United States Department of Labor
Employees' Compensation Appeals Board

LINDA A. BERNARDINO, Appellant	)	
and	)	**Docket No. 05-1689**
	)	**Issued: November 3, 2005**
U.S. POSTAL SERVICE, POST OFFICE, San Francisco, CA, Employer	)	

Appearances:
Linda A. Bernardino, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On August 11, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 24, 2005 merit decision denying her emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty on March 19, 2004.

FACTUAL HISTORY

On March 19, 2004 appellant, then a 52-year-old clerk, filed a traumatic injury claim alleging that she sustained an emotional condition in the performance of duty on that date.[1] In the supervisor portion of the form, Alma Dizon stated that on March 19, 2004 appellant was questioned by Douglas White, a supervisor, about her "clock rings" in order to correct a problem.

[1] Appellant stopped work on March 22, 2004.

She asserted that Mr. White used his normal tone of voice and that Vicky Young, an acting supervisor, was also present.

In an accompanying statement, appellant asserted that she was confronted and humiliated by Mr. White on March 19, 2004 concerning an anonymous letter which was sent to management regarding when she began her workday. She claimed that Mr. White confronted her in front of Ms. Young and "other craft employees in front of the attendance control office area." Appellant alleged that she was embarrassed and humiliated by the things that Mr. White said in a loud voice and that she had to seek medical treatment due to developing a headache, shortness of breath and chest pains.

Appellant submitted a March 19, 2004 note in which a physician with an illegible signature indicated that she should be off work for one to two days.

By letter dated March 26, 2004, the Office requested that appellant submit additional factual and medical evidence in support of her claim.

In a supplemental statement dated April 23, 2004, appellant asserted that during the discussion on March 19, 2004 Mr. White showed her a printout of her attendance and stated that she and Ms. Dizon were going to be "in big trouble." She claimed that Mr. White seemed to believe the contents of an anonymous letter more than her responses to his concerns and stated that nothing she said satisfied him. Appellant indicated that due to the conversation with Mr. White she worried that she would lose her job and asserted that the proper procedure for such disciplinary actions was to conduct them in private in front of a union steward. Appellant indicated that there were no previous "bad feelings" between the two and asserted that she feared retaliation from her supervisors.

Appellant submitted several statements, dated in March 2004, in which coworkers stated that they either heard that appellant had a conversation with Mr. White on March 19, 2004 or saw appellant in a wheelchair on March 19, 2004 while she was in an upset state.[2] None of these coworkers indicated that they actually witnessed a conversation appellant had on that date with Mr. White or any other individuals. Appellant also submitted additional medical evidence in support of her claim, including reports of Robert A. Kaplan and Alex C.N. Leung, both attending clinical psychologists.

The record contains a March 23, 2004 statement in which Mr. White stated that, along with Ms. Young, he spoke to appellant on March 19, 2004 regarding the manner in which she clocked in at the beginning of her work tour. He asserted that no employees were present during this discussion and that he did not speak to her in a loud tone of voice. Mr. White indicated that appellant did not indicate that she was ill during the discussion and stated that "there was no altercation or dispute of any kind between us." He indicated that he later learned that appellant required medical care on that date.

[2] Two of the witnesses indicated that, as appellant was being wheeled out of the building, they heard her scream that people were "squealing" on her.

In a statement dated March 25, 2004, Ms. Young stated that on March 19, 2004 she approached appellant and told her that Mr. White wanted to talk to her about her clock rings. She indicated that she was present while Mr. Young showed appellant a record of her clock rings and informed her that she needed to clock in on time and that if she was late she needed to fill out a 3971 form. Ms. Young stated that appellant responded "OK" and returned to the postage due unit. She indicated that there was no one else present during the conversation among appellant, Mr. Young and herself. Ms. Young asserted that she later discovered that appellant required medical care.

By decision dated May 4, 2004, the Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors.

Appellant requested a hearing before an Office hearing representative which was held on February 23, 2005. On the day of the hearing, appellant submitted a February 23, 2005 statement in which she again argued that Mr. White harassed her and violated the contract between management and the union because he did not conduct the March 19, 2004 disciplinary discussion in private in front of a union steward.[3] She made similar arguments during the course of the hearing.[4]

Appellant then submitted a May 2, 2005 statement in which she indicated that she could not specifically identify the individuals who saw Mr. White's discussion with her but she stated that "several employees did in fact glance and see this incident." She asserted that Mr. White violated article 16, section 2 of the contract between management and the union in that this provision requires that for minor offenses discussions "shall be held in private between the employee and the supervisor." She submitted an April 24, 2004 settlement of a grievance which indicates that appellant and management agreed that management will treat employees with dignity and respect and that any discussion concerning "an employee's personal manners should be done in private setting." The settlement indicated that it was a "nonprecedent setting."[5]

By decision dated and finalized May 24, 2005, the Office hearing representative affirmed the Office's May 4, 2004 decision.

