United States Department of Labor
Employees' Compensation Appeals Board

CYNTHIA L. KERR, Appellant	)	
and	)	**Docket No. 05-253**
	)	**Issued: June 20, 2005**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Colorado Springs, CO, Employer	)	

Appearances:
Ernest Joslin, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On November 5, 2004 appellant filed a timely appeal of an August 6, 2004 merit decision of the Office of Workers' Compensation Programs, which found that she had not established that she sustained a psychological injury in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant sustained a psychological condition in the performance of duty.

FACTUAL HISTORY

On January 9, 2004 appellant, then a 37-year-old supervisor, filed a claim for compensation for an occupational disease of work-related stress. She stated that she had been treated for psychiatric disorders since childhood, but that her condition was controlled with medication until work-related stress resulted in treatment for major depression, post-traumatic stress disorder, panic disorder, anxiety and bipolar disorder. Appellant stopped work on

March 26, 2003. She stated that after she returned to work following a February 20, 2003 letter of warning, she was subjected to job pressures, a hostile work environment and harassment. On March 25, 2003 the plant manager told her to take immediate family leave.

Appellant submitted reports and progress notes from Dr. Ann Seig, a Board-certified psychiatrist, dated July 19, 2002 to March 5, 2004. She recounted the following events at work: a stressful conversation with the plant manager on July 24, 2002, an August 7, 2002 letter of warning, the issuance of an expectations list only to appellant in September 2002, a threat relating to maintaining safe books, an email regarding poor work performance in February 2003, humiliation and shouting over appellant's wireless telephone ringing during a staff meeting on March 21, 2003, being placed on family leave and told not to return until medically cleared on March 25, 2003, a letter of warning on April 22, 2003, a September 12, 2003 letter from the manager of labor relations and lack of response to appellant's April 1, 2003 letter. In an April 26, 2004 report, Dr. Seig stated that she was depressed over her recent loss of loved ones and that part of her continuing lack of progress was not receiving closure regarding her April 1, 2003 letter alleging disparity of treatment. She diagnosed post-traumatic stress disorder, anxiety and panic attacks. In an April 28, 2004 report, Dr. Seig stated that despite being off work for a prolonged period, appellant's psychiatric condition had continued to deteriorate with increasing symptoms which were greatly due to work stress, including a hostile work environment where she could not make an honest mistake without disciplinary action.

In an April 30, 2004 statement, appellant described 66 specific incidents to which she attributed her psychiatric condition. She stated that on September 12, 2000 Dennis Wilson, manager of distribution operations used vulgar and foul language. On May 11, 2001 a subordinate employee used profane language. On September 13, 2001 Garry Gilmore, the plant manager, told her she did not belong in management. On January 17, 2002 Beau Meyer, who replaced Mr. Wilson as manager of distribution operations, teased appellant and said that the postal service did not tell her to have a baby. On January 31, 2002, Mr. Meyer said that her private life was affecting her work performance. On July 24, 2002 Mr. Gilmore told appellant that coworkers disliked her. On November 19, 2002 a union representative suggested that she go back to craft work. Appellant stated that on September 28, 2000 a threatening letter of expectations was sent to all supervisors, that on September 17, 2002 a letter of expectations was sent only to her, that the response to her April 15, 2001 email requesting more staffing on weekends was told that was a management not a staffing problem, that she again complained of lack of staffing on August 16, 2002 and that on January 18, 2002 appellant was chastised by Mr. Wilson about using too many employee hours on her shift, which she attributed to a lack of craft employee training. She continued that on November 13, 2001 she was admonished by Mr. Gilmore for sending a copy of an email on standard operating procedures to the district manager, even though Mr. Wilson suggested that she do so, that on December 17, 2002 and January 6, 2003 all supervisors received threatening emails regarding submission of safety books, that on February 26 and 28, 2003 emails on this issue were directed at her, that on March 21, 2003 Mr. Gilmore "went ballistic" when she received two calls on her wireless telephone at a staff meeting and that she did not receive a satisfactory response to her April 1, 2003 letter describing disparate treatment.

