

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

LINDA C. KENNEDY, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Charleston, WV, Employer**

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**Docket No. 04-874
Issued: July 27, 2004**

Appearances:
Kathryn Reed Bayless, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On February 17, 2004 appellant filed a timely appeal of a merit decision of the Office of Workers' Compensation Programs dated November 14, 2003, which affirmed an August 19, 2002 hearing representative's decision denying her claim for an emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that she sustained an emotional condition, causally related to compensable factors of her federal employment.

FACTUAL HISTORY

On March 29, 2001 appellant, then a 51-year-old clerk, filed an occupational disease claim alleging that she sustained an emotional condition causally related to harassment, intimidation, embarrassment and humiliation by management beginning in 2000, which caused a very stressful work atmosphere. She claimed that these actions caused stress and aggravation of

a preexisting condition, a 1995 internal carotid artery aneurysm for which she underwent surgery.

Appellant implicated the following employment incidents as the cause of her stress, embarrassment and humiliation:

1. Sexual harassment by her supervisor, Brian Cornes, when he would sit on the ledge in front of her and stare, prop his leg up on the ledge and stand very close or walk up behind her.
2. On December 21, 2000 appellant told Mr. Cornes that his behavior was embarrassing and humiliating and made her uncomfortable. He agreed to stop and did and he reported the conversation to the postmaster.
3. The postmaster's failure to investigate, inappropriate handling of the complaint and retaliation against appellant.
4. The postmaster's discussion regarding the complaint and appellant's personal life with the supervisor.
5. Management's failure to respond to appellant's inquiries, with indirect threats and intimidation.
6. Appellant was allegedly laughed at, she became the subject of crude jokes and was avoided by her coworkers.

Appellant claimed that she was upset, cried often and easily, suffered from headaches, stomach disorders and nervous problems as a result of the stress. She stopped working on March 21, 2001 and sought psychiatric treatment with Dr. Sheila Wendler, a Board-certified psychiatrist,¹ diagnosed an adjustment disorder with mixed anxiety and depression; rule out post-traumatic stress disorder; major depressive disorder, single episode, moderate with anxiety and without psychotic features.

An April 11, 2001 statement from the union president, Earl Reed, indicated that William Akers, the postmaster had discussed appellant's allegations with him and also discussed her personal relationship with a coworker, Darrell Guill.

Appellant submitted a copy of an Equal Employment Opportunity (EEO) complaint she filed on April 12, 2001 alleging emotional distress caused by the postmaster's discussion of her personal life with other management officials. However no resolution of the complaint was included.

¹ On March 26, 2001 appellant's treating physician, Dr. Mayank Amin, a Board-certified internist, indicated that he was treating her for anxiety and depression with her workplace being one of her major stressors and he projected that she would be off work for six weeks.

By letter dated June 1, 2001, the employing establishment controverted appellant's claim and provided statements from Mr. Cornes and Mr. Akers. Mr. Cornes noted that, in late December 2000, appellant told him that his standing and looking at her made her feel uncomfortable. He explained that he was waiting for her and other employees to complete their activities so that he could assign other tasks. Mr. Cornes stated that he was not aware that his presence made her uncomfortable and agreed to limit the time he spent watching her work. He also advised the union president of the conversation because he was concerned about its validity. Mr. Cornes noted that he additionally informed Mr. Akers of the conversation, who stated that he discussed it with the union president. Mr. Akers noted, however, that neither Mr. Cornes nor appellant mentioned that it was a sexual harassment complaint.

By decision dated February 13, 2002, the Office rejected appellant's claim finding that the evidence failed to establish that she developed an emotional condition, causally related to her employment. The Office found that the stressors identified by appellant were not compensable factors of employment.

By letter dated March 9, 2002, appellant disagreed with the rejection of her claim and requested a review of the written record by an Office hearing representative. She disagreed with Mr. Cornes' statements and characterization of his conduct, appellant made several unflattering comments about him personally and she submitted pictures of the workstation involved.

In a March 17, 2002 statement, Mr. Guill, appellant's personal friend and coworker, claimed that he witnessed the incidents alleged by appellant. He claimed that Mr. Cornes was the most troublesome employee at that facility and claimed that, two years earlier, on or about August 8, 2000 Mr. Cornes threatened appellant with abolishing her job, as he was supposedly instructed to do by Mr. Akers and that his inappropriate behavior began after that incident.

In a May 17, 2002 statement, Mr. Akers responded to appellant's March 9, 2002 letter, indicating that her 1995 intracranial aneurysm was not work related, that after discussing appellant's allegations with Mr. Cornes and the union president, he did not believe any sexual harassment occurred as alleged, that her allegations of his failure to investigate a sexual harassment charge was misleading as she did not originally state that she was claiming sexual harassment and that, when she finally claimed sexual harassment in late January, he did investigate and found none and he opined that she and Mr. Guill, her personal friend, were just trying to bring unwarranted sexual harassment charges against Mr. Cornes to get him removed.

