

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

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<b>CHRISTINE C. BODENHEIMER, Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 04-1230</b>
	)	<b>Issued: September 10, 2004</b>
<b>DEPARTMENT OF HOUSING &amp; URBAN</b>	)	
<b>DEVELOPMENT, New Orleans, LA, Employer</b>	)	
	)	

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*Appearances:*  
*Christine C. Bodenheimer, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

WILLIE T.C. THOMAS, Alternate Member  
MICHAEL E. GROOM, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On April 7, 2004 appellant filed a timely appeal of the March 10, 2004 merit decision of the Office of Workers' Compensation Programs, which denied her claim for an employment-related emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d) the Board has jurisdiction over the merits of appellant's claim.

**ISSUE**

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

**FACTUAL HISTORY**

On February 10, 2003 appellant, then a 46-year-old program assistant, filed an occupational disease claim for an employment-related emotional condition. She claimed that she developed major depression, panic disorder and anxiety disorder due to factors of her federal employment. Appellant identified January 16, 2003 as the date she first realized her condition was employment related. She stopped work on January 21, 2003.

Appellant was first diagnosed with major depressive illness in 1988. In 1990, when she was required to undergo surgery, the employing establishment reportedly denied her request for advanced sick leave. Appellant stated that she took leave without pay (LWOP) for two months, which caused severe financial and emotional hardship. She was unable to pay her bills and eventually lost her home. Appellant was diagnosed with major depression and treated with anti-depressant medication. She returned to work despite her depression. Over the course of the next five years appellant applied for several positions, but the employing establishment denied her a promotion. She also alleged that she was sexually harassed by supervisors on a daily basis. She stated that reports of sexual harassment were not taken seriously and if an employee reported the harassment, reprisals would follow. She stated that she also abused alcohol as a method of blocking out thoughts of the workplace.

In 1993, appellant was hospitalized for mental illness and alcohol abuse and placed on LWOP status for a year. When she returned to work in 1994, she was healthy and a motivated employee. Appellant continued to apply for new positions as they became available, but was never promoted. She stated that she collapsed at work in 1996 after being advised that she was not selected for a position. Appellant was transported to a hospital by ambulance and was treated for major depression. She returned to work two weeks after her collapse. Appellant stated that between 1997 and 2002 she periodically sought help for her condition from the Employee Assistance Program (EAP). In 2002, appellant's supervisor denied her administrative leave to attend EAP counseling sessions. Appellant stated that she continued to attend the EAP sessions on her own time. From 1997 onward, she also received psychiatric treatment. On January 15 and 16, 2003 appellant reportedly attended a hearing regarding four Equal Employment Opportunity (EEO) complaints she filed. She explained that participating in the hearing and listening to the witnesses made her realize the extent of the emotional damage she sustained since 1996. Appellant stated that she had not returned to work since the January 16, 2003 EEO hearing.

In a January 21, 2003 report, Dr. Arthur J.L. Strauss, a Board-certified psychiatrist, stated that he began treating appellant in July 2001. He reported depressive symptoms since early childhood and a history of depression with acute episodes of severe depression dating back to 1988.<sup>1</sup> Dr. Strauss diagnosed major depression with generalized anxiety and intermittent anxiety. He also diagnosed a dysthymic disorder, which he indicated was longstanding from childhood. Under the heading "psychosocial stressors," Dr. Strauss noted "probable biologic propensity toward depression" and "[c]ontinuing distress caused by [appellant's] job and effort to maintain her job and job performance." He stated that she was not likely to be able to perform her work or other gainful employment.

On April 10, 2003 the Office requested additional factual and medical evidence regarding appellant's claimed emotional condition. She responded on April 23, 2003, submitting various EEO complaints, a list of job applications, several statements from coworkers, a request for reasonable accommodations and additional medical evidence.

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<sup>1</sup> Appellant was diagnosed with Hepatitis C in 2000 and her internist referred her to Dr. Strauss for consultation regarding appropriate anti-depressant medication.

In a supplemental statement, appellant alleged that she was the only employee in the regional office with 25-year's experience who had been denied a promotion beyond the GS-7 level. She had applied for at least 38 positions and was always denied a promotion despite acceptable performance ratings. Appellant described her history of depression and alcohol abuse, which she attributed to countless acts of discrimination, rejection and reprisal at the employing establishment. She also stated that Jose Pagan, a former supervisor, would not keep his hands off of her. He reportedly stroked appellant's hair, rubbed her back and approached her from behind and placed his hands around her waist. Appellant also stated that Mr. Pagan made inappropriate comments about her appearance while he touched her. This behavior reportedly occurred in full view of the entire office and continued for several years. Appellant indicated that she did not report Mr. Pagan's behavior due to fear of reprisal, but eventually she reported the harassment to Robert E. Faulkenstein, who reportedly advised Mr. Pagan that such harassment had to stop.

