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

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| **SHANTINA Q. MIDGET, Appellant** | ) | |
| **and** | ) | **Docket No. 05-1450** |
| | ) | **Issued: October 18, 2005** |
| **U.S. POSTAL SERVICE, POST OFFICE, Memphis, TN, Employer** | ) | |

*Appearances:*
*Shantina Q. Midget, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
WILLIE T.C. THOMAS, Alternate Judge

### ***JURISDICTION***

On June 28, 2005 appellant filed a timely appeal from the March 23, 2005 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the Office's decision.

### ***ISSUE***

The issue is whether appellant sustained an injury while in the performance of duty.

### ***FACTUAL HISTORY***

On August 21, 2003 appellant, then a 32-year-old mail handler, filed a claim alleging sexual harassment, retaliation and intimidation by her supervisor:

> "On the week of May 11, 2003 Keith Liberty (Supervisor 180 unit) made sexual advances to me. When I replied immediately 'no' he began to harass me on May 17, 2003. I received an investigative interview and it continued on thereafter. I also was asked to leave my 180 unit to do other people's jobs."

Appellant added that, when she brought the incident to the attention of management, guidelines were set forth for both her and Mr. Liberty. She alleged that he violated every guideline, constantly making contact with her and coming to her unit to ask her to work in his area. Appellant stated that Mr. Liberty had angrily thrown down an ink pen on a table in her direction and had one day come to her unit to stare and seemingly stalk her. On July 30, 2003 she stated that someone put a white skeleton on her desk in the caller service area.

To support her claim, appellant submitted statements from coworkers. On August 14, 2003 a coworker described her own experience with Mr. Liberty. On July 13, 2003 another coworker stated that appellant came to her around the week of June 11, 2003 to report that Mr. Liberty had made an inappropriate sexual comment: he told appellant that he wanted to have sex with her after work that day. On July 14, 2003 a third coworker related the same, that appellant had come to her extremely distraught about Mr. Liberty stating he wanted to go make love to her when they got off work. She submitted a copy of the first page of her August 9, 2003 Equal Employment Opportunity (EEO) complaint of discrimination.

On June 29, 2003 Mr. Liberty stated that he had a discussion with appellant on May 3, 2003 about unscheduled absences. On May 10, 2003 she once again had an unscheduled absence. Mr. Liberty held an investigative interview on May 17, 2003, but appellant and her union representative chose to make no statement. He requested discipline and the manager of distribution operations concurred. On June 26, 2003 Mr. Liberty issued appellant a letter of warning. The next day the manager of distribution operations informed him that she was making a sexual harassment and stalking allegation. Mr. Liberty called her allegations false and an attempt by her, with coaching from the union, to discredit a postal supervisor in order to have a letter of warning removed from her record.

On October 10, 2003 Ralph A. Morgan, the manager of distribution operations, explained that on June 11, 2003 appellant advised that she wanted to go back to her bid assignment in the 180 unit. She acknowledged that this meant interacting with and following the directions of Mr. Liberty, who was informed of the situation with no stipulation regarding appellant's ability to take instruction from him. Later that day, however, the shop steward advised Mr. Morgan that appellant had changed her mind. He was unable to relay this to Mr. Liberty, who was under the impression that it was okay for him to give her instruction. That evening Mr. Liberty instructed appellant to work caller service and she became hysterical. Mr. Morgan continued:

> "I was first aware of harassment issues concerning [appellant] on June 27, 2003. Prior to that time, I had witnessed Mr. Liberty and [appellant] interacting with one another without any appearance of a problem. Daily, I would speak with [her] and she gave no indication that she had a problem with [him].
>
> "During the period May 3, 2003, when the alleged sexual harassment was made and June 26, 2003, when [appellant] was issued a letter of warning, she gave no indication that there was a problem with Mr. Liberty. During the same time frame, [she] and her representative met with [him] on several occasions concerning her attendance and [Family Medical Leave Act] issues and she never raised the issue of sexual harassment until after receiving a letter of warning."

The case file contains few medical records. An August 19, 2003 duty status report from Dr. Jerry R. Floyd, a specialist in family medicine, indicated that appellant was totally disabled for work with a diagnosis of profound depression and stress-related hypertension, uncontrolled. A September 22, 2003 report from a psychiatrist offered a diagnosis of adjustment disorder with depressed mood. The report indicated that appellant would continue with medication for three more months and was able to return to work. An October 1, 2003 note from Dr. Floyd's office indicated that she was diagnosed with hypertension and was released to return to work. An October 6, 2003 form signed by him indicated that appellant's absence was not in connection with an on-the-job injury. The form indicated that she could return to work with no restrictions. Two return-to-work clearances also indicated that appellant was released to full duty without restrictions.

In a decision dated April 6, 2004, the Office denied appellant's claim for compensation. The Office found that she had failed to identify even one employment factor in the performance of duty and that a discussion of the probative value of the medical evidence was, therefore, unnecessary.

Appellant requested an oral hearing before an Office hearing representative, which was held on December 13, 2004.

In a decision dated March 23, 2005, the Office hearing representative affirmed the denial of appellant's claim for compensation. The hearing representative found that the incidents alleged did not arise in the performance of duty, that she had presented no evidence to establish error or abuse by the employing establishment and that she had submitted no evidence corroborating that she was in fact harassed or discriminated against.

## ***LEGAL PRECEDENT***

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of proof to establish the essential elements of her claim. This burden includes the submission of a detailed description of the employment factors that she believes caused or adversely affected the medical condition for which she claims compensation.[2] The claimant's burden of proof is not discharged by the fact that she has identified employment factors that may give rise to a compensable disability. She must also submit a well-reasoned medical opinion establishing that she has an emotional or psychological disorder and that such disorder is causally related to the identified compensable employment factors.[3]

[1] 5 U.S.C. §§ 8101-8193.