Appellant noted that on May 10, 2001 Mr. Wilson discussed her three unscheduled absences in the past year, that on May 21, 2001 all supervisors received an email about abuse of

leave, that on October 23, 2001 she had to use emergency leave, that on July 2, 2002 her use of leave under the Family Medical Leave Act to go to a family reunion was questioned, that on September 18, 2002 she received an investigative interview for an absence of 41.75 hours in six months and that on October 2, 2002 appellant was issued a letter of warning for failure to be regular in attendance. She listed other letters of warning: one on August 7, 2002 for failure to follow written instructions, one on February 20, 2003 for unacceptable performance and failure to follow instructions and one on April 21, 2003 for failure to follow instructions and unsatisfactory performance. Appellant objected to the decision to keep a letter of warning in her official personnel folder for two years, stated that a facsimile with her personal information was left on the machine for three days and contended that after a March 25, 2003 appeal hearing for her letter of warning, at which Mr. Gilmore ordered her out on immediate family leave and told her not to return until she was medically cleared, the acting manager of human resources wrote a September 12, 2003 letter stating that at this meeting she requested to leave work for an undetermined period of time.

Appellant submitted a copy of the September 17, 2002 letter regarding expectations for her work, a coworker's March 25, 2003 statement that a letter regarding appellant's fitness for duty was left on the facsimile machine from March 21 to 24, 2003, a copy of her April 1, 2003 letter to the employing establishment complaining about disparate treatment and a hostile work environment and copies of the emails and letters of warning referred to in her April 30, 2004 statement. She also submitted a copy of the Step 2 decision regarding the grievance of the employee she accused of using profane language on May 11, 2001. This decision found that the remarks attributed to the employee by appellant were in fact made and that his suspension was issued with just cause. In an October 27, 2003 letter, Dr. Seig stated that she was at the March 25, 2003 meeting, that appellant did not request to leave work, that Mr. Gilmore, citing a medical report showing symptoms including lack of concentration, repeatedly insisted that she take time off work and that appellant was adamantly opposed to taking more time off work and argued with Mr. Gilmore that she did not need to be put on leave for her medical condition.

The employing establishment responded to appellant's allegations. Mr. Wilson denied that he used vulgar language on September 12, 2000, noted that the employee alleged to have directed profane language toward appellant on May 11, 2001 was suspended and stated that appellant brought up her personal health problems on September 13, 2001, that she insisted on contacting the district manager in November 2001 and that on January 18, 2002 appellant made an overtime call without authorization, which she rescinded after the employees reported to work, resulting in financial liability. Mr. Meyer denied that he teased appellant about her shift or that he made the remark about having a baby and stated that on January 31, 2002 she brought up her private life during a discussion of her performance. Mr. Gilmore noted that a suspension was issued to the employee alleged to have directed profanity at appellant on May 11, 2001, that on November 13, 2001 she was told to follow the chain of command, that he questioned her use of family leave to attend a family reunion, that she did not return the memorandum on settling grievances and that he had to stop a meeting twice because appellant's wireless telephone was ringing. He addressed the March 25, 2003 meeting, stating that she told him about her severe medical and mental conditions, that Dr. Seig reiterated how severe appellant's condition was and she recommended that appellant take time off work and deal with her conditions, that appellant did not want to take time off, that after a private talk with her representative and Dr. Seig appellant came back and said she would listen to her doctor and take time off and he told

Dr. Seig that appellant would need a medical clearance if she was gone for more than 21 days. Walt Gale, manager of distribution operations, stated that he gave other supervisors expectation letters on September 17, 2002, that further staffing in appellant's area was not needed and that she took a second wireless telephone call at a staff meeting on March 12, 2003. In a May 12, 2003 letter, Mr. Gale stated that he had no idea how the letter directing appellant to undergo fitness for duty was left on the facsimile machine from March 21 to 24, 2003, as he did not use this machine. The employee accused of directing profanity at appellant on May 11, 2001 denied he had done so.

By decision dated August 6, 2004, the Office found that appellant had not established that she sustained a psychiatric condition in the performance of duty.

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 work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act. 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.[1]

Generally, actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of personnel matters, coverage may be afforded.[2] In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[3]

Where appellant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.[4] The Board has held that actions of an employee's supervisor which the employee characterizes as harassment or discrimination may constitute factors of employment giving rise to coverage under the Act. However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence

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

[2] *Michael Thomas Plante*, 44 ECAB 510 (1993).