Appellant reiterated her allegation that the employing establishment improperly denied her advanced sick leave in 1990 and that this caused her financial and emotional distress. She also stated that she filed an EEO complaint regarding the matter. Appellant alleged that the employing establishment's decision to cancel her telework assignment in June 2002 contributed to her emotional condition. The assignment was allegedly cancelled because two other employees had recently been promoted and reassigned to other divisions. Appellant explained that she had been working at home three days a week and found it increasingly difficult to report to the office five days a week while receiving medical treatment for Hepatitis C. Appellant's application to continue the telework assignment as an accommodation for her medical condition was denied. She stated that she filed EEO complaints regarding the withdrawal of the telework assignment and the denial of the medical accommodation.

Appellant identified incidents on July 12 and August 14, 2002 when David Schulz, her supervisor, granted a limited amount of administrative leave for her to prepare for an upcoming EEO hearing and rescinded prior approval of administrative leave to attend EAP counseling sessions. In the first instance, appellant requested 40 hours of administrative leave to prepare for the hearing and Mr. Schulz approved only 12 hours of the requested time. On August 14, 2002 Mr. Schulz reportedly denied the use of administrative leave to attend three EAP sessions, which he had previously approved. Appellant claimed that Mr. Schulz's handling of her leave requests exacerbated her emotional condition. She filed EEO complaints regarding both incidents.

In a January 29, 2003 statement, Ann C. Kizzier, appellant's second-line supervisor from 1997 until appellant retired in 2003, stated that she never discriminated against appellant while she was employed in her division. She noted that during appellant's final year in the division, she was sick and unable to work much. Ms. Kizzier explained that appellant had requested an accommodation due to her illness, but her application for telework was denied because there was insufficient work to do at home as a program assistant. She explained that appellant had previously worked at home on a special project, but this was on a short-term basis and most of the work had been completed. Ms. Kizzier advised that the employing establishment attempted to accommodate appellant by allowing liberal leave and by assigning most of her duties to other employees. She explained that during appellant's last year, she was unable to do her own work and another employee performed the timekeeping duties appellant would have normally

performed. Ms. Kizzier further stated that other employees took over appellant's computer data input and filing responsibilities.

In a decision dated October 7, 2003, the Office denied appellant's claim finding that she failed to establish any compensable employment factors as the cause of her claimed emotional condition. She requested a review of the written record. By decision dated March 10, 2004, an Office hearing representative affirmed the October 7, 2003 decision.

### **LEGAL PRECEDENT**

To establish that she sustained an emotional condition causally related to factors of her federal employment, appellant must submit: (1) factual evidence 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 condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that her emotional condition is causally related to the identified compensable employment factors.<sup>2</sup>

Workers' compensation law does not apply to each and every injury or illness that is somehow related to one's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless, does not come within the purview of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or hold a particular position.<sup>3</sup> Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a basis in fact for the claim by supporting her allegations with probative and reliable evidence.<sup>4</sup>

### **ANALYSIS**

Appellant alleged that Mr. Pagan, her former supervisor, sexually harassed her for many years. He allegedly touched her by stroking appellant's hair, rubbing her back, placing his hands around her waist and making inappropriate comments about her appearance. Appellant stated that this occurred in full view of the entire office. She also stated that she eventually reported Mr. Pagan's misconduct to Mr. Faulkenstein, his supervisor.

For harassment to give rise to a compensable disability there must be evidence that harassment did, in fact, occur.<sup>5</sup> An employee's mere perception of harassment is not

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<sup>2</sup> See *Kathleen D. Walker*, 42 ECAB 603 (1991). Unless a claimant establishes a compensable factor of employment, it is unnecessary to address the medical evidence of record. *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

<sup>3</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>4</sup> *Ruthie M. Evans*, 41 ECAB 416 (1990).