[2] *Walter D. Morehead*, 31 ECAB 188, 194 (1979) (one of the essential elements of a claim is that the claimant specify factors of his employment that he believes have caused an injury, such as an emotional or hypertensive condition).

[3] *William P. George*, 43 ECAB 1159, 1168 (1992).

Causal relationship is a medical issue[4] and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,[5] must be one of reasonable medical certainty,[6] and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[7]

The Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[8] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of performance."[9] "In the course of employment" relates to the elements of time, place and work activity. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in her employer's business, at a place where she may reasonably be expected to be in connection with her employment and while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto. The employee must also establish an injury "arising out of the employment." To arise out of employment, the injury must have a causal connection to the employment, either by precipitation, aggravation or acceleration.[10]

When an employee experiences emotional stress in carrying out her employment duties or has fear and anxiety regarding her ability to carry out her duties and the medical evidence establishes that the disability resulted from her emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability resulted from her emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of her work. By contrast, there are disabilities having some kind of causal connection with the employment that are not covered under workers' compensation law because they are not found to have arisen out of employment, such as when disability results from an employee's fear of a reduction-in-force

[4] *Mary J. Briggs*, 37 ECAB 578 (1986).

[5] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[6] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

[7] *See William E. Enright*, 31 ECAB 426, 430 (1980).

[8] 5 U.S.C. § 8102(a).

[9] This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

[10] *See Eugene G. Chin*, 39 ECAB 598 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp (Joseph L. Barenkamp)*, 5 ECAB 228 (1952).

or frustration from not being permitted to work in a particular environment or to hold a particular position.[11]

Workers' compensation law does not cover an emotional reaction to an administrative or personnel action unless the evidence shows error or abuse on the part of the employing establishment.[12] The Board has held that actions of an employer which the employee characterizes as harassment or discrimination may constitute a factor of employment giving rise to coverage under the Act, but there must be some evidence that harassment or discrimination did in fact occur. As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[13] Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.[14] The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.[15]

## ***ANALYSIS***

Appellant seeks compensation for her depression and uncontrolled blood pressure. Her physician, Dr. Floyd, diagnosed depression and hypertension and a psychiatrist diagnosed adjustment disorder with depressed mood. But none of the medical evidence in this case attributes any diagnosed condition to appellant's federal employment, much less to any specific comment or act by her supervisor, Mr. Liberty. To the contrary, Dr. Floyd, her physician, reported on October 6, 2003 that her absence was not in connection with an on-the-job injury.

The record thus contains no medical opinion supporting the essential element of causal relationship. This alone warrants a denial of appellant's claim[16] and generally no further review of the record need be undertaken. But as the Office has made a finding that appellant failed to establish a compensable factor of employment, the Board will address that matter as well.

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

[12] *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566, 572-73 (1991).

[13] *See Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case the Board looked beyond the claimant's allegations of unfair treatment to determine if the evidence corroborated such allegations).

[14] *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

[15] *Paul Trotman-Hall*, 45 ECAB 229 (1993) (concurring opinion of Michael E. Groom, Alternate Judge).

[16] *Ruby W. Porter*, 8 ECAB 613 (1956); *Willie Mae Johnson*, 4 ECAB 571 (1952) (the claimant has the burden of establishing a *prima facie* case); *see Herman E. Harris* (Docket No. 91-1754, issued April 29, 1992) (finding that the claimant failed to establish a *prima facie* claim for compensation where he submitted no medical opinion relating his occupational disease or condition to factors of his federal employment).

As stated earlier, appellant attributes her depression and uncontrolled blood pressure to the actions of her supervisor. Generally speaking, an emotional reaction to the actions of a supervisor is not covered by workers' compensation. An exception exists where the evidence establishes error or abuse by the supervisor, but the evidence in this case is not sufficient to establish this exception. The record indicates that appellant filed an EEO complaint, but she has offered the Office no final decision or finding by the EEO Commission to support the truth of her allegations. She has submitted statements from coworkers, but they did not hear Mr. Liberty proposition appellant and did not corroborate her allegations of retaliation and intimidation. These statements are relevant to appellant's emotional state at the time and they are consistent in their account of what she stated. But they are at best hearsay and are not sufficiently probative to establish as a matter of fact that Mr. Liberty propositioned appellant or that he retaliated against her and intimidated her after she turned him down. Add to this Mr. Liberty's denial, his charge of fabrication by appellant to have a letter of warning removed and the observations of Mr. Morgan, the manager of distribution operations, who questioned the timing of appellant's allegations and the facts are far from clear.[17] Because the evidence is not sufficient to establish her allegations of sexual harassment, retaliation and intimidation, the Board finds that appellant has not met her burden of proof to establish a factual basis for her claim.

## ***CONCLUSION***

The Board finds that appellant has failed to make a *prima facie* claim for compensation. She has submitted no medical opinion attributing any diagnosed medical or psychological condition to any specific factor of her federal employment. Further, the Board finds that appellant has not met her burden of proof to establish a factual basis for her claim. The weight of the probative evidence fails to establish her allegations of sexual harassment, retaliation and intimidation.

[17] The record indicates that some arrangement was made at work to separate appellant and Mr. Liberty and witness statements support that Mr. Liberty was seen in or near her work area. But the arrangement or agreement itself is not a matter of record and Mr. Liberty's presence in her work area is not necessarily proof of breach where as Mr. Morgan explained, appellant at one point had asked for and was granted permission to return to Mr. Liberty's unit, effectively suspending the arrangement. Where she has failed to make a *prima facie* claim for compensation, the Board will not remand the case to the Office for further development of the factual evidence.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the March 23, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 18, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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