a district court in Washington State. Appellant was not a party to this suit, but rather served as a witness.

In connection with Mr. Feathers' suit, the court issued an order in August 2002, which granted appellant's motion for a protective order. The order effectively quashed a subpoena that Mr. Guarnero had issued to appellant's attending physician. The court noted that the evidence confirmed appellant's contention that the information sought by Mr. Guarnero would be "used primarily to harass and intimidate" her and that questions regarding appellant's medical history would not be "relevant nor calculated to lead to relevant evidence." In early 2003, appellant filed a lawsuit in a superior court in Washington State, against Mr. Feathers and Mr. Guarnero, seeking damages for a violation of Washington State privacy laws which occurred when her medical records were released without allowing her an opportunity to challenge the release of the documents.⁴

The record also contains an October 11, 2002 agreement between appellant and the employing establishment concerning the settlement of two EEO grievances. The agreement provided that, appellant would be reccredited with 480 hours of leave and receive \$25,000.00 for "compensatory damages." The agreement indicated that it "should not be construed as an admission of discrimination or wrongdoing on the part" of the employing establishment.

By decision dated July 16, 2003, the Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors.

On July 22, 2003 appellant requested reconsideration of her claim and submitted additional documents, including records relating to the employing establishment's termination of Mr. Feathers' employment in late 2001.⁵ In a December 21, 2001 decision effectuating the termination, the employing establishment indicated that Mr. Feathers was terminated for various infractions, including using work resources to promote a personal business and committing sexual harassment against appellant.⁶ Appellant also resubmitted copies of documents concerning her suit in superior court which alleged that Mr. Feather and his attorney violated her privacy rights.

By decision dated July 31, 2003, the Office denied modification of its July 16, 2003 decision. The Office indicated that the materials appellant submitted in connection with her reconsideration request did not relate to the claimed employment factors she described in her June 30, 2002 letter.

⁴ The suit also named Mr. Guarnero's wife, Mr. Guarnero's law firm, Mr. Feathers' wife and the hospital which released the records.

⁵ It does not appear that Mr. Feathers supervised appellant after October 2000.

⁶ The employing establishment indicated that her charges of sexual harassment, including sending her sexually-oriented emails, were more credible than Mr. Feathers' denials. In the proposed notice of termination dated October 12, 2001, the employing establishment noted various other alleged instances that Mr. Feathers sexually harassed appellant, including kissing her, reaching into her shirt or skirt and making lewd comments to her. The incidents were alleged to have occurred between September 1997 and July 2000. It is unclear from the December 21, 2001 decision which of the alleged infractions in the proposed notice of termination were accepted as occurring.

LEGAL PRECEDENT

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 his 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.⁷ On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.⁸

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.⁹ 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.¹⁰

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.¹¹ 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.¹²

ANALYSIS

In the present case, appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. By decision dated July 16, 2003, the Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. By decision dated July 31, 2003, the Office affirmed its

⁷ 5 U.S.C. §§ 8101-8193.

⁸ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁹ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

¹⁰ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

¹¹ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹² *Id.*

July 16, 2003 decision. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

In her claim filed in May 2003, appellant alleged that harassment and discrimination on the part of her supervisors contributed to her claimed stress-related condition. She alleged that the employing establishment retaliated against her after she filed a sexual harassment claim against a former supervisor, Mr. Feathers, and that someone placed a \$56,800.65 check in her personal mailbox at work which had been issued to Mr. Feathers, an action that resulted in her being questioned by Mr. Feathers' attorney. She alleged that she was harassed after January 2003 by a supervisor, Ms. Dickinson, who made disparaging comments about her to another employee and unfairly criticized her after someone left confidential files on her chair. Appellant asserted that she was made a "PEG coordinator" and had to perform "PEG duties" in addition to her regular duties as a secretary, but that other PEG coordinators were not required to perform their regular duties in addition to their PEG duties. She claimed that she was unfairly prevented from taking leave under the FMLA and otherwise harassed for taking leave; that she was unfairly singled out for disciplinary action; and that she was the only EAS employee in her building who did not receive an award check in April 2003.