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 her regular or specially assigned duties or to a requirement imposed by the

[3] Appellant also submitted additional medical evidence in support of her claim.

[4] Mr. White submitted a March 31, 2005 statement in which he took issue with appellant's testimony at the hearing and again denied that he harassed appellant or discussed disciplinary matters in front of coworkers on March 19, 2004.

[5] The record was supplemented to contain a June 1, 2004 statement in which a coworker asserted that another coworker told her that she was going to "get" appellant and also made a vulgar reference about appellant.

employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[6] 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.[7]

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.[8] 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.[9]

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.[10] 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.[11]

ANALYSIS

Appellant alleged that she sustained an emotional condition as a result of employment incidents and conditions which occurred on March 19, 2004. By decisions dated May 4, 2004 and May 24, 2005, the Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant asserted that she was confronted and humiliated by Mr. White, a supervisor, on March 19, 2004 concerning an anonymous letter which was sent to management regarding when she began her workday. She claimed that Mr. White confronted her in front of Ms. Young, an acting supervisor, and "other craft employees in front of the attendance control office area." Appellant alleged that she was embarrassed and humiliated by the things that Mr. White said in a

[6] 5 U.S.C. §§ 8101-8193.

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

[8] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[9] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

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

[11] *Id.*

loud voice. She asserted that during the discussion on March 19, 2004 Mr. White showed her a printout of her attendance and stated that she and Ms. Dizon, a supervisor, were going to be "in big trouble." Appellant claimed that Mr. White seemed to believe the contents of an anonymous letter more than her responses to his concerns and stated that nothing she said satisfied him.

To the extent that disputes and incidents alleged as constituting by supervisors are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[12] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[13]

In the present case, employing establishment officials, including Ms. White and Ms. Young, denied that appellant was subjected to harassment and appellant has not submitted sufficient evidence to establish that she was harassed by Mr. White.[14] Appellant alleged that Mr. White made statements and engaged in actions which she believed constituted harassment, but she provided insufficient corroborating evidence, such as probative witness statements, to establish that the statements actually were made or that the actions actually occurred.[15] Appellant submitted several statements in which coworkers stated that they either heard that appellant had a conversation with Mr. White on March 19, 2004 or saw her in a wheelchair on March 19, 2004 while she was in an upset state. However, none of these coworkers indicated that they actually witnessed a conversation appellant had on that date with Mr. White or any other individuals. Appellant filed a grievance about the events of March 19, 2004 but it was settled on April 24, 2004 without prejudice and contains no finding that the employing establishment committed harassment. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.[16]

Appellant also asserted that Mr. White violated article 16, section 2 of the contract between management and the union because he conducted his disciplinary discussion in front of her coworkers. She indicated that this provision requires that for minor offenses discussions "shall be held in private between the employee and the supervisor."

Regarding these allegations, the Board finds that they relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[17] Although the handling of disciplinary actions is

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

[13] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[14] *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).

[15] *See William P. George*, 43 ECAB 1159, 1167 (1992).

[16] The record contains a June 1, 2004 statement in which a coworker asserted that another coworker told her that she was going to "get" appellant and also made a vulgar reference about appellant. However, there is no indication that these statements were made in appellant's presence.

[17] *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).

generally related to the employment, it is an administrative function of the employer, and not duties of the employee.[18] 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.[19]

However, appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to this matter. First, she did not establish that her coworkers were present when she was counseled on March 19, 2004 by supervisors, *i.e.*, Mr. White and Ms. Young. Appellant did not submit witness statements from coworkers who were present during the discussions she had on that date with Mr. White and Ms. Young. In fact, appellant was not even able to identify any of the other individuals she alleged were present. Both Mr. White and Ms. Young denied that any coworkers were present. Secondly, she did not submit any evidence, such as the result of a grievance, complaint or suit, that the employing establishment committed error or abuse by violating the contract between management and the union or some other relevant rule or procedure. Appellant filed a grievance about the events of March 19, 2004 but it was settled on April 24, 2004 without prejudice and contains no finding that the employing establishment committed any wrongdoing. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.[20]

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.[21]

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 on March 19, 2004.

[18] *Id.*

[19] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[20] Appellant indicated that due to the conversation with Mr. White she worried that she would lose her job and asserted that she feared retaliation from her supervisors. However, there is no evidence that appellant would be subject to retaliation and the Board has held that a claimant's job insecurity is not a compensable factor of employment under the Act. *See Artice Dotson*, 42 ECAB 754, 758 (1990); *Allen C. Godfrey*, 37 ECAB 334, 337-38 (1986).

[21] 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 Office of Workers' Compensation Programs' May 24, 2005 decision is affirmed.

Issued: November 3, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board