<sup>5</sup> *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

compensable.<sup>6</sup> The allegations of harassment must be substantiated by reliable and probative evidence.<sup>7</sup> In the instant case, appellant has not provided sufficient evidence to substantiate her allegations of sexual harassment. There are several statements in the record from various coworkers; however, none reported witnessing any acts of sexual harassment by Mr. Pagan, which appellant stated occurred in full view of the entire office. Mr. Faulkenstein reportedly counseled Mr. Pagan about his offensive behavior; however, the record does not include any evidence substantiating the alleged harassment or any corrective measures taken by the employing establishment to curtail Mr. Pagan's alleged misconduct. The record is devoid of any evidence substantiating appellant's allegation of sexual harassment.

The remaining incidents appellant identified as contributing to her emotional condition pertain to administrative or personnel matters. As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of the Federal Employees' Compensation Act.<sup>8</sup> However, to the extent the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.<sup>9</sup>

The earliest incident appellant identified dates back to 1990 when she was denied advanced sick leave for surgery. She also alleged that Mr. Schulz improperly denied her requests for administrative leave on July 12 and August 14, 2002. Although the handling of leave requests and attendance matters are generally related to the employment, they are administrative functions of the employer and not duties of the employee.<sup>10</sup> Appellant has not demonstrated that the employing establishment erred or acted abusively in handling her various leave requests. In 1991, an EEO officer found that appellant was not discriminated against with regard to the 1990 denial of advanced sick leave. With respect to the July 12 and August 14, 2002 actions regarding appellant's requests for administrative leave, she has similarly failed to identify any error on the part of the employing establishment. She filed EEO complaint's concerning these two incidents, but they have not yet been resolved. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or discrimination occurred.<sup>11</sup>

Appellant also alleged that the employing establishment discriminated against her by denying her application for promotion. She submitted a list of 30 positions she applied for between 1980 and 2001. The list also included the names of the persons selected for the various positions and the person's race, if known. The fact that appellant was not selected for a position and was denied promotions over a 20-year period does not establish that she was discriminated

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<sup>6</sup> *Id.*

<sup>7</sup> *Joel Parker Sr.*, 43 ECAB 220, 225 (1991).

<sup>8</sup> *Ruthie M. Evans*, *supra* note 4.

<sup>9</sup> *Id.*

<sup>10</sup> *Dinna M. Ramirez*, 48 ECAB 308, 313 (1997).

<sup>11</sup> *James E. Norris*, 52 ECAB 93, 101 (2000).

against. The record indicates that appellant filed EEO complaints with respect to at least four of the positions for which she was not selected. In a decision dated February 10, 2003, an administrative judge with the EEO Commission found that appellant was not discriminated against with respect to four positions in 1996 and 1999. She has not demonstrated error or abuse on the part of the employing establishment with respect to her nonselection for the various positions identified. While at least four coworkers provided statements indicating that the employing establishment discriminated against appellant by not promoting her, the individuals did not provide any specific examples of the alleged discriminatory practices.

An employee's frustration from not being permitted to work in a particular environment or hold a particular position is not compensable.<sup>12</sup> Thus, appellant's emotional response to not being promoted is not compensable. Additionally, her frustration from not being permitted to continue working from home is not compensable. Appellant has not submitted any evidence establishing that the employing establishment's June 2002 decision to terminate her telework assignment constituted error or abuse. The employing establishment explained that the reassignment was necessary due to the loss of two program assistants. Because of the decrease in staff, the services appellant had been performing at home were no longer a priority and her presence was required in the office. Furthermore, there is no evidence in the record demonstrating that the employing establishment erred in addressing appellant's request for a reasonable medical accommodation. While she may not have been accommodated precisely as requested, Ms. Kizzier explained that the employing establishment attempted to accommodate appellant by allowing her liberal leave to attend to her medical needs. She also stated that many of appellant's duties were assigned to coworkers, thereby reducing her workload. The EEO claims appellant filed with respect to these matters have not yet been resolved.

Appellant's participation in the EEO process and attendance at the January 15 and 16, 2003 hearing is not compensable. The processing of an EEO claim is not, of itself, compensable and appellant was not required to participate in the hearing as a function of her job duties.<sup>13</sup>

Appellant failed to establish a compensable factor of employment as the cause of her claimed emotional condition. Accordingly, the Office hearing representative properly denied appellant's claim.

### **CONCLUSION**

The Board finds that appellant failed to meet her burden of proof in establishing that she sustained an emotional condition in the performance of duty.

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<sup>12</sup> See *Lillian Cutler*, *supra* note 3.

<sup>13</sup> *Isabel R. Pumpido*, 51 ECAB 326, 329 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 10, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 10, 2004  
Washington, DC

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member