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.¹³ 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.¹⁴ In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and she has not submitted sufficient evidence to establish that she was harassed or discriminated against by her supervisors.¹⁵ Appellant alleged that supervisors made statements and engaged in actions which she believed constituted harassment and discrimination, but she provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.¹⁶ The record contains an October 11, 2002 agreement between appellant and the employing establishment concerning the settlement of two EEO grievances. Although the agreement reccredited appellant with 480 hours of leave and awarded her \$25,000.00 for so-called "compensatory damages," it explicitly indicated that the agreement was not intended to be construed as an admission of discrimination or wrongdoing on the part of the employing establishment. Moreover, the agreement is of limited probative value as it does not provide any description of the specific subject matter of the grievances that it served to settle.¹⁷

¹³ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹⁴ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁵ *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).

¹⁶ *See William P. George*, 43 ECAB 1159, 1167 (1992).

¹⁷ The record does not contain any other evidence regarding appellant's EEO grievances.

Thus, appellant has not established a compensable employment factor under the Act with respect to these above-described allegations of harassment and discrimination.

Appellant also alleged that the employing establishment harassed her by causing her private medical records to be released in connection with a lawsuit Mr. Feathers filed in district court in Washington State, to challenge his termination by the employing establishment. The record reveals that, in connection with the lawsuit, Mr. Feathers' attorney, Mr. Guarnero, effectuated the release of appellant's medical records in January 2002 and used the records in a deposition he took from her in May 2002. While it appears that appellant was successful in preventing Mr. Guarnero from questioning her attending physician about her medical condition,¹⁸ she has not adequately explained how this matter was sufficiently related to her employment to constitute an employment factor. The record reveals that Mr. Feathers last supervised appellant in October 2000 and was terminated from the employing establishment in December 2001. The release of appellant's medical records was not effectuated by Mr. Feathers in connection with his employment with the employing establishment, but rather occurred in connection with a private lawsuit he brought regarding his termination from the employing establishment. Therefore, the facts of the present case do not show that this matter was related to appellant's work duties or other conditions of employment and it does not constitute an employment factor.¹⁹

The record contains a December 21, 2001 decision which effectuated Mr. Feathers' termination from the employing establishment. In this decision, the employing establishment indicated that Mr. Feathers was terminated for various infractions, including committing sexual harassment against appellant; the decision noted that it had been established that Mr. Feathers sent sexually-oriented emails to appellant. In the proposed notice of termination dated October 12, 2001, the employing establishment noted various other alleged instances that Mr. Feathers sexually harassed appellant; the incidents were alleged to have occurred between September 1997 and July 2000. While these documents provide support for the proposition that Mr. Feathers sexually harassed appellant in some manner, she did not allege in her current emotional condition claim, which was not filed until May 2003, that she sustained a stress-related condition due to the direct effects of sexual harassment by Mr. Feathers. Rather appellant emphasized other alleged factors, such as the claimed harassment and discrimination by Ms. Dickinson, the work assignments and leave decisions which were perceived as constituting harassment and discrimination and the release of her medical records. Therefore, appellant has not established an employment factor in this regard.

Appellant also generally alleged that the employing establishment engaged in improper disciplinary actions, wrongly denied leave, improperly assigned work duties and unreasonably monitored her activities at work. The Board finds that these allegations relate to administrative

¹⁸ In connection with Mr. Feathers' suit, the court issued an order in August 2002, which quashed a subpoena that Mr. Guarnero had issued to appellant's attending physician; the court noted that information sought would be unnecessary and would be "used primarily to harass and intimidate" appellant.

¹⁹ Appellant also claimed that the employing establishment did not provide adequate support and time off work in connection with the lawsuit she subsequently filed against Mr. Feathers, but she did not provide any further explanation of the basis for this allegation.

or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.²⁰ Although the handling of disciplinary actions and leave requests, the assignment of work duties and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer and not duties of the employee.²¹ 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.²² Appellant has not submitted sufficient evidence to show that the employing establishment committed error or abuse with respect to these matters.²³ 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 his burden of proof in establishing that he sustained an emotional condition in the performance of duty.²⁴

CONCLUSION

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.

²⁰ 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).

²¹ *Id.*

²² See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

²³ As noted above, the October 11, 2002 EEO settlement agreement does not indicate that the employing establishment committed wrongdoing; nor does it provide a description of the basis of the EEO grievances it served to settle.

²⁴ 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).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 31 and 16, 2003 are affirmed.

Issued: January 6, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member