By decision dated August 19, 2002, the hearing representative affirmed the February 13, 2002 decision, finding that the evidence presented did not establish sexual harassment, that it did not demonstrate that the postmaster's handling of the complaint was inappropriate and that there was no evidence of retaliation by the postmaster or evidence of threats. The hearing representative found that there was no evidence submitted to demonstrate that appellant was the subject of crude jokes or laughter that her coworkers avoided her. The hearing representative found that statements submitted from coworkers following the original decision of denial failed to support appellant's claim as they did not provide any direct corroboration of the specific incidents implicated by appellant.

The hearing representative found that Mr. Guill indicated that he had witnessed the actions of Mr. Cornes watching appellant as she worked. However, Mr. Cornes had already admitted these actions and explained why he was doing it and he stopped this close monitoring when informed that it was upsetting appellant. As there had been no finding of sexual harassment, nor any determination that Mr. Cornes' actions were erroneous, Mr. Guill's statements did not support appellant's sexual harassment claim. Moreover, he provided his March 2002 statement more than two years after the emotional claim was filed.

The hearing representative found that no evidence of sexual harassment had been presented, that no determination of administrative error or abuse by the supervisor of the postmaster had been made and that, since no compensable factor of employment had been established, there was no need to consider the medical evidence submitted.

By letter dated August 14, 2003, appellant, through her attorney, disagreed with the August 19, 2002 hearing representative decision and requested reconsideration. Her attorney argued that the previously submitted substantive medical evidence was not addressed, that her EEO complaint was dropped for lack of money and increased stress, that Mr. Cornes had no business displaying himself in front of appellant as she alleges, that Mr. Akers did not ask her to physically demonstrate how she was harassed and where Mr. Cornes sat, that Mr. Cornes did not deny that he watched her, that appellant had no reason to lie, but that Mr. Cornes did and that he was never asked specific questions about the incidents.

In support appellant submitted a personal statement, an affidavit and progress reports from Dr. Wendler, notes from a master's level psychologist for the period May 14, 2001 to April 22, 2003, an April 28, 2003 report from Dr. Amin, her application for disability retirement and a letter from the Office of Personnel Management approving her disability retirement.

By decision dated November 14, 2003, the Office denied modification of the prior August 19, 2002 decision, finding that the evidence submitted did not prove that harassment or retaliation occurred as alleged or that improper actions were taken. The Office found that appellant failed to implicate compensable factors of employment in the development of her claimed emotional condition.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that the injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.²

To establish appellant's occupational disease claim that she sustained an emotional condition in the performance of duty, she must submit the following: (1) factual evidence

² *Elaine Pendleton*, 40 ECAB 1143 (1989).

identifying and supporting employment factors or incidents alleged to have caused or contributed to her condition; (2) rationalized 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.³ Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.⁴

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 concept of workers' compensation. These injuries occur in the course of employment and have some kind of causal connection with it but are not covered because they do not arise out of the employment. Distinctions exist as to the type of situations giving rise to an emotional condition which will be covered under the Act. Generally speaking, when an employee experiences an emotional reaction to his or her regular or special assigned employment duties or to a requirement imposed by his or her employment or has fear or anxiety regarding his or her ability to carry out assigned duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is regarded as due to an injury arising out of and in the course of the employment and comes within the coverage of the Act.⁵ Conversely, if the employee's emotional reaction stems from employment matters which are not related to his or her regular or assigned work duties, the disability is not regarded as having arisen out of and in the course of employment and does not come within the coverage of the Act.⁶ Noncompensable factors of employment include administrative and personnel actions, which are matters not considered to be "in the performance of duty."⁷

When working conditions are alleged as factors in causing 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.⁸ When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record

³ See *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁴ *Id.*

⁵ *Donna Faye Cardwell*, *supra* note 3, see also *Lillian Cutler*, 28 ECAB 125 (1976).

⁶ *Id.*

⁷ See *Joseph DeDonato*, 39 ECAB 1260 (1988); *Ralph O. Webster*, 38 ECAB 521 (1987).

⁸ See *Barbara Bush*, 38 ECAB 710 (1987).

substantiates that factor. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁹ When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence of record.¹⁰ If the evidence fails to establish that any compensable factor of employment is implicated in the development of the claimant's emotional condition, then the medical evidence of record need not be considered.¹¹

The Board has held that actions of an employee's supervisor, which the employee characterizes as harassment may constitute factors of employment giving rise to coverage under the Act.¹² However, in order for harassment to give rise to a compensable disability under the Act, there must be some evidence that such harassment did in fact occur. Mere perceptions of harassment alone are not compensable under the Act.¹³ Appellant has the burden of establishing a factual basis for her allegations, however, when the allegations in question are not supported by specific, reliable, probative and substantial evidence and have been refuted by statements from appellant's employer, they cannot be considered to be compensable factors of employment since appellant has not established a factual basis for them.

In *Thomas D. McEuen*¹⁴ the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act, as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment's superiors in dealing with the claimant.¹⁵ Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated.

ANALYSIS

In this case, appellant has failed to implicate any compensable factors of her employment in the development of her alleged emotional conditions. Although she alleged that sexual harassment occurred, in part, because the postmaster discussed her relationship with Mr. Guill with the union president, for personnel purposes, on the workroom floor where they could have been overheard, which was corroborated by the union president, there is no evidence that they

⁹ *Ruthie M. Evans*, 41 ECAB 416 (1990).