[3] *Richard J. Dube*, 42 ECAB 916 (1991).

[4] *Joel Parker, Sr.*, 43 ECAB 220 (1991).

that harassment or discrimination did in fact occur. Mere perceptions alone of harassment or discrimination are not compensable under the Act.[5]

ANALYSIS

With one exception, appellant has not established that she was subjected to vulgar or profane language or to inappropriate comments about her private life or her suitability to be a manager. Each of the employees alleged to have made such comments specifically denied making them and appellant has not submitted sufficient evidence to establish that the alleged remarks in question were actually made to her. The exception is the May 11, 2001 incident in which a subordinate employee directed profane remarks at appellant. The employee grieved his suspension for making these remarks, but the suspension was upheld and found to be issued for just cause. The grievance decision presents the profane remarks as factual and is sufficient to establish that these inappropriate remarks were made on May 11, 2001 as alleged. Remarks by appellant's union representative would not constitute compensable factors of employment.[6]

Most of the incidents cited by appellant involve administrative or personnel actions by the employing establishment. She has not shown error or abuse in any of these actions, including the letters of expectations, the employing establishment's responses to her requests for more staffing[7] and the messages about the safety books. Appellant has not shown that any of the letters of warning or investigations were unwarranted[8] or that employing establishment personnel responded inappropriately to her message to the district manager or to her wireless telephone ringing twice during a staff meeting. She also has not shown error or abuse in the employing establishment's actions regarding her attendance, including its questioning of whether family leave was appropriate to attend a family reunion.[9] In none of these actions has appellant established that the employing establishment acted unreasonably. Her complaint that the employing establishment did not properly address her April 1, 2003 letter complaining of disparate treatment and a hostile work environment bears no relation to appellant's assigned duties and is not a compensable factor of employment.[10]

The accounts of the March 25, 2003 meeting by appellant, Dr. Seig and Mr. Gilmore reflect that there was a disagreement between appellant and Mr. Gilmore about whether she

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

[6] Generally, union activities are personal in nature and not considered to occur within the employee's performance of duty. *Larry D. Passalacqua*, 32 ECAB 1862 (1981).

[7] Assignment of work is an administrative function of the employing establishment. *James W. Griffin*, 45 ECAB 774 (1994).

[8] Disciplinary actions are administrative functions of the employer not duties of the employee. *Sharon R. Bowman*, 45 ECAB 187 (1993).

[9] Matters involving use of leave and procedures relating thereto, including requests for medical documentation for absences, are administrative and personnel actions not directly related to an employee's duties. *Helen Castillas*, 46 ECAB 1044 (1995).

[10] *See George A. Ross*, 43 ECAB 346 (1991).

needed to take time off from work to deal with her medical problems. Although the evidence indicates that Mr. Gilmore strongly recommended that she take time off work, it does not support her allegation that she was ordered to take family leave at this meeting. Without appellant's acquiescence, which Mr. Gilmore stated was obtained, such an order would necessitate a written followup of which there is no evidence.

Appellant has established one other potentially compensable factor of employment: the incident in which a letter directing her to undergo a fitness-for-duty examination was left on the facsimile machine for three days. The employing establishment's managers denied that they left this letter there, but did not deny that this incident, supported by a witness statement, occurred as alleged. Appellant was in the performance of duty when this incident occurred.

Appellant's burden of proof is not discharged by the fact that she established an employment factor which may give rise to a compensable disability under the Act. To establish her occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that her psychological condition is causally related to the accepted employment factor.[11] The reports from Dr. Seig, appellant's treating Board-certified psychiatrist, do not mention either of the potentially compensable employment incidents -- the May 11, 2001 profane remarks or the leaving of the fitness-for-duty letter on the facsimile machine. These reports are insufficient to meet her burden of proof.

CONCLUSION

While appellant has established two potentially compensable factors of employment, she has not met her burden of proof to establish that her psychological condition was sustained in the performance of duty.

[11] *Dennis J. Balogh*, 52 ECAB 232 (2001).

ORDER

IT IS HEREBY ORDERED THAT the August 6, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 20, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member