¹⁰ *See Gregory J. Meisenberg*, 44 ECAB 527 (1993).

¹¹ *See Donna Faye Cardwell*, *supra* note 3; *see also Lillian Cutler*, *supra* note 5.

¹² *Sylvester Blaze*, 42 ECAB 654 (1991).

¹³ *Ruthie M. Evans*, *supra* note 9.

¹⁴ *Thomas D. McEuen* 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

¹⁵ *See Richard J. Dube*, 42 ECAB 916 (1991).

were overheard and hence, there was no evidence that this indiscreet discussion of appellant's personal life was further communicated to anyone else, constituting sexual harassment.

Appellant did not allege that she developed an emotional condition arising out of her regular or specially assigned duties or out of specific requirements imposed by her employment. She alleged, for the most part, that her condition was caused by supervisory harassment and sexual harassment. The implicated employment factors that appellant alleges caused or contributed to her condition which fall into the category of administrative or personnel actions.

The incidents and allegations made by appellant which fall into the category of administrative or personnel actions include: her being monitored closely¹⁶ and the conduct of the investigation of her claim.¹⁷ However, no evidence of administrative error or abuse in conducting these actions was provided.

Appellant alleged that Mr. Cornes sat on a ledge in front of her and allegedly stared at her. She claimed that he sat and stood very close, which made her uncomfortable and that he followed her closely. However, Mr. Cornes denied that his actions were harassment and he explained fully what he was doing with monitoring appellant's work to facilitate good time usage and to provide her with further follow-on assignments. He stated that he was unaware that his monitoring was upsetting appellant. Moreover, when she mentioned to him that his monitoring made her uncomfortable, he ceased his actions. As Mr. Cornes provided a reasonable explanation for his monitoring actions, they were not harassment and as he ceased when he was advised that they made appellant uncomfortable, it appears that no substantive harassment occurred. Mr. Cornes was carrying out his administrative assignment to monitor and direct the performance of employees whom he supervised and no error or abuse was demonstrated. Therefore, appellant has not established that his monitoring of her work rose to the level of sexual harassment or administrative error or abuse.

Appellant also alleged that Mr. Cornes reporting their conversation to the postmaster, Mr. Akers, was harassment, was embarrassing and humiliating. However, the record demonstrates that Mr. Cornes properly reported such a conversation to the postmaster, as was administratively required by his position, should a subsequent claim of improper behavior be made. Mr. Akers also reported the conversation to the union president as he was concerned about its validity. This was appropriate under the circumstances and cannot be considered to be harassment of any sort, but rather proper administrative handling of the situation.

Appellant claimed that the postmaster failed to properly investigate this sexual harassment claim, however, when answering her charges, Mr. Akers noted that initially neither appellant, nor Mr. Cornes advised him that a sexual harassment claim was being made arising out of the monitoring incident. Mr. Akers stated that he did not even find out about appellant's alleged claim of sexual harassment until late January, after which he did conduct an investigation speaking with Mr. Cornes, Mr. Reed and other employees regarding the alleged incidents.

¹⁶ *Id.*

¹⁷ See *Ernest St. Pierre*, 51 ECAB 623 (2000).

Therefore, the record establishes that there was no inappropriate handling of appellant's complaint, that her charges were investigated and that no evidence of any retaliation was submitted to the record. Accordingly, no harassment or administrative error or abuse was established.

Appellant alleged that Mr. Akers discussed her personal life with Mr. Cornes as part of dealing with a personnel matter. This would seem to be a natural follow-up for fact-finding when a claim of sexual harassment was made against him supported by a written statement. Therefore, this discussion was not improper, as appellant opened the door to such a line of inquiry with her witness statements from Mr. Guill supporting her sexual harassment claim. Accordingly, this was not harassment, humiliation or retaliation and no administrative error or abuse was shown.

Appellant alleged that management failed to respond to her inquiries, but rather made indirect threats and intimidation, however, this is not supported by the evidence of record. No such evidence of any indirect threats or incidents of intimidation was brought forth related to the monitoring incidents or the investigation and administrative handling of her harassment claim. As there was nothing submitted to the record which supported these allegations, they have not been established as occurring as alleged.

Appellant finally alleged that she was laughed at, that she became the subject of crude jokes and was avoided by her coworkers. There was no evidence to support that any of these allegations. As none of these allegations were corroborated by independent substantive evidence, they have not been established as occurring as alleged and do not constitute compensable factors of employment.

As none of appellant's allegations of harassment, sexual harassment or intimidation, humiliation or retaliation were substantiated as having occurred as alleged or as being administratively improper, erroneous or abusive, she has not established compensable factors of employment as causing her emotional condition. Therefore, the medical evidence need not be addressed.

CONCLUSION

In this case, as appellant has failed to implicate any compensable factors of her employment in the development of her alleged emotional conditions, she has not met her burden of proof to establish her emotional condition claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 14, 2003 is hereby affirmed.

Issued: July 